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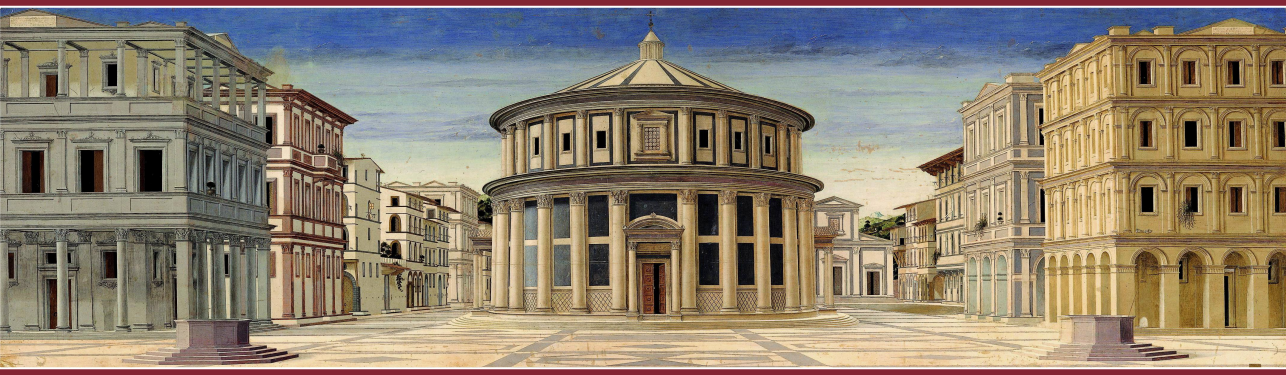

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A Journal on Law and Integration

Vol. 7, 2022, No 1*

Editorial

Articles

The EU's Shifting Borders Reconsidered: Externalisation, Constitutionalisation, and Administrative Integration

edited by Evangelia (Lilian) Tsourdi, Andrea Ott and Zvezda Vankova

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

EUROPEAN FORUM

Editorial

Convulsive Direct Effect?

In spite of overflowing case law and an incessant scholarly debate, the doctrine of direct effect still delivers fresh surprises. The last in time is a mysterious tripartite statement included in *Thelen Technopark* ECLI:EU:C:2022:33 (commented by J Lindeboom, 'Thelen Technopark and the Legal Effects of the Services Directive in Purely Internal and Horizontal Disputes' European Papers (European Forum Insight of 11 June 2022) www.europeanpapers.eu 305).

In para. 32, the Court of justice seems to plainly follow the line of the classical doctrine by saying that "a directive cannot of itself impose obligations on an individual and cannot therefore be relied on as such against that individual before a national court". In accordance with the third paragraph of art. 288 TFEU, the binding nature of a directive, which constitutes the basis for the possibility of relying on it, exists only in relation to 'each Member State to which it is addressed".

The subsequent point 33 seems to draw the logical consequence of this assumption, namely that "a directive cannot of itself impose obligations on an individual and cannot therefore be relied on as such against that individual before a national court".

The imperativeness of both the assumption and the consequence is soothed by what, at first reading, seems an inadvertent saving clause: "of itself". But the meaning of this clause is clarified in the last passage of para. 33: "without prejudice, however, to the possibility, for that (national) court, or for any competent national administrative authority, to disapply, on the basis of domestic law, any provision of national law which is contrary to a provision of EU law that does not have such effect".

This passage is, to the knowledge of the current writer, unprecedented in case law, even though, in hindsight, one could speculate that the ground was prepared by a less explicit passage in *Poplawski* ECLI:EU:C:2019:530 para. 68. Here the Court said that "a national court is not required, solely on the basis of EU law, to disapply a provision of its national law which is contrary to a provision of EU law if the latter provision does not have direct effect".

Equally unprecedented might be its far-reaching implications. The of-itself-clause makes it clear that the *disapplication* (what a terrible neologism!) of domestic law contrary to directives not having a direct effect is neither based on EU law nor on domestic law, but on a combination between them. The most obvious situation seems to be the qualification of a national law contrary to an unimplemented directive as unconstitutional. There would

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be no need to refer to the doctrine of direct effect for a national court to disapply a provision of domestic law for reasons unrelated to its contrariness to an EU directive.

If this reading of *Thelen Technopark* is correct, several technical issues arise. How the premise of the binding nature of a directive for Member States (MS) only could be reconciled with the power of a national court to impose obligations upon individuals flowing from the directive, even if indirectly used as a standard of legality for national law? Which domestic law, other than that designed to implement a directive, could produce this miraculous effect?

The doctrine of direct effect is not, or not only, a logic construct. It is a complex doctrine, whose coherence is continuously challenged by preferences and ideologies about the relationship between legal orders.

The idea that a treaty can impose on its parties an obligation to consider the treaty provisions as having a direct effect is by no means a novelty. In the case of the PCJI *Jurisdiction of the Courts of Danzig* (Advisory Opinion) [3 March 1928], paras 17–18, the PCIJ famously said that "it cannot be disputed that the very object of an international agreement, according to the intention of the contracting Parties, may be the adoption by the Parties of some definite rules creating individual rights and obligations and enforceable by the national courts". This conception tends to highlight the autonomy of the international legal order, which could determine how its obligations must be implemented in the domestic orders. Of course, absent a determination by international law, each national order remains free to implement international law based on its constitutional requirements.

The doctrine of direct effect in the European legal order was aimed at pursuing the same objective, namely to ensure the independence of European law from the constitutional systems of implementation of the MS. In *Van Gen den Loos* ECLI:EU:C:1963:1, in response to an objection raised by the governments of the Netherlands and of Belgium, namely that "the reference relate[d] not to the interpretation but to the application of the treaty in the context of the constitutional law of the Netherlands", the Court famously said that "the court is not asked to adjudicate upon the application of the treaty according to the principles of the national law of the Netherlands, which remains the concern of the national courts, but is asked [...] only to interpret the scope of article 12 of the said treaty within the context of community law and with reference to its effect on individuals".

Whereas both the PCIJ and the CJEU claimed that a treaty can determine the direct effect of its substantive obligations, the two courts differed on a matter of principle. In the view of the PCIJ, direct effects in *foro domestico* should be based on the intent of the parties. In the opinion of the CJUE, direct effects of European law should rather be deduced from "the spirit, the general scheme and the wording" of the treaties' provisions: not exactly a model of deference toward the "lords" of the founding treaties.

Not only was the doctrine of the direct effect conceived of by the Court as independent from the intent of the MS. This disconnection was precisely aimed at enforcing European law despite the reluctance and even against the will of the MS. The apex of this

tendency was perhaps reached in the long fight engaged by the Court to impose the implementation of directives. In *Ratti* ECLI:EU:C:1979:110, the Court clarified that "a member state which has not adopted the implementing measures required by the directive in the prescribed periods may not rely, as against individuals, on its own failure to perform the obligations which the directive entails".

The importance of *Ratti* in the development of the doctrine of direct effect can be hardly overshadowed. *Ratti* definitively upheld not only the verticality of the direct effects of directives but also their unidirectional character under which, in vertical relations, only individuals can invoke the direct effect flowing from directive to their benefit and the detriment of the uncompliant MS. By doing so, *Ratti* definitively transformed direct effects from a doctrine on the relations between legal orders in a constitutional doctrine on the relationship between individuals and MS under in the new order created by the founding treaties.

The logical corollary is that States are prevented from inverting the directionality of the effect of directives. In a conception of direct effect as a constitutional doctrine governing the relationship between MS and individuals, the enhancement of the effectiveness of directives at the expense of individuals will paradoxically upset the normative balance inherent in the assumption that the main aim of the doctrine of direct effect is to protect individuals *vis-à-vis* the uncompliant MS.

Thelen Technopark, despite its unassuming tone, has the potential to subvert the constitutional dimension of the doctrine of direct effect. If national judges had the power, based on national law, to disapply domestic provisions contrary to a directive which, "of itself", could not produce such effect, the very essence of the unidirectionality of the direct effects of directive is circumvented.

The doctrine of direct effect is controversial. It was built on the basis of a Hegelian methodology, based on claims and counterclaims to be progressively composed in a legal doctrine, which, by the way, is not entirely coherent. Over the years, the Court of justice, the custodian of this orphic mystery, attempted to adjust some of the most evident backlashes of the doctrine of direct effect, not always felicitously (for recent criticism see M Dougan, 'When Worlds Collide! Competing Visions of the Relationship Between Direct Effect and Supremacy' (2007) 44 CMLRev 931; L Squintani and J Lindeboom, 'The Normative Impact of Invoking Directives: Casting Light on Direct Effect and the Elusive Distinction Between Obligations and Mere Adverse Repercussions' (2019) Yearbook of European Law 18). Yet, the doctrine stood the test of time and its core contents remained more or less untouched.

But this doctrine is also a fragile object, to be handled with great care. We do not know whether the dictum in *Thelen Technopark* was aimed to start a process of revision or whether we can dismiss it as an incidental passage which escaped from the pen of the Grand Chamber. But the Constitutional relevance of direct effect for the present state of the European legal order and for its possible future development should dissuade the Court from facile and dangerous experimentalism.

E.C.

ARTICLES

THE EXTERNALISATION OF THE EU'S CYBERSECURITY REGIME: THE CYBER DIPLOMACY TOOLBOX

YULIYA MIADZVETSKAYA* AND RAMSES A. WESSEL**

ABSTRACT: It is often claimed that there is a blurring line between external and internal security in the EU with both being increasingly intertwined. Apart from providing the state of affairs in EU cybersecurity law and policy, the argument of this contribution is that these internal-external links are also visible in a growing tendency towards the *externalisation* of the EU's cybersecurity policy. Typical interior policy fields in that area that were tackled through the internal market and the Area of Freedom Security and Justice (AFSJ) legal bases, are now penetrating the field of action of the Common Foreign and Security Policy (CFSP). This tendency towards a growing *externalisation* of the EU cybersecurity will be demonstrated by analysing the emblematic EU's Cyber Diplomacy Toolbox and its deterrence instrument: restrictive measures in response to cyber-attacks. Our analysis pinpoints a number of limitations for the EU's common action under the CFSP, including problems of attribution and evidence collection. Our *Article* questions whether the CFSP is fit for the digital age and what repercussions cyber threats may have for the future of the EU CFSP and its Cyber Diplomacy Toolbox.

KEYWORDS: Cyber Diplomacy Toolbox – CFSP – restrictive measures – PESCO – sanctions – cybersecurity.

* Researcher at the Chair of Law and Artificial Intelligence, University of Tuebingen, yuliya.miadzvetskaya@uni-tuebingen.de.

** Professor of European Law, Faculty of Law, University of Groningen, r.a.wessel@rug.nl.
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I. Introduction

There is nothing new in stating that both European and national institutions are increasingly confronted with new cyber threats. Throughout 2021 the European Medicines Agency and the European Banking Authority have both been subject to cyber-attacks.[1] At national level, in May 2021 a ransomware attack affected the Irish health sector.[2] In Belgium two large scale cyber-attacks hit Belnet and the Internal Affairs Department responsible for immigration policy and public order.[3] In February 2022 cyber-attacks hit oil facilities in Belgium, Germany and the Netherlands.[4] And the year 2022 started with a series of cyber-attacks on Ukraine[5] followed by the Russian aggression through kinetic warfare.

Against this background, the resilience of institutions and critical infrastructures to cyber threats is of paramount importance to the EU and its partner countries. Security is one of the core objectives of the EU mentioned both in provisions relating to the Area of Freedom, Security and Justice (AFSJ) and the Common Foreign and Security Policy (CFSP). Traditionally, there has been a divide in the EU between internal security issues falling under the AFSJ (such as crime, terrorism, racism, xenophobia)[6] and the external dimension of the EU's security covered under the CFSP. The latter were, and to a large extent still are, "subject to specific rules and procedures",[7] and it remains complex to adopt measures combining them. Furthermore, art. 4(2) TEU – the *national identity clause* – requires the EU to respect some core areas of "Member States' national identities" and "essential State functions", including national security. The *national identity clause* is meant to preclude an "encroachment" of the EU upon Member States competences, in particular upon Member States' freedom to determine the requirements of public policy and security in accordance with their national needs.[8] In addition, art. 72 TFEU prevents the EU's action in the AFSJ from interfering with the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.

These days, the notion of EU security changes in fundamental ways along with the nature of threats due to the emergence of new technologies. The EU has been increas-

[1] A Neville, 'Recent Cyber-Attacks and the EU's Cybersecurity Strategy for the Digital Decade' (2011) European Parliament Research Service.

[2] *Ibid.,* 1.

[3] *Ibid.*

[4] J Tide, 'European Oil Facilities Hit by Cyber-Attacks' (3 February 2022) BBC www.bbc.com.

[5] For a detailed account of cyber aspects of the Russian war in Ukraine see B Smith, 'Defending Ukraine: Early Lessons from the Cyber War' (22 June 2022) Microsoft aka.ms; L Harding, 'Ukraine Hit By "Massive" Cyber-Attack on Government Websites' (14 January 2022) The Guardian www.theguardian.com.

[6] Art. 67(3) TFEU.

[7] Art. 24(1) TEU.

[8] Case C-348/09 *P.I. v. Oberbürgermeisterin der Stadt Remscheid* ECLI:EU:C:2012:300 para 23.

ingly exposed to hybrid threats in the last years.[9] This contribution aims to look at one of the pressing issues of EU security: cybersecurity. It aims to unveil the tendency towards the *externalisation* of EU cybersecurity concerns. By *externalisation* we understand an increase in institutionalised forms of joint representation or joint initiatives of the EU vis-à-vis external actors in the field of cybersecurity.

For instance, some EU Member States, notably Estonia, France, Germany, the Netherlands, and Romania participate in discussions of the UN Group of Governmental Experts (UNGGE) on non-binding normative agreements for cyberspace. The new mandate of the UNGGE also provides for informal consultations with regional organisations, including the EU.[10] A parallel process on responsible State behaviour in cyberspace takes place within the Open-Ended Working Group (OEWG) open to all the UN members. In addition to this, the EU is also involved in negotiations on the updating of Budapest Convention on Cybercrime within the Council of Europe[11] as well as on a new Convention on the use of information technology and communications technologies for criminal purposes at the UN.[12] The EU's participation in multilateral negotiations on cyber norms at different international fora takes place along with the launch of the EU's unilateral initiatives such as Cyber Diplomacy Toolbox in 2017[13] and the first enactment of sanctions in response to cyber-attacks in 2020.[14]

The growing ambition of the EU as a global cyber actor[15] called for a less inward-looking approach towards cyber-incidents and for a more outward-looking EU. Practically this translates in a shift from the conventional defence of networks and resilience-building paradigm to the EU that promotes and enforces norms of responsible State behaviour across its borders.

Cybersecurity, by definition, often transcends national, international, transnational and private actors, both internally and externally. This lies behind the ongoing discus-

[9] L Lonardo, 'EU Law Against Hybrid Threats: A First Assessment' (2021) European Papers www.europeanpapers.eu 1075.

[10] Group of Governmental Experts**,** Report of the Group of Governmental Experts on Advancing Responsible State Behaviour in Cyberspace in the Context of International Security A/76/135, para 4.

[11] Council of Europe, Second Additional Protocol to the Convention on Cybercrime on Enhanced Cooperation and Disclosure of Electronic Evidence [2022].

[12] General Assembly, Resolution 75/282 of 26 May 2021, UN Doc A/RES/75/282.

[13] Council, Conclusions of 19 June 2017 on a Framework for a Joint EU Diplomatic Response to Malicious Cyber Activities ("Cyber Diplomacy Toolbox"); Council, Draft implementing guidelines of 9 October 2017 for the Framework on a Joint EU Diplomatic Response to Malicious Cyber Activities.

[14] Council Decision (CFSP) 2020/1127 of 30 July 2020 amending Decision (CFSP) 2019/797 concerning restrictive measures against cyber-attacks threatening the Union or its Member States; Council Implementing Regulation (EU) 2020/1125 of 30 July 2020 implementing Regulation (EU) 2019/796 concerning restrictive measures against cyber-attacks threatening the Union or its Member States.

[15] RA Wessel, 'European Law and Cyberspace' in N Tsagourias and R Buchan (eds), *Research Handbook on International Law and Cyberspace* (Edward Elgar Publishing 2021) 490.

sion on the blurring divide between the external and internal dimensions of security,[16] in which the argument often is that security *at home* cannot be guaranteed without addressing the root causes of security challenges abroad.[17] This is even more so taking into account the EU's offer to provide cyber support to Ukraine[18] by a group of EU countries that launched the Cyber Rapid Response Team (CRRT) under the PESCO cooperation scheme.[19] As a side note, the CRRT was not deployed in Ukraine since the context has changed dramatically after the start of the Russian invasion of Ukraine.[20] The question remains, however, to what extent the EU is legally, functionally and operationally endowed to counter external cyber threats.

EU cybersecurity initiatives were initially developed as measures aimed at establishing and securing a well-functioning internal market.[21] For instance, the NIS Directive, a central piece of the EU's cybersecurity-related legal framework, mentions the "achievement of a high common level of security of network and information systems within the Union"[22] as one of the essential objectives necessary for the smooth functioning of the internal market. Step by step, cybersecurity issues were tackled also under the AFSJ and some other perhaps less expected legal provisions relating to for instance research and technological development and industry.[23]

However as from 2013, the *externalisation* of EU cybersecurity and its mainstreaming into EU foreign policy, notably the CFSP, was announced by the EU Cybersecurity Strate-

[16] X Kurowska and P Pawlak, 'Introduction: The Politics of European Security Policies' (2009) Perspectives on European Politics and Society 474; J Eriksson and M Rhinard, 'The Internal-External Security Nexus' (2009) Cooperation and Conflict 243.

[17] P Pawlak, 'The External Dimension of the Area of Freedom, Security and Justice: Hijacker or Hostage of Cross-Pillarization?' (2009) Journal of European Integration 25, 35.

[18] L Cerulus, 'EU Races to Help Ukraine Fight Cyberattack" (14 January 2022) Politico www.politico.eu.

[19] LRT, 'Lithuania May Activate EU Cyber Force to Help Ukraine' (17 January 2022) LRT www.lrt.lt.

[20] Exchanges on Twitter with Laurens Cerulus, Cybersecurity Editor at Politico Europe. The exchange is publicly accessible here: www.twitter.com.

[21] Research on the EU law aspects of cybersecurity is limited, but see J Odermatt, 'The European Union as a Cybersecurity Actor' in S Blockmans and P Koutrakos (eds), *Research Handbook on EU Common Foreign and Security Policy* (Edward Elgar Publishing 2018) 354; A Bendiek and E Pander Maat, 'The EU's Cybersecurity Policy: Building a Resilient Regulatory Framework' in G Siboni and L Ezioni (eds) *Cybersecurity and Legal-Regulatory Aspects* (World Scientific 2021) 23; as well as RA Wessel, 'European Law and Cyberspace' cit. 15.

[22] Directive (EU) 2016/1148 of the European Parliament and of the Council of 6 July 2016 concerning measures for a high common level of security of network and information systems across the Union ("NIS Directive"), art. 1.

[23] Arts 173(3) and 188 TFEU served as legal bases for establishing the European Cybersecurity Industrial, Technology and Research Competence Centre and the Network of National Coordination Centres; art. 173(3) TFEU provides for measures to support the competitiveness of the Union's industry; art. 188 TFEU defines a procedure for setting up joint undertakings for the Union's research, technological development and demonstration programmes.

gy.[24] Since 2015 the Council's conclusions started shaping what is now called *EU cyber diplomacy* by highlighting the need for cooperation with third countries, industry, academia and civil society for establishing a coherent cyberspace policy.[25] In October 2017, EU Member States adopted a Cyber Diplomacy Toolbox that laid down foundations for a joint EU diplomatic response to malicious cyber behaviour.[26] The 2019 Cybersecurity Act also recognised the need for EU wide response to cyber-attacks. According to the Cybersecurity Act, there is a need to overcome the problem that cybersecurity and law enforcement authorities are predominantly national, whereas large-scale incidents necessitate effective and coordinated responses and crisis management at Union and global levels.[27]

Earlier, a similar development could be also observed with respect to other security threats, such as terrorism, which led to the *externalisation* of the AFSJ and its penetration into issues of EU foreign policy.[28] With respect to EU cybersecurity, internal rule-making also proves inseparable from EU external rule-making.

This *Article* demonstrates how, after having started as an element of the internal market, cybersecurity now found a solid anchor in the CFSP. The Cyber Diplomacy Toolbox and cyber-sanctions will be examined as a case-study for showcasing the emergence of EU initiatives in the field of the CFSP. By connecting the dots between different legal instruments in the field of cybersecurity, this *Article* aims to shed light on the main developments in the EU cybersecurity legal framework. First, it points to cybersecurity as an internal market initiative (section II). Secondly, it zooms in on the role of the AFSJ in further shaping the EU cybersecurity framework (section III). It concludes with an analysis of the *externalisation* of EU cybersecurity through the CFSP and the special role this policy area plays in a further development of EU cybersecurity (section IV). In this contribution we aim to go beyond the law in books and explore how the ambitions stated in EU official documents correspond to what the EU is functionally and operationally endowed to do (section V).

[24] Joint Communication JOIN/2013/01 final from the Commission and the High Representative of the European Union for Foreign Affairs and Security Policy of 7 February 2013, 'Cybersecurity Strategy of the European Union: An Open, Safe and Secure Cyberspace' ("The EU 2013 Cybersecurity Strategy").

[25] Council, Conclusions on Cyber Diplomacy 6122/15, 11 February 2015.

[26] Council, Draft implementing guidelines for the Framework on a Joint EU Diplomatic Response to Malicious Cyber Activities cit.

[27] Regulation (EU) 2019/881 of the European Parliament and of the Council of 17 April 2019 on ENISA (the European Union Agency for Cybersecurity) and on information and communications technology cybersecurity certification and repealing Regulation (EU) No 526/2013 (Cybersecurity Act), recital 5.

[28] C Matera, 'Some Reflections on the Nature and Scope of the Externalisation of the AFSJ Domains' in M Fletcher and E Herlin-Karnell (eds) *The European Union as an Area of Freedom, Security and Justice* (Routledge 2016) 357.

II. Cybersecurity as internal market resilience

Several cybersecurity related initiatives have been addressed on the basis of the internal market clause of art. 114 TFEU. As is well known, under this provision, the EU can adopt measures for the approximation of national laws, regulations and administrative practices with the objective of establishing the internal market and enabling its functioning (*harmonisation*). Unlike other policy areas, the internal market is not determined by one concrete policy field. Some scholars note that art. 114 TFEU endows the Union with functional powers, as an expression of an open-ended integration, and deliberately broadly formulated in view of the necessary flexibility.[29]

In the absence of an explicit legal basis to regulate cybersecurity, the economic rationale of the internal market clause was relied upon as one of the most appropriate legal bases for bringing security, resilience and trust to the EU digital market.[30] The EU Digital Single Market Strategy identified secure and trustworthy infrastructures as necessary conditions for maximising the growth potential of the digital economy.[31] Since cyber threats are a borderless problem, extending beyond the boundaries of any Member State, they may lead to significant economic losses. Therefore, cybersecurity considerations call for the EU-wide action, for more harmonisation and integration. Conversely, diverging cyber regulations risk having negative effects on the functioning of internal market and the overall coherence of EU policies.

The internal market clause bears a lot of uncertainty with respect to its area of application.[32] The appropriateness of this provision for intervening in (cyber)security-related matters is questionable from the point of view of both the vertical and horizontal distribution of competences. The broader the scope of art. 114 TFEU, the larger the *creeping expansion* of EU competences to the detriment of Member States' powers.[33] While it is obvious that the well-functioning internal market is unthinkable without secure infrastructures, it remains unclear how far the EU can go with this provision in order to address a growing number of hybrid threats.

In the past many have accused the EU of the inappropriate use of the free movement provisions where "Union competence is either non-existent, severely circumscribed or subject to very different institutional arrangements".[34] A balanced guidance on the operation of art. 114 TFEU was offered in the *Tobacco Advertising Directive* ruling, establishing that proposed measures should have a meaningful and demonstrable

[29] S Garben, 'Confronting the Competence Conundrum: Democratising the European Union Through an Expansion of its Legislative Powers' (2015) OJLS 55, 74.

[30] RA Wessel, 'European Law and Cyberspace' cit. 15. See also art. 1 NIS Directive cit.

[31] Communication COM(2015) 192 final from the Commission of 6 May 2015 'A Digital Single Market Strategy for Europe'.

[32] M Dougan, 'Legal Developments' (2010) JComMarSt 163, 164.

[33] S Garben, 'Confronting the Competence Conundrum' cit. 70.

[34] M Dougan, 'Legal Developments' cit. 172-173.

connection to the internal market.[35] The subsequent case-law has adopted a broader interpretation of art. 114 TFEU by abandoning the requirement for "an actual link with free movement between the Member States" in favor of a more relaxed test such as the general intention of the measure to improve the functioning of internal market.[36] The expansionist reading of art. 114 TFEU was a key trend of the case-law after the first *Tobacco Advertising Directive* ruling.[37]

A high common level of security of network and information systems is one of the essential elements of a smooth functioning internal market.[38] This tendency towards the (cyber)securitisation of the internal market legal basis is not recent. The internal market clause was already relied upon for establishing the EU Agency for Cybersecurity (original name: European Network and Information Security Agency (ENISA)) in 2004. The appropriateness of the internal market legal basis for enacting cyber related legislation has been upheld by the Court of Justice in 2004[39] when the United Kingdom contested the use of art. 114 TFEU for the establishment of the ENISA. According to the UK, the power delegated to the EU is the power to harmonise and not to set up new bodies. The Court did not agree. Art. 114 TFEU played a crucial role in the agencification of EU policies "in particular in fields with complex technical features".[40] The relevance of the internal market legal basis for establishing the ENISA was further confirmed by the 2013 Regulation (EU) No 526/2013 establishing the new mandate of the Agency for a period of seven years and the 2019 Cybersecurity Act which provides for the permanent mandate of the Agency.

Furthermore, the landmark judgment in *Digital Rights Ireland* confirmed that several security-oriented purposes such as the prevention, investigation, detection and prosecution of serious crimes, can be addressed under the internal market harmonisation competence of art. 114 TFEU.[41] The Directive on security of network and information systems (NIS),[42] a central piece of the EU's cybersecurity-related legal framework, also finds its legal basis in internal market harmonisation provisions. The NIS Directive and its updated

[35] *Ibid.* 173; Case C-376/98 *Germany v. European Parliament and Council* ECLI:EU:C:2000:544, paras 83-84.

[36] Joined Cases C-465/00 C-138/01 & C-139/01 *Rechnungshof v. Österreichischer Rundfunk* ECLI:EU:C:2003:294, para 41. Case C-380/03 *Germany v. Parliament and Council* ECLI:EU:C:2006:772, para 80; See also Case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco* ECLI:EU:C:2002:741, para 60.

[37] SR Weatherill, 'The Limits of Legislative Harmonisation Ten Years after Tobacco Advertising: How the Court's Case Law has Become a "Drafting Guide"' (2011) German Law Journal 827.

[38] Proposal for a Directive of the European Parliament and of the Council concerning measures to ensure a high common level of network and information security across the Union, COM(2013) 48 final, 7 February 2013.

[39] Case C-217/04 *United Kingdom vs. European Parliament and Council* ECLI:EU:C:2006:279.

[40] Case C-358/14 *Republic of Poland v European Parliament & Council* ECLI:EU:C:2016:323, para. 68; M Chamon and V Demedts, 'Constitutional Limits to the EU Agencies External Relations' in H Hofmann, E Vos, and M Chamon (eds) *The External Dimension of EU Agencies and Bodies* (Edward Elgar Publishing 2019) 12.

[41] Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland* Ltd ECLI:EU:C:2014:238, para 24.

[42] NIS Directive cit.

version NIS2 Directive[43] lay down a common EU legal framework regarding Member States capabilities in handling network and information systems incidents, mechanisms for EU-wide cooperation and requirements for key private and public actors. The European Cyber Resilience Act on common cybersecurity standards for connected devices[44] and the European Chips Act,[45] that are expected to already rely on art. 114 TFEU.

At the same time, the recourse to 114 TFEU legal basis for cybersecurity-related purposes comes with several limitations. Network and information systems, communications networks, digital products, services and devices support our everyday societal activities. The danger of using internal market provisions for regulating cross-cutting policy issues with an important human dimension resides in their primarily economic policy-aims to the detriment of other objectives. This economic bias in the adoption of legislative measures entails the risks of overlooking or undervaluing other socio-cultural values at stake.[46] At the same time, different provisions scattered throughout the Treaties make it compulsory for internal market legislation to take other non-related objectives on board.[47] A classic example of this reasoning is the Directive on Audiovisual Media Services, which is grounded in the internal market objective of facilitating the provision of media services and *inter alia* constitutes a cultural policy instrument of promotion of European programmes.[48] The EU Cybersecurity Act, referring to the importance of cybersecurity awareness-raising and education, could qualify as another example of an incorporation of non-market objectives in the measures based on art. 114 TFEU. Even if the internal market clause is relied upon for legislating non-market aims, pursuing those non-economic objectives can have an economically beneficial effect.[49]

As was shown above, the internal market legal basis was relied upon on several occasions as an appropriate legal basis for building a more coherent EU approach to handle cyber incidents. Indeed, divergences in cyber capabilities between Member States and levels of protection across the EU could endanger, in turn, the functioning of the

[43] Commission Proposal for a Directive of the European Parliament and of the Council on measures for a high common level of cybersecurity across the Union, repealing Directive (EU) 2016/1148, COM(2020) 823 final, 16 December 2020 ("NIS 2 Directive").

[44] The European Cyber Resilience Act is being in preparation with the Commission's proposal foreseen for the third quarter of 2022.

[45] Proposal for a Regulation of the European Parliament and of the Council establishing a framework of measures for strengthening Europe's semiconductor ecosystem (Chips Act), COM(2022) 46, 8 February 2022. The European Chips Act is meant to develop Europe's semiconductor industry, making it less dependent on international supply chains.

[46] S Garben, 'Confronting the Competence Conundrum' cit. 69.

[47] B de Witte, 'A Competence to Protect: The Pursuit of Non-Market Aims Through Internal Market Legislation' in P Syrpis (ed), *The Judiciary, the Legislator and the Internal Market* (CUP 2012) 25, 32. For instance, the values and objectives of gender equality (art. 8 TFEU), non-discrimination generally (art. 10 TFEU), social protection (art. 9 TFEU) and animal welfare (art. 13 TFEU).

[48] *Ibid*. 34.

[49] *Ibid.* 26.

internal market. Furthermore, a comprehensive approach at Union level is necessary for preventing incidents causing disruption of IT services and critical infrastructures.[50]

It is not excluded that in future art. 114 TFEU could be relied upon to incentivise Member States to share more information and for expanding EU institutions' powers in terms of cyber threat analysis sharing. As a consequence, this would help bridging the existing gap between external and internal dimensions of (cyber)security. The use of art. 114 TFEU for addressing cybersecurity implications is reminiscent of the EU's practice to regulate social, regional development and environmental measures on the basis of the general harmonisation power conferred by internal market clause in the absence of sector-specific Treaty provisions in the past.[51] The number of legislative measures based on the internal market clause decreased with the creation of legal bases for sector-specific policies. We will see whether the overreliance on the internal market clause for (cyber)security related objectives could jumpstart a discussion on the reform of EU treaties and enhance cooperation in security and defence sectors, despite traditional Member States' reservations in the area. In this respect, the Russian aggression towards Ukraine served as a trigger for the security and defence dimension of the EU.

III. Cybersecurity as an issue of internal security under the AFSJ

The AFSJ serves as another major legal anchor for bringing minimal harmonisation of sanctions for particularly serious crimes with a cross-border dimension to the cyber domain, as well as for the admissibility of cross-border evidence (art. 82(2) TFEU).[52] In a way, the AFSJ offers an umbrella that could be used to regulate different questions relating to internal security, including terrorism and cybercrime. The EU has deployed several legislative and non-legislative actions aimed at preventing cybercrime and building capacity in law enforcement and the judiciary. Those legal acts include the 2001 Framework Decision on combating fraud and counterfeiting,[53] the 2005 Council Framework Decision on attacks against information systems,[54] the 2011 Directive on

[50] H Carrapico and B Farrand, 'Cyber-Crime as a Fragmented Policy Field in the Context of the Area of Freedom, Security and Justice' in A Ripoll Servent and F Trauner (eds), *Routledge Handbook on the Area of Freedom, Security and Justice* (Routledge 2018) 146.

[51] B de Witte, 'A Competence to Protect' cit. 30.

[52] RA Wessel, 'European Law and Cyberspace' cit. 15.

[53] Council Framework Decision 2001/413/JHA of 28 May 2001 combating fraud and counterfeiting of non-cash means of payment. This Decision was repealed by the Directive (EU) 2019/713 of the European Parliament and of the Council of 17 April 2019 on combating fraud and counterfeiting of non-cash means of payment and replacing Council Framework Decision (2019) 2001/413/JHA.

[54] Council Framework Decision 2005/222/JHA of 24 February 2005 on attacks against information systems.

combatting the sexual exploitation of children online and child pornography,[55] and the 2013 Cybercrime Directive.[56]

The Directive on combatting the sexual exploitation of children online and child pornography was adopted on the basis of arts 82(2) and 83(1) and aims at criminalising child sexual exploitation and sexual abuse which is most evident in child pornography having a considerable cross-border dimension. The Cybercrime Directive contributes to the judicial cooperation in criminal matters and was adopted on the basis of art. 83(1) TFEU. It provides for minimum rules on the definition of criminal offences and sanctions in response to attacks against information systems. Those include access to systems, systems interferences, data interference and can be criminalised with penalties from two to five years.[57] It also sets out a procedure in its art. 12 on the basis of which a Member State must inform the Commission how it establishes its jurisdiction over offences outside its territory.

The reduction of criminal activities performed with the involvement of computers and information systems as a primary tool or as a primary target remains one of regulatory goals for the EU. With this objective, the European Cybercrime Centre (EC3) was officially launched in 2013 within Europol. The EC3 is designed as the European focal point in the fight against cybercrime. Cybercrimes can be divided into the following categories: cyber-dependant, cyber-enabled, and computer dependant.[58] A comprehensive legal definition of *cybercrime* for the EU was not yet provided in EU secondary law.[59] And we would argue that this not really needed since the nature of cybercrime evolves daily, in contrast to EU legal frameworks that take years before coming into being.

Since electronic evidence is relevant in around 85 per cent of the total criminal investigations, the Commission put forward a proposal for an e-evidence framework for facilitating cross-border access to electronic evidence.[60] Two legislative proposals were

[55] Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision (2011) 2004/68/JHA.

[56] Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA ("Cybercrime Directive").

[57] Art. 9 Cybercrime Directive.

[58] J Clough, *Principles of Cybercrime* (CUP 2010).

[59] The EU 2013 Cybersecurity Strategy refers to cybercrime as "a broad range of different criminal activities where computers and information systems are involved either as a primary tool or as a primary target [...] and which comprises traditional offences (e.g. fraud, forgery, and identity theft), content-related offences (e.g. on-line distribution of child pornography or incitement to racial hatred) and offences unique to computers and information systems (e.g. attacks against information systems, denial of service and malware)".

[60] Commission Staff Working Document Impact Assessment accompanying the document Proposal for a Regulation of the European Parliament and of the Council on European Production and Preservation Orders for electronic evidence in criminal matters and Proposal for a Directive of the European Parlia-

presented in 2018 in order to enhance the cross-border gathering of electronic evidence: a Regulation on European Production and Preservation Orders for electronic evidence in criminal matters[61] and a Directive on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings.[62] The first legal act is meant to allow law enforcement authorities from one Member State to request a service provider established in another Member State to provide access to or preserve data needed for investigation and prosecution of crimes. This legal act complements the Directive regarding the European Investigation Order in criminal matters,[63] which did not contain any specific provision with respect to electronic types of evidence. Furthermore, for strengthening the existing judicial cooperation mechanisms the European Commission envisages the creation of a secure platform for the swift exchange of requests between judicial authorities within the EU.[64]

Art. 82(1) TFEU on judicial cooperation in criminal matters was relied upon as the legal basis for a Regulation on European production and preservation orders for electronic evidence in criminal matters. This article provides for the possibility to adopt measures for ensuring recognition of judgments and judicial decisions and facilitating cooperation between judicial authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions. However, it seems that the Regulation on European production and preservation orders for electronic evidence in criminal matters goes way beyond a mere judicial cooperation and mutual recognition rationale. It foresees rules on direct cooperation with service providers allowing the authority in one Member State to directly address the service provider in another Member State and even impose obligations on it. It follows that the procedures mentioned in the e-evidence framework do not involve two judicial authorities as laid down under art. 82(1) TFEU. It seems that the Commission in its proposal applies a certain degree of elasticity by using this provision for establishing a cooperation between law enforcement authorities and electronic services providers. The Regulation shifts away from the traditional application of the principle of mutual recognition in criminal matters and the case is yet another example of a creative use of existing legal bases by the Commission.

ment and of the Council laying down harmonised rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings, SWD(2018) 118 final, 17 April 2018.

[61] Proposal for a Regulation of the European Parliament and of the Council on European Production and Preservation Orders for electronic evidence in criminal matters, COM(2018) 225 final, 17 April 2018.

[62] Proposal for a Directive of the European Parliament and of the Council laying down harmonised rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings, COM(2018) 226 final, 17 April 2018.

[63] Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters.

[64] Proposal COM(2018) 225 final cit.

As noted above, internal rule-making in the EU is inseparable from external rule-making.[65] This statement can be confirmed by the observation on the evolution of the *ERTA* doctrine and its role in EU external relations law.[66] Something that starts as an EU internal policy area will sooner or later have consequences for the EU's external action or will simply develop an external dimension. This is also clearly visible in the area of the AFSJ with respect to cybercrime.[67]

As most of the world's information is now stored digitally, it is hard to imagine a criminal investigation that does not involve digital evidence. Indeed, the cross-border access to electronic evidence is a pressing issue in 55% of crimes investigation and prosecution.[68] Furthermore, the efficiency of gathering e-evidence through legal agreements is, however, questionable since it often entails complex lengthy procedures. As a result, governments tend to opt for extraterritoriality of their access request and compel companies under their jurisdiction to grant access to data regardless of the location of the servers.[69] Since September 2019 the EU has been negotiating an agreement with the US on access to e-evidence for judicial cooperation in criminal matters.[70] The Commission plans to train practitioners from all EU Member States in mutual legal assistance and cooperation in particular with the United States as the third country receiving the largest number of requests from the EU.[71] The EU also participates in the negotiations for the second additional protocol to the Budapest Convention, the main international instrument in cyber-crime.

Better co-ordination between external action and Justice and Home Affairs policies is crucial in the fight against cybercrimes. Greater coherence is needed not only among EU instruments, but also to coordinate the external activities of the individual Member States.[72] The next section will unveil how cyber threats can be handled through the CFSP.

IV. Mainstreaming cybersecurity into the CFSP

The EU's development of collective responses to cyber-attacks has rested on a recognition that the multiplication of cyber-attacks and their destructive character required a different

[65] E Fahey, 'The EU's Cybercrime and Cyber-Security Rulemaking: Mapping the Internal and External Dimensions of EU Security' (2014) European Journal of Risk Regulation 46.

[66] G Butler and RA Wessel, 'Happy Birthday ERTA! 50 Years of the Implied External Powers Doctrine in EU Law' (31 March 2021) EU Law Blog www.europeanlawblog.eu.

[67] C Matera, 'Some Reflections on the Nature and Scope of the Externalisation of the AFSJ Domains' cit.

[68] Commission SWD(2018) 118 final cit.

[69] S Carrera and others, 'Access to Electronic Data by Third-Country Law Enforcement Authorities Challenges to EU Rule of Law and Fundamental Rights' (*Centre for European Policy Studies* 2015); J Daskal, 'Law Enforcement Access to Data Across Borders: The Evolving Security and Rights Issues', (2016) Journal of National Security Law & Policy 473.

[70] T Christakis and F Terpan, 'EU–US Negotiations on Law Enforcement Access to Data: Divergences, Challenges and EU Law Procedures and Options' (2021) International Data Privacy Law 81.

[71] Proposal COM(2018) 225 final cit.

[72] European Security Strategy (2003) 15895/03.

response, beyond the conventional defence of networks and resilience-building paradigm. This called for a less inward-looking approach towards cyber-incidents and for a more outward-looking EU. In order to do this, the Union needed regulatory tools to address emerging hybrid threats to its security coming from the outside.

This *externalisation of EU cybersecurity* is a direct consequence of the institutional architecture that stems from the Lisbon Treaty that abolished the pillar structure. This led to an integration of the CFSP and other external objectives in single provisions and for a somewhat less fragmented decision-making process.[73] For instance, the 2013 cybersecurity strategy[74] was a product of a direct cooperation of three different bodies of the EU, with roots in the pre-Lisbon pillar-structure.[75] DG CONNECT (former pillar 1), the EEAS responsible for managing and developing the common foreign and security policy (former pillar 2) and DG HOME (previously pillar 3) adopted a holistic approach to cybersecurity by drawing different aspects into one structured document.[76] The involvement of the EEAS in the work on the 2013 Cybersecurity Strategy might be one of the reasons why this document elevates mainstreaming cybersecurity issues into EU external relations and Common Foreign and Security Policy as one of the EU's priorities.

The 2013 Cybersecurity Strategy is a steering document for the development of the EU Cyber Diplomacy Toolbox and EU's cyber defence. Cyber diplomacy and cyber defence emerge as the main aspects of the EU's cybersecurity under the CFSP. While they are inherently intertwined, they pursue different objectives. Cyber defence aims at protecting the EU against external threats by military and civilian means, whereas cyber diplomacy relies on non-military diplomatic means. Cyber diplomacy emphasises the need to work towards a coherent EU International cyberspace policy by improving coordination of global cyber issues and promoting EU values in cyberspace.[77]

IV.1. The emergence of cyber cooperation under PESCO

Cyber defence is a key aspect of the Strategic Compass and of the EU Cybersecurity Strategy.[78] The special role of the Common Security and Defence Policy (CSDP) in addressing cyber threats has been articulated in the EU Cyber Defence Policy Framework

[73] RA Wessel, 'Integration and Constitutionalisation in EU Foreign and Security Policy, in R Schütze (ed), *Globalisation and Governance: International Problems, European Solutions* (CUP 2018) 339; RA Wessel, 'General Principles in EU Common Foreign and Security Policy' in V Morena-Lax, P Neuvonen and K Ziegler (eds), *Research Handbook on General Principles of EU Law* (Edward Elgar Publishing 2022) 606.

[74] The EU 2013 Cybersecurity Strategy cit.

[75] R Dewar, 'Cyber-Lisbon? The Impact of the Treaty of Lisbon on European Union Cybersecurity Policy' (2015) EUSA Conference Proceedings aei.pitt.edu.

[76] *Ibid.*

[77] The EU 2013 Cybersecurity Strategy cit.

[78] *Ibid.*; Council, 'A Strategic Compass for Security and Defence' 7371/22, 21 March 2022; Josep Borrel, *Cyber Defence: Speech on Behalf of High Representative/Vice-President Josep Borrell at the EP Plenary* www.eeas.europa.eu.

adopted in 2014 and updated in 2018.[79] The cooperation in the area of defence has always been marked by a differentiated approach across the EU,[80] and the cyber domain is no exception. Cyber elements of defence and security are included in the Permanent Structured Cooperation (PESCO) – launched in December 2017 – by 25 Member States. PESCO, established by art. 42(6) Treaty on European Union (TEU) and Protocol No. 10 to the Lisbon Treaty, has recently emerged as the most emblematic form of differentiated integration and enhanced cooperation in the EU.[81] It allows for small groups of Member States to work closely together in different areas of EU defence policy.

PESCO includes 10 cyber-related projects that aim at increasing efforts in the cooperation on cyber defence. The first set of PESCO cyber-related projects include: "Cyber Rapid Response Teams and Mutual Assistance in Cyber Security" (CRRTs) and "Cyber Threats and Incident Response Information Sharing Platform".[82] CRRTs form part of a Lithuania-led force in operation since 2019. It was launched by Ministers of Defence of Croatia, Estonia, Poland, Lithuania, the Netherlands, and Romania. Belgium, Greece, Spain, Italy, France, Slovenia, and Finland have a status of observers. CRRTs operate by pooling participating Member States' experts and is equipped with unified Deployable Cyber Toolkits in order to detect and mitigate cyber threats.[83] It is on a permanent standby and can be activated to assist other Member States, EU Institutions, Common Security and Defence Policy (CSDP) operations as well as partners as soon as a concrete agreement on such assistance is reached. As an example, the EU's CRRTs was meant to be deployed to help Ukraine which has been facing cyber-attacks.[84] Lithuanian Deputy Defence Minister Margiris Abukevičius stressed that "It is important [...] to demonstrate solidarity with Ukraine and to provide it with assistance, and the deployment of the cyber rapid response team when needed is one of the objectives of the Lithuanian-led multinational project".[85] Nevertheless, this plan did not materialise due to the dramatic events that unfolded in the country after the start of the Russian war in Ukraine.

Another PESCO cyber-related project is the Strategic Command and Control (C2) System for CSDP missions and operations. Its objective is to enhance the military deci-

[79] Council, 'EU Cyber Defence Policy Framework' 15585/14, 18 November 2014; Council, 'EU Cyber Defence Policy Framework (2018 update)' 14413/18, 19 November 2018.

[80] B Leruth, S Gänzle and J Trondal, 'Differentiated Integration and Disintegration in the EU After Brexit: Risks Versus Opportunities' (2019) JComMarSt 1383.

[81] S Blockmans and DM Crosson, 'PESCO: A Force for Positive Integration in EU Defence'. (2021) European Foreign Affairs Review 87. Council Decision (CFSP) 2017/2315 of 11 December 2017 establishing permanent structured cooperation (PESCO) and determining the list of participating Member States.

[82] EU Cyber Defence Policy Framework (2018 update) cit.

[83] Cyber Rapid Response Teams and Mutual Assistance in Cyber Security (CRRT) www.pesco.europa.eu.

[84] Lithuania may activate EU cyber force to help Ukraine' cit.

[85] *Ibid.*

sion-making process. More precisely it aims at the improvement of the planning and conduction of operations and missions, and the coordination of EU forces.

The practice of empowering the EU to deal with cybersecurity issues through the CFSP is reminiscent of the EU's fight against terrorism.[86] The Seville Declaration on the contribution of the CFSP to the fight against terrorism underlined the role of the CFSP and CSDP in countering terrorist threats to Union's security.[87] Along similar lines, the Declaration on combating terrorism adopted at the European Council in March 2004 underlined the role of the CFSP in the fight against terrorism.[88] This returned in the Treaty of Lisbon, which codified the special role of the CFSP and CSDP in fighting terrorism in art. 43 TEU, providing for the possibility to use civilian and military means in addressing terrorism. art. 43 TEU could be used by analogy to address cybersecurity related threats by joint Union operations and participation in common tasks, including through supporting third parties in their cyberspace stabilisation efforts. The support of third countries through confidence-building, preventive and restrictive measures is also foreseen in the EU Cyber Diplomacy Toolbox that will be analysed in the next section.

IV.2. Cyber Diplomacy Toolbox: between sanctions and a lawful response to cyber-attacks

Faced with widespread cyber-attacks and a deadlock in the global negotiations on international law and state responsible behaviour in cyberspace,[89] the EU decided to develop its own framework for a joint EU diplomatic response to malicious cyber operations.[90] In 2016 the Dutch presidency submitted a Non-paper on "Developing a Joint EU Diplomatic Response Against Coercive Cyber Operations".[91] This document paved the way for the emergence of EU cyber diplomacy with a set of measures going beyond the traditional resilience and security of networks paradigm.

The *externalisation* of EU cybersecurity in order to deter and respond to cyber-attacks is in conformity with the CFSP objectives set out in art. 21 TEU. Accordingly, the Union's action on the international scene, inter alia, aims at "preserving peace, preventing conflicts and strengthening international security, in accordance with the purposes and prin-

[86] C Hillion, 'Fighting Terrorism Through the Common Foreign and Security Policy' in I Govaere and S Poli (eds) *EU Management of Global Emergencies* (Brill Nijhoff 2014).

[87] European Council, Declaration on the contribution of the ESDP in the fight against terrorism [2002].

[88] European Council, Declaration on combating terrorism [2004].

[89] F Delerue, 'International Cooperation on the International Law Applicable to Cyber Operations' (2019) European Foreign Affairs Review 203. The Group of governmental experts in the 2016–2017 UNGGE failed to reach a consensus in June 2017. Developments in 2021 were more positive: both the UNGGE and OEWG produced reports.

[90] Council Conclusions on cyber diplomacy cit.

[91] Council, 'Non-Paper: Developing a Joint EU Diplomatic Response Against Coercive Cyber Operations' 5797/6/16, 19 May 2016, www.statewatch.org.

ciples of the United Nations Charter, with the principles of the Helsinki Final Act and with the aims of the Charter of Paris".[92] While cybersecurity thus fits the Union's objectives, any action in that regard will also have to be guided by the mentioned principles.

In June 2017, the Council continued its work on the issue and presented its draft conclusions on a Framework for a Joint EU Diplomatic Response to Malicious Cyber Activities.[93] Those conclusions refer to a range of diplomatic measures to be undertaken by the EU and Member States, including preventive measures, cooperative measures, stability measures and restrictive measures within the CFSP.

Preventive measures encompass EU-supported *Confidence Building Measures*, including initiatives in third countries through the European Neighbourhood Instrument (ENI) or any other relevant financing instruments. They also include awareness-raising on EU policies, such as EU-led political and thematic dialogues, particularly cyber or security dialogues.

Cooperative measures refer to EU-led political and thematic dialogues or EU-diplomatic *démarches* to facilitate the peaceful resolution of an ongoing incident.

Stability measures are understood as statements expressing concern or condemning general cyber trends[94] or cyber-attacks like *Wannacry* and *NotPetya* on behalf of the EU.[95] These include common positions by the Council, declarations by the High Representative of the EU,[96] EU Council Conclusions or démarches by the EU delegations as a way to signal the likely consequences of a malicious cyber activity.

Restrictive measures refer to sanctions under the CFSP that must, first, be proportionate to the scope, scale and duration of an aggressive behaviour in cyberspace.[97] Secondly, the use of restrictive measures is meant to deter potential perpetrators by influencing their rational cost-benefit analysis.

This paper devotes specific attention to two measures from the EU Cyber Diplomacy Toolbox. We will start with restrictive measures that were considered as a suitable foreign policy instrument for mitigating cyber threats and influencing the change of the behaviour of aggressors in the long term.[98] We will then reflect upon possibilities for EU support to Member States' lawful responses to cyber threats as foreseen under the Cyber Diplomacy Toolbox.

[92] Art. 21 TEU.

[93] Cyber Diplomacy Toolbox cit.

[94] Joint Statement by Presidents Tusk and Juncker and High Representative Mogherini on Russian Cyberattacks (4 October 2018) www.consilium.europa.eu.

[95] Council, Conclusions on malicious cyber activities 7925/18, 16 April 2018.

[96] In a declaration made on behalf of the Union on 12 April 2019, the High Representative urged actors to stop undertaking malicious cyber-activities that aim to undermine the Union's integrity, security and economic competiveness, including acts of cyber-enabled theft of intellectual property. Such cyber-enabled thefts include those carried out by the actor publicly known as "APT10" ("Advanced Persistent Threat 10").

[97] Council Draft implementing guidelines for the Framework on a Joint EU Diplomatic Response to Malicious Cyber Activities cit. 4.

[98] Cyber Diplomacy Toolbox cit.

a) Restrictive measures in response to cyber-attacks

The European Union cyber sanctions framework is a new EU foreign policy tool that came into effect in May 2019.[99] It consists of two legal acts: Council Decision (CFSP) 2019/797 and Council Regulation (EU) 2019/796 providing for targeted restrictive measures against cyber-attacks threatening the Union or its Member States. The regular two-step procedure for adopting sanctions was followed. First, a CFSP decision[100] was adopted by the Council on the basis of art. 29 TEU laying down the overall sanctions framework. This was followed by the adoption of the associated Regulation[101] on the basis of art. 215 TFEU. Both legal acts are renewed every year.

Sanctions in response to cyber-attacks fall under the category of smart, unilateral sanctions. *Smart* in the sense that they adopt a targeted approach and are directed at the individuals and entities responsible for the attacks from a perspective of their conduct. These cyber-sanctions are different from the broad economic sanctions or sectoral economic sanctions that affect the entire population of a country by stalling the development of certain sectors of its economy. The EU cyber sanctions toolkit includes travel bans, asset freezes and prohibitions to make funds and economic resources available to those responsible for cyber-attacks. They thus constitute a personalised deterrence tool.

For the time being, eight natural persons and four entities or bodies are targeted by EU restrictive measures as being responsible for the attempted cyber-attack against the OPCW and the cyber-attacks publicly known as *WannaCry* and *NotPetya*, as well as *Operation Cloud Hopper*, and the cyber-attack on the German Federal Parliament (*Deutscher Bundestag*) in April and May 2015.[102] The EU has to date aligned itself to a large extent with the US cyber-related sanctions programme. For instance, in July 2020 it introduced

[99] For earlier assessment of cyber sanctions see Y Miadzvetskaya, 'Challenges of the Cyber Sanctions Regime Under the Common Foreign and Security Policy (CFSP)' in A Vedder and others (eds), *Security and Law: Legal and Ethical Aspects of Public Security, Cyber Security and Critical Infrastructure Security* (Intersentia, 2020) 277.

[100] Council Decision (CFSP) 2019/797 of 18 May 2019 concerning restrictive measures against cyber-attacks threatening the Union or its Member States.

[101] Council Regulation (EU) 2019/796 of 17 May 2019 concerning restrictive measures against cyber-attacks threatening the Union or its Member States.

[102] Council Decision (CFSP) 2020/1127, cit.; Council Implementing Regulation (EU) 2020/1125 cit.; Council Decision (CFSP) 2020/1537 of 22 October 2020 amending Decision (CFSP) 2019/797 concerning restrictive measures against cyber-attacks threatening the Union or its Member States; Council Implementing Regulation (EU) 2020/1536 of 22 October 2020 implementing Regulation (EU) 2019/796 concerning restrictive measures against cyber-attacks threatening the Union or its Member States; Council Decision (CFSP) 2020/1748 of 20 November 2020 amending Decision (CFSP) 2019/797 concerning restrictive measures against cyber-attacks threatening the Union or its Member States; Council Implementing Regulation (EU) 2020/1744 of 20 November 2020 implementing Regulation (EU) 2019/796 concerning restrictive measures against cyber-attacks threatening the Union or its Member States.

targeted sanctions against Russian, Chinese and North Korean entities and individuals that were already on the US cyber sanctions listings.[103]

The EU cyber sanctions framework is not country-specific but global in scope. Its main feature is indeed the shift to individual listings. Natural or legal persons are included on sanctions lists independently of a specific geographic area. This contrasts with most of the EU sanctions packages that are taken in response to major political crises and threats to peace and security in third countries (e.g. Belarus, Syria, Ukraine, Venezuela).

Cyber-attacks as the central focus of this sanctions regime are very distinct due to intrinsic features of cyberspace such as internet structural design and anonymity that constitute barriers to forensic-based technical attribution.[104] Cyber-attacks imply unauthorised actions that involve access to information systems, information system interference, data interference or interception.[105]

The EU cyber-sanctions framework is thus characterised by criteria for listing that are different from other sanctions regimes. These listing criteria refer to cyber-attacks that represent an external threat[106] and that have significant effects. The significance of an attack is assessed on the basis of the following criteria: scope, scale, impact or severity of disruption caused; number of natural or legal persons, entities or bodies affected; number of Member States concerned; the amount of economic loss caused; the economic benefit gained by the perpetrator; and the amount or nature of data stolen or accessed.[107] Sanctions may not just be imposed in case of successful attacks, but also in case of attempted attacks. As said by one EU official, the fact that a potentially harmful cyber-attack failed does not mean that it shall not be punished.[108]

The listing criteria in the cyber sanctions framework are, however, rather vague, which offers more flexibility to the Council, but also increases the likelihood of arbitrary decision-making. More precisely, the decision to include cyber-attack perpetrators or organisers on the EU sanctions lists is not only linked to them falling under specific listing criteria but also constitutes a political message. The lack of transparency with respect to sanctions designations is, however, a recurrent issue in EU sanctions practice and is not specific to the cyber sanctions framework.

The thematic nature of cyber sanctions also offers a higher degree of flexibility in contrast to country-specific measures. First of all, it allows the Council to act faster by updating the existing sanctions listings instead of enacting a completely new legal

[103] Y Miadzvetskaya, 'Cyber Sanctions: Towards a European Union Cyber Intelligence Service?' (College of Europe Policy Brief 1-2021).

[104] W Earl Boebert, 'A Survey of Challenges in Attribution' in National Academies, *Proceedings of a Workshop on Deterring Cyberattacks* (The National Academies Press 2010) 43.

[105] Council Decision (CFSP) 2019/797 cit. art. 1(3).

[106] *Ibid.* art. 1(2)(4).

[107] *Ibid*. art. 3.

[108] Interview with an EU official on file with the author.

framework each time a new sanction has to be imposed. Complex and lengthy procedures that are prone to Member State vetoes and which are typical for new country-specific designations are thus not required. Second, the personalised character better suits the present dynamics in the cyberspace in which states often rely on non-state actors – so-called proxies – to project their strategic interests.

Out of 46 sanctions regimes in place in the EU in 2022,[109] only four are horizontal and thematic in nature. Apart from cyber sanctions, these are sanctions addressing the use of chemical weapons, the EU's terrorist list, and the newly adopted Magnitsky-type Act against human rights abusers. The established cyber sanctions regime mirrors the EU framework on restrictive measures addressing the use and proliferation of chemical weapons.[110] The EU also contemplates thematic sanctions for spreading disinformation and undermining trust in democratic institutions. There are also some quasi-thematic sanctions regimes in place that pursue a specific objective while being tied to a particular country, for instance measures against Iran's nuclear program.[111]

b) EU support to Member States' lawful responses

In addition to the above-mentioned actions and instruments, the Treaties also foresee possibilities for EU support to or coordination of Member States' lawful responses to non-forcible and proportionate countermeasures to compel or convince an attacker to change their behaviour. After all, in grave instances, cyber-attacks could amount to a use of force or an armed attack within the meaning of art. 51 of the Charter of the United Nations. In this case, art. 42(7) TEU (the *Mutual Assistance Clause*) may be invoked by an attacked Member State to ask the EU and fellow Member States for aid and assistance. These collective defence arrangements are similar or even complementary to the collective defence provision in art. 5 of the North Atlantic Treaty.

In some other instances, the *solidarity clause* of art. 222 TFEU could be used for activating the help by other EU Member States.[112] The Treaty of Lisbon, for the first time in history, equipped the Union with a special provision aimed at improving the EU's solidarity in response to natural or man-made disasters. The *solidarity clause* creates an obligation for all Member States to act jointly "in a spirit of solidarity" and to assist one another in the event of disasters and crises which exceed their individual response capaci-

[109] For a complete overview of sanctions lists see www.sanctionsmap.eu.

[110] Council Decision (CFSP) 2018/1544 of 15 October 2018 concerning restrictive measures against the proliferation and use of chemical weapons.

[111] In addition to implementing UN sanctions, the EU imposed autonomous economic and financial restrictions on Iran. See for instance Council Decision 2010/413/CFSP of 26 July 2010 concerning restrictive measures against Iran and repealing Common Position 2007/140/CFSP.

[112] See for a recent overview of the options V Szép and others, 'The Current Legal Basis and Governance Structures of the EU's Defence Activities' (ENGAGE Working Paper Series 4–2021).

ties. Art. 222 TFEU stands in isolation from other Treaty provisions without being integrated in Union's external action provisions and without forming an inherent part of defence related treaty provisions.

The *solidarity clause* finds its roots in the Declaration on Solidarity Against Terrorism, issued by the European Council after the Madrid terrorist attacks in March 2004[113] and returned in the 2005 draft Constitutional Treaty that never entered into force. Initially two types of solidarity where contemplated by the Working group VIII on defence: solidarity in response to *armed aggression* and solidarity in the event of non-conventional threats.[114] It was believed that narrowing down the scope of solidarity to mutual defence arrangements could deprive the EU from the full range of its crisis and disaster management capacities.[115] Solidarity, set out in art. 222 TFEU, constitutes "a soft mutual defence commitment" covering non-conventional threats to the Union's security.[116] Such a broad solidarity approach, encompassing non-intentional disasters, also distinguishes the EU from a purely military alliance which was in particular relevant for some traditionally neutral Member States.[117]

Solidarity in the form of mutual assistance has contributed to shaping the EU's internal, external and security policies. Notably, mutual solidarity is referred to in arts 67(2) and 80 TFEU dealing with asylum, immigration and external border control as well as in art. 122 TFEU covering financial assistance in cases of severe difficulties caused by natural disasters or exceptional occurrences, and in art. 194 TFEU on EU energy policy.[118]

Contrary to the solidarity clause, the *Mutual Assistance Clause* in art. 42(7) TEU – which is quite similar to art. 5 of the NATO Treaty – remains a rather rhetorical concept without a defined implementing framework. Its activation imposes an obligation of aid and assistance on Member States, but does not seem to require any political coordination at the EU level. For the first time in history, the French Government officially invoked the *Mutual Assistance Clause* in the aftermath of the terrorist attacks in Paris on 13 November 2015.

The Treaty provisions do not make any explicit reference suggesting that the *solidarity clause* or *mutual assistance clause* may be invoked for cyber incidents. The type of events defined as covered by the *solidarity clause* include a terrorist attack and a natural or man-made disaster. "Disaster" in this context refers to any situation capable of se-

[113] Declaration on combating terrorism cit.

[114] S Blockmans, 'L'union fait la force: Making the Most of the Solidarity Clause (art. 222 TFEU)' in I Govaere and S Poli (eds) *EU Management of Global Emergencies : Legal Framework for Combating Threats and Crises* (Brill Nijhoff 2014) 111.

[115] *Ibid*., 113.

[116] T Konstadinides, 'Civil Protection in Europe and the Lisbon "Solidarity Clause": A Genuine Legal Concept or a Paper Exercise' (Uppsala Faculty of Law Working Paper 3-2011) 13.

[117] S Myrdal and M Rhinard, 'Empty Letter or Effective Tool' (UI Occasional Papers - The Swedish Institute of International Affairs 2/2010).

[118] T Konstadinides, 'Civil Protection in Europe' cit. 5.

verely impacting people, the environment or property, including cultural heritage.[119] This broad phrasing does, however, seem to offer enough flexibility to justify the activation of the *solidarity clause* in cases with a risk to a *severe impact*, which may encompass cyber-attacks affecting critical infrastructure or services necessary for the essential social activities, for instance in the sectors of energy or transport. As an illustration, a Distributed Denial of Service attack can result in severe impact on people by disturbing their access to public information or to the e-services provided. In the same vein, the recent cyber-attacks *WannaCry* and *NotPetya* displayed the disastrous paralysing effects that ransomware can have on the industry and society.

The relevance of a joint action and mutual assistance in a case of a major cyber incident or an attack was also confirmed in the EU Cybersecurity Strategy.[120] The latter explicitly states that a particularly serious cyber incident or attack could serve as a sufficient ground for a Member State to trigger the EU *solidarity clause*. The Council conclusions of November 2017 on cyber issues also highlighted that a particularly serious cyber incident or crisis could constitute sufficient ground to invoke the EU *solidarity clause* and/or the *mutual assistance clause*.[121]

There are diverging views on the temporal scope of the assistance foreseen under the *solidarity clause*. Some scholars believe that the emphasis is placed on the prevention and protection rather than on the actual assistance in dealing with consequences of a disaster.[122] At the same time, the European Parliament recalled in 2015 that art. 222 TFEU is specifically designed to deal with the consequences of the terrorist attacks in Europe.[123] The Cybersecurity Strategy similarly suggests that the solidarity clause deals with the consequences of an occurred incident, but cannot be activated on an *ex ante* basis for preventing a cyber-attack from occurring.[124] Consequently, any action under the auspices of EU solidarity is triggered in response to a disaster, upon request by a Member State. In other words, the *duty to prepare to assist* is a necessary first step anticipating the *duty to assist*.[125]

Hence, art. 222 TFEU can be relied upon in combination with some other Treaty provisions (including perhaps the principle of sincere cooperation under art. 4(3) TEU)[126] as a legal basis for adopting cybersecurity related legislation in the name of solidarity. However, it is not clear yet whether it can be used on its own to address certain

[119] Council Decision 2014/415/EU of 24 June 2014 on the arrangements for the implementation by the Union of the solidarity clause.

[120] The EU 2013 Cybersecurity Strategy cit.

[121] Council Conclusions on the Joint Communication to the European Parliament and the Council: Resilience, Deterrence and Defence: Building strong cybersecurity for the EU, 14435/17, 20 November 2017.

[122] T Konstadinides, 'Civil Protection in Europe' cit.

[123] European Parliament resolution of 21 January 2016 on the mutual defence clause (art. 42(7) TEU).

[124] The EU 2013 Cybersecurity Strategy, cit.

[125] S Blockmans, 'L'union fait la force' cit. 118.

[126] T Konstadinides, 'Civil Protection in Europe' cit p. 15.

threat scenarios. Some scholars held that it does not grant the EU a direct mandate to, for instance, develop defence policy instruments.[127] Instead, art. 222 TFEU would aim at strengthening the role of the EU in crisis management, such as the volcanic ash crisis of April 2010 and spread of pandemics like the H1N1 swine flu in April 2009 and Coronavirus in 2020.[128] The latter indeed put EU solidarity to the test.[129]

V. The *externalisation* of the EU's cybersecurity and its limitations under CFSP

V.1. The attribution of responsibility for cyber-attacks

The EU does not have procedures in place for the attribution of responsibility for cyber-attacks to third countries. Discussions on this topic are out of question at the moment since there is no political will to establish common attribution frameworks. Sanctions, mentioned in Cyber Diplomacy Toolbox, are targeted measures aimed at individuals, groups or companies and they do not lead to the attribution of responsibility to a State. While the guidelines of the Council of October 2017 initially referred to the possibility of the adoption of sanctions against a State when it carries out the malicious cyber activity or when it is deemed responsible for the actions of a non-state actor,[130] the May 2019 Council Decision emphasises the targeted nature of restrictive measures, excluding any attribution of responsibility for cyber-attacks to a third State.[131]

Nevertheless, Member States are free to make their own determinations with respect to the attribution of cyber-attacks. And contrary to some Member States, which publicly attributed cyber-attacks to specific States, the EU has not taken any act of attribution.[132] Moreover, any measure under the proposed Cyber Diplomacy Toolbox should take into account the broader context and objectives of the EU external rela-

[127] *Ibid*.

[128] *Ibid.*

[129] S Michalopoulos, 'Coronavirus Puts Europe's Solidarity to the Test' (6 March 2020) Euractiv www.euractiv.com.

[130] Council Draft implementing guidelines for the Framework on a Joint EU Diplomatic Response to Malicious Cyber Activities cit. 5: "In the case where the malicious cyber activity is being carried out by a State, as well as in the case when a State is deemed responsible for the actions of a non-state actor that is acting under its direction or control, or if this State recognizes and adopts the behaviour of such a non-state actor as its own, the full range of measures in the Framework, including restrictive measures against that State, could be used by the EU and its Member States".

[131] Council Decision (CFSP) 2019/797 cit.; See also A. Bendiek and M. Schulze, 'Attribution: A Major Challenge for EU Cyber Sanctions' (SWP Research Paper 2021/RP 11).

[132] P Ivan, 'Responding to Cyberattacks: Prospects for the EU Cyber Diplomacy Toolbox' (2019) European Policy Centre www.epc.eu.

tions, should be proportionate to malicious activities and should be based on a shared situational awareness agreed among the Member States.[133]

The targeted nature of cyber sanctions allows the EU to avoid the sensitive question of attribution of responsibility for cyber-attacks to a third country within the currently still underspecified international legal framework governing this area. Examples include the 2015 hack of the German Federal Parliament and the disrupting ransomware cyber-attacks (*WannaCry* and *NotPetya*), which paralysed the work of corporations and government agencies in 2017. As individual designations circumvent the establishment of State responsibility, the EU has *de facto* never attributed a cyber-attack to a third country, but has limited its actions to the expression of concerns and condemnations.

However, the delimitation between targeted measures and attribution of responsibility to a State remains rather superficial since a vast majority of cyber-attacks with high impact, such as the abovementioned *WannaCry* and *NotPetya*, were widely understood to have been orchestrated at the request and with the support of governments of, allegedly, North Korea and Russia respectively. We would argue that individual listings under the cyber-sanctions framework could be compared to the indirect attribution of responsibility to States since all actors sanctioned have a clear connection with a specific State. The EU has indeed attributed responsibility for cyber-attacks to individuals who worked for State bodies. As an example, the EU sanctioned four Russians including the current Head of the Main Directorate of the General Staff of the Armed Forces of the Russian Federation (GU/GRU), while others work at different levels for the Main Directorate of the General Staff of the Armed Forces of the Russian Federation (GU/GRU). Other sanctioned individuals and entities are connected to APT10 or APT38 known as a Chinese and North Korean state-sponsored threat groups that specialise in cyber operations.

V.2. Evidence collection as a limitation for the EU Cyber Diplomacy Toolbox

Individual designations within the cyber-sanctions framework take place at three levels: legal, technical and political. Discussions first take place within the Horizontal Working Group on Cyber Issues, then in RELEX at the Council where political, legal and technical agreement is achieved and then finalised at COREPER. As the last step the Council adopts restrictive measures. Along this time designations have to be substantiated by evidence. Collecting evidence constitutes a sensitive issue which will be tackled in this section.

While sanctions in response to cyber-attacks constitute a novel personalised cyber deterrence tool, they are not immune to judicial review and must satisfy a set of procedural and substantive requirements. They must be accompanied by reasons for listings and sub-

[133] Cyber Diplomacy Toolbox cit.

stantiated with evidence.[134] Furthermore, this evidence must also be disclosed to the person listed in order to guarantee her defence and fair trial rights.[135]Taking into account that sanctions can be challenged in Court, the EU has to rely on evidence that the Council, more precisely Member States, will not be hesitant to share.[136] Most of EU sanctions listings now rely on open source data.[137] Such commitment to use open-source data for sanctions listings makes it easier to share those materials in Court. However, the main problem of data stemming from publicly available materials is their degree of reliability and accuracy.[138] The fact that they are in a public domain does not make them trustworthy, even more so when we speak about cyber and hybrid threats in our information was era.

This distinct feature makes the EU cyber sanctions system different from the one in the US on both ex-ante and ex-post levels. First, while the US cyber sanctions programme is more advanced and benefits from less fragmented decision-making, EU decision-making on sanctions still requires unanimity, even though a shift towards a qualified majority voting is contemplated.[139] Second, the US cyber-sanctions instrument is more flexible since the sanctions cannot be subject to appeal in the same manner as in the EU. While the EU's recent cyber sanctions framework provides for an extensive judicial review, questions remain with respect to evidence relating to each listed individual and entity. In our understanding, most of supporting evidence in question are of confidential nature. Data of such a sensitive nature would potentially hinder its disclosure in court.

Countering cyber threats indeed relies on an exchange of gathered intelligence which is not without difficulties due to a *sui generis* nature of the EU. The EU relies mostly on the cyber-related information provided by the EC3, EU Agency for Cybersecurity, EU's Computer Emergency Response Team (CERT-EU), and Member States, including their will to disclose such data, as well as the NATO. Taking into account the growing tendency towards the *externalisation* of the EU's cybersecurity, procedural and structur-

[134] Case C-417/11P *Council/Bamba* ECLI:EU:C:2012:718 para 49; Joined Cases T-307/12 and T-408/13 *Mayaleh v Council* ECLI:EU:T:2014:926 para 85; art. 296 TFEU provides that EU legal acts must state the reasons on which they are based.

[135] Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *European Commission and Others v Yassin Abdullah Kadi* ECLI:EU:C:2013:518 para 130; See also C Eckes, 'EU Restrictive Measures Against Natural and Legal Persons: From Counterterrorist to Third Country Sanctions' (2014) CMLRev 869-905.

[136] Case T-228/02 *Organisation des Modjahedines du peuple d'Iran v. Council and UK (PMOI I)* ECLI:EU:T:2006:384 para 155; Joined Cases C-402/05 P and C-415/05 *P Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* ECLI:EU:C:2008:461 paras 342-344; V Abazi and C Eckes, 'Closed Evidence in EU Courts: Security, Secrets and Access to Justice' (2018) CMLRev 753.

[137] C Eckes, 'EU Global Human Rights Sanctions Regime: Is the Genie Out of the Bottle?' (2021) Journal of Contemporary European Studies 255.

[138] *Ibid.* 265-266.

[139] European Parliament Resolution of 9 June 2022 on the Call for a Convention for the Revision of the Treaties para 6; See also K Pomorska and RA Wessel, 'Qualified Majority Voting in CFSP: A Solution to the Wrong Problem?' (2021) European Foreign Affairs Review 351.

al reforms might be needed, including in the framework of the CFSP, in order to enhance information sharing among Member States and stimulate cooperation with the private sector. In fact, as recent research reveals, the intelligence cooperation within the European Union is still very much in development and largely takes place behind closed doors.[140] Enhancing cooperation might be even more pressing taking into account that with Brexit the analysis provided by the British experts will be lost.[141]

Three avenues for enhancing the exchange of evidence could be contemplated in the EU. First, by using the possibilities offered by the PESCO. In this respect, the project Cyber and Information Domain (CID) Coordination Center (CIDCC) could serve as an example. It is meant to establish and operate a multinational Cyber and Information Domain (CID) Coordination Center (CIDCC). On the basis of the CIDCC, the participating Member States second their national staff, but decide on case-by-case basis for which threat, incident and operation they provide support.[142] Similar PESCO frameworks could provide a framework for cooperation between the willing.

A second road is through an enhanced cooperation on the basis of art. 329(2) TFEU that provides for the possibility to embark on the path of closer cooperation in the field of the CFSP. It foresees the possibility to start an enhanced cooperation among Member States in the CFSP provided it is authorised by the Council and is consistent with the CFSP and other Union policies.

A third and novel avenue involves cooperation with private parties. Given that the essential part of infrastructures are owned by private companies, their participation in threat analysis is crucial for the European and national security. The multi-stakeholder model for cybersecurity, including regular and structured exchanges with the private sector, was stressed in the EU Council Conclusions on EU's Cybersecurity Strategy for the Digital Decade[143] and the 2020 Cybersecurity Strategy.[144] In this respect, Microsoft constitutes an interesting example of a private entity sharing threat analysis data with EU institutions and advancing debates on EU cybersecurity through *European Cyber Agora* forum. Nevertheless, a steadily growing role of private companies in sensitive security-related issues raises questions with respect to the privatisation of public policies by a few stakeholders. Such a dynamic may lead to the equation of their status to that of public bodies that is not met with enthusiasm by everyone in Brussels and national capitals.

[140] V Szép, E Sabatino and RA Wessel, 'Developing Assessment Criteria for Security and Intelligence Cooperation in the EU' (ENGAGE Working Paper Series 2022).

[141] R Bossong, 'Intelligence Support for EU Security Policy' (SWP Comment 51-2018).

[142] European Parliament Resolution of 13 June 2018 on cyber defence.

[143] Commission, The EU's Cybersecurity Strategy for the Digital Decade (2020) JOIN(2020) 18 final.

[144] Council, Draft Council conclusions on the EU's Cybersecurity Strategy for the Digital Decade, 6722/21, 9 March 2021.

VI. Concluding remarks

The main aim of this *Article* was to assess the legal tools the European Union has in dealing with cyber-attacks. EU cybersecurity policies are still in their infancy. Yet, over the past two decades a number of instruments have been developed that directly or indirectly address cybersecurity concerns. As in most policy areas, this development started by extending internal rules on, for instance, the internal market and the Area of Freedom, Security and Justice to allow for cybersecurity dimensions to be taken into account. This was followed by what we have termed the *externalisation* of the EU's cybersecurity regime.

The increasing number of threats coming from (individuals in) third countries called for the Union to mainstream cybersecurity in its foreign and security policy. Just as with regard to internal measures, the Treaties do not provide for concrete legal bases to adopt measures to prevent or counter external cyber threats or attacks. This forced the Union to be creative and use existing legal bases (*inter alia* on restrictive measures or defence policy) and cooperation frameworks (such as PESCO). This gradually led to a formulation of the Union's cyber diplomacy in 2015, followed by a Cyber Diplomacy Toolbox in 2017 that was subsequently filled to allow the Union to react in a more comprehensive manner to the increasing number of threats that form a serious risk to essential infrastructures in the Member States as well as to the Union's own institutions.

Despite the many instruments that have been adopted, the Union continues to face a number of challenges. One of them is the absence of attribution procedures at the EU level. This omission significantly hinders common action by the EU Member States and leaves this prerogative in the realm of national decision-makers. Since the attribution of responsibility lays at the core of sovereign powers of Member States, there is no political will to transfer those prerogatives to the EU level at the moment. Assuming that such transfer takes place in the future, the operationalisation of common attribution procedures may be subject to disagreements between Member States compounded by uneven cyber-capabilities.

The second challenge relates to the evidence collection in the EU that still relies on data collected by national experts. Access to evidence is essential for the EU's situational awareness. The EU Cyber Diplomacy Toolbox will be significantly strengthened if information exchange gets reinforced under PESCO programs or through an enhanced cooperation on the basis of art. 329(2) TFEU that provides for the possibility to embark on the path of closer cooperation in the field of the CFSP. The multi-stakeholder model for cybersecurity, including regular and structured exchanges with the private sector is another avenue for improving cyber threat information sharing in the EU.

Overall, while an indirect use of legal bases has allowed the Union to adopt an impressive set of internal instruments to deal with cybersecurity, the step to *externalise* these instruments and use them in relation to external action is still at a first stage, despite the gradual mainstreaming of cybersecurity in the Union's foreign and security policy. The current war in Ukraine, and the cyber threats that come with it, may however speed-up the process in the direction of a true cyber diplomacy coordinated by the European Union.

ARTICLES

COMPARING THE PRACTICE OF ACCESSION TO AND WITHDRAWAL FROM THE EUROPEAN UNION: COMMONALITIES IN PRINCIPLES AND PROCEDURES?

MARCO EVOLA*

ABSTRACT: This *Article* assesses the practice of withdrawal in the light of the practice of admission and highlights the numerous commonalities between the two practices. The analysis shows that most of the principles underlying the accession conditions underpin the exit from the EU, contributing to the enhancement of the values on which the EU legal system is rooted. Moreover, the techniques Member States make recourse to during the admission procedure, to strengthen their control over membership, were also used in Brexit, fostering intergovernmentalism in the process of European integration.

KEYWORDS: accession to the EU – withdrawal from the EU – Brexit – Copenhagen criteria – supranationalism – intergovernmentalism.

I. INTRODUCTION

The Lisbon Treaty devoted an express provision of the TEU to withdrawal from the European Union.[1] As a consequence of this reform endowing EU Member States with the right

*Associate Professor of European Union Law, LUMSA Department of Law Palermo, m.evola@lumsa.it.

[1] On art. 50 TEU see AF Tatham, 'Don't Mention Divorce at the Wedding, Darling!: EU Accession and Withdrawal after Lisbon' in A Biondi, P Eeckout and S Ripley (eds), *EU Law after Lisbon* (OUP 2012) 128; M Puglia, 'Art. 50' in A Tizzano (a cura di), *Trattati dell'Unione europea* (Giuffré Editore 2014) 338; T Tridimas, 'Article 50: An End Game Without an End?' (2016) King's Law Journal 297. Scholars were divided on the existence of the right to withdraw from the EU before the Lisbon Treaty. For a summary of this debate see A Wyrozumska, 'Article 50 [Voluntary Withdrawal from the Union]' in HJ Blanke and S Mangiameli (eds), *The Treaty on European Union (TEU). A Commentary* (Springer 2013) 1388.

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to withdrawal,[2] the TEU regulates both facets of membership therefore implying how to become a member of the Union and how to put an end to that legal status.

This *Article* argues that there are several commonalities between admission and withdrawal. Some of these commonalities are crystal clear and stem from the rules the TEU lays down.

The first hallmark is their procedural nature for both are framed in stages which are connected to each other. Art. 49 and art. 50 TEU contain just a few rules on the substantial conditions and focus on the path States have to follow in order to enter or leave the EU. Although the reforms of the founding Treaties have inserted the reference to the values on which art. 2 TEU grounds the EU into the original laws on admission, accession has kept its procedural nature since the regulation on the procedure embodies the core of the law as a whole.

The procedural approach to accession was retained by the Convention[3] and then by the negotiators of the Lisbon Treaty in drafting the new provisions on withdrawal. The Court of Justice of the European Union (CJEU) stressed the procedural nature of withdrawal in *Wightman*, holding that one of the objectives art. 50 TEU is intended to attain is that of "establishing a procedure to enable such a withdrawal to take place in an orderly fashion".[4]

The central role of the agreement in both art. 49 TEU and art. 50 TEU is the second feature which is common to admission and withdrawal, despite the divergent function and nature of the two agreements and their legal relationship with the aim of the

[2] Case C-621/18 *Andy Wightman and Others v Secretary of State for Exiting the European Union* ECLI:EU:C:2018:999 para. 56 stated that art. 50 TEU aims at "enshrining the sovereign right of a Member State to withdraw from the European Union". See also RJ Friel, 'Providing a Constitutional Framework for Withdrawal from the EU: Article 59 of the Draft European Constitution' (2004) ICLQ 425; J Herbst, 'Observations on the Right to Withdraw from the European Union: Who are the "Masters of the Treaties"?' (2005) German Law Journal 1755; P Athanassiou, 'Withdrawal and Expulsion from the EU and the EMU: Some Reflections' (European Central Bank Legal Working Papers 10-2009) 25; H Hofmaister, "'Should I Stay or Should I Go?" – A Critical Analysis of the Right to Withdraw from the EU' (2011) ELJ 592; M Vellano, 'Commento Art. 50 TUE' in F Pocar and MC Baruffi (eds), *Commentario breve ai Trattati sull'Unione europea e sul funzionamento dell'Unione europea* (CEDAM 2014 second edition) 150; C Closa, 'Interpreting Article 50: Exit and Voice and... What about Loyalty?' (EUI Working Paper RSCAS 71-2016) 6; C Hillion, 'Le retrait de l'Union européenne. Une analyse juridique' (2016) RTDE 721.

[3] On the law on withdrawal in the Treaty establishing a Constitution for Europe see T Bruha and C Nowak, 'Recht aus der Europäischen Union?' (2004) Archiv des Völkerrechts 1; L Grosclaude, 'La clause de retrait du Traité établissant une Constitution pour l'Europe: reflexions sur un possible marché de dupes' (2005) RTDE 533; R Mehdi, 'Brèves observations sur la consécration constitutionnelle d'un droit de retrait volontaire' in P Demaret, I Govaere and D Hanf (eds), *30 Years of European Legal Studies at the College of Europe / 30 ans d'études juridiques européennes au Collège d'Europe: Liber Professorum 1973/74 – 2003/04* (PIE-Peter Lang SA 2005) 113; A Vahlas, 'Appartenance à l'Union européenne' in V Constantinesco, Y Gautier and V Michel (eds), *Le Traité établissant une Constitution pour l'Europe* (Presses Universitaires de Strasbourg 2005) 270; JV Louis, 'Le droit de retrait de l'Union européenne' (2006) Cahiers de droit européenne 293; P Van Nuffel, 'Appartenance à l'Union' in G Amato, H Bribosia and B De Witte (eds), *Genèse et destinée de la Constitution européenne/Genesis and Destiny of the European Constitution* (Bruylant 2007) 280; F Spagnoli, 'Una "clausola di secessione" per l'Unione europea? L'Art. 1-60 del Trattato Costituzionale' (8 June 2018) Forum di Quaderni costituzionali www.forumcostituzionale.it.

[4] *Andy Wightman and Others v Secretary of State for Exiting the European Union* cit. para. 56.

procedures. If on one hand admission agreement between the Member States and the acceding countries is necessary to be admitted into the EU, on the other hand, departure from the EU takes place also if no agreement has been concluded between the EU and the withdrawing state. The exit from the EU follows the lapse of the two-year time from the notification of the intention to withdraw or, the expiry deadline consented by the European Council pursuant to art. 50 para. 3.[5] Although the withdrawal agreement is not mandatory,[6] art. 50 TEU gives it utmost importance and aims at favouring a compromise. To achieve these results, the TEU imposes a duty to negotiate upon the EU[7] and regulates the role of the institutions in negotiating and concluding such a treaty. Brexit, in fact, showed the importance of the withdrawal agreement because it could be functional to the interests of the country that decided to leave the Union and contribute to the attainment of the objectives it pursues. The supporters of the "hard Brexit" made a step back, setting aside the no-deal solution.[8]

The key role agreements play, in both admission and withdrawal procedures, is to be found in the wide scope and complexity of the *acquis communautaire* as well as in the strict connections EU law creates between Member States, and citizens, and workers, and businesses, and stakeholders.

However, the set of rules art. 49 and art. 50 TEU envisage did not lay down a comprehensive and exhaustive regulation of the procedures they set up. The incomplete nature of the legal regime on admission and withdrawal is the third feature which is common to

[5] R Mehdi, 'Commentaire à l'article I-60?' in L Bourgogue-Larsen, A Levade and F Picod (eds), *Commentaire article par article du traité instituant une Constitution pour l'Europe* (Bruylant 2007) 746; L Daniele, 'Brevi note sull'accordo di recesso dall'Unione europea ai sensi dell'art. 50 TUE' in E Triggiani and others (eds), *Dialoghi con Ugo Villani* (Cacucci Editore 2017) 727.

[6] AF Tatham, 'Don't Mention Divorce at the Wedding, Darling!: EU Accession and Withdrawal after Lisbon' cit. 152. *Contra*, A Łazowski, 'Withdrawal from the European Union and Alternatives to Membership' (2012) ELR 526.

[7] C Hillion, 'Leaving the European Union, the Union Way. A Legal Analysis of Article 50 TEU' (August 2016) SIEPS www.sieps.se 5; C Hillion, 'This Way, Please! A Legal Appraisal of the EU Withdrawal Clause' in C Closa (ed.), *Secession from A Member State and Withdrawal from the European Union* (CUP 2017) 223 argues that the withdrawing State is obliged to cooperate with the Union because of the duty of loyalty pursuant to art. 4(3) TEU. A Łazowski, 'Be Careful What You Wish for: Procedural Parameters of EU Withdrawal' in C Closa (ed.), *Secession from A Member State and Withdrawal from the European Union* (CUP 2017) 236 holds that it is uncertain whether the obligation to negotiate could be deduced from the principle of loyal cooperation. As we see things the issue is not regulated by EU law but rather by international law so that the withdrawing state enjoys the freedom to assess whether or not a negotiation is consistent with the achievement of its objectives. On the relationship between withdrawal from the EU and the principle of loyal cooperation see F Casolari, *Leale cooperazione tra Stati membri e Unione europea* (Editoriale Scientifica 2020) 170.

[8] PR Polak, 'EU Withdrawal Law After Brexit. The Emergence of a Unique Legal Procedure' in J Santos Vara, RA Wessel and PR Polak (eds), *The Routledge Handbook on the International Dimension of Brexit* (Routledge 2021) 64 argues that pursuant to the principle of loyal cooperation the withdrawing State is under the obligation to assist the Union in carrying out the task of agreeing a withdrawal treaty.

accession and withdrawal.[9] Art. 49 and art. 50 TEU outline the general framework of both procedures and their fundamental stages, but do not solve all of the problems which are involved in admission or withdrawal. As a consequence, there is the need to adjust the shortcomings of the existing laws.

This framing of the Treaty provisions has not only raised the issue of the application of international law within EU law,[10] but has also given great possibilities to practice in facing the challenges of each round of enlargement or departure.

Member States of the EU and its institutions have in fact been availing themselves of the margins of manoeuvring emerging from the rules of the Treaty to shape the substantial features as well as the procedure of admission and withdrawal.

The wide development of practice to integrate the law on substantial facets and procedural arrangements is the fourth mark which is common to admission and withdrawal.

Further commonalities emerge from the comparison between the practice which has been shaping admission and the practice which moulded withdrawal. In this perspective, this *Article* will take into consideration the Withdrawal Agreement between the EU and the UK (WA)[11] as far as the provisions it encompasses highlight the features of withdrawal from the EU.

The assessment shows that most of the principles underlying the accession conditions underpinned Brexit, contributing to the enhancement of the values on which the EU legal system is rooted. Despite the said upshot, this *Article* argues that the practice on admission has enhanced the intergovernmental character of the process of European integration since Member States strengthened their control over membership availing themselves of the technique they made recourse to within the admission procedure.

II. The "principles" common to admission to and withdrawal from the European Union

European States willing to become members of the EU are obliged to fulfil an array of conditions which were not established by the Treaty provisions. Such conditions were

[9] RJ Friel, 'Providing a Constitutional Framework for Withdrawal from the EU' cit. 426; H Hofmaister, '"Should I Stay or Should I Go?"' cit. 595; A Łazowski, 'Withdrawal from the European Union and Alternatives to Membership' cit. 526; who argues that some parts of the EU accession *acquis* can be applied to withdrawal *mutatis mutandis*; P Nicolaides, 'Withdrawal from the European Union: A Typology of Effects' (2013) Maastricht Journal of European and Comparative Law 209; C Hillion, 'Accession and Withdrawal in the Law of the European Union' in A Arnull and D Chalmers (eds), *Oxford Handbook of European Law* (OUP 2015) 138. *Contra* L Daniele, 'Brevi note sull'accordo di recesso dall'Unione europea ai sensi dell'art. 50 TUE' cit. 726-727.

[10] F Casolari, 'Il recesso dall'Unione europea: per una lettura dell'art. 50 TUE tra diritto sovranazionale e diritto internazionale' (2019) RivDirInt 1006; M Evola, 'L'art. 50 TUE tra autointegrazione ed eterointegrazione del diritto dell'Unione europea (2020) Studi sull'integrazione europea 113.

[11] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2012].

imposed on candidate States in the practice of accession. Only later did the Copenhagen European Council give them formal recognition.[12]

The practice following the Copenhagen European Council has identified further conditions. The 1995 Madrid European Council stressed the need for setting up administrative structures that could implement the acquis communautaire.[13] Furthermore, the European Council tailored specific conditions to the Western Balkans' applications for membership, taking into account the problems arising from their candidatures such as good neighbourliness.

II.1. The principle of democracy

Practice has grounded admission and withdrawal on principles which are substantial in nature. Some of these principles define the two procedures.[14]

The political conditions for accession pursue the aim of urging candidates for membership to adhere to the basic values of the EU – democracy, Rule of law, respect for fundamental rights – and to prevent their admission from undermining the process of European integration.[15]

The first element of correspondence between accession and withdrawal is to be found in the principles lying behind the Copenhagen political criteria, for they are the hallmark of the UK's withdrawal from the European Union.

The EU institutions and the Member States committed themselves to respect the outcome of the UK's EU membership referendum because of the democratic nature of the decision British voters adopted.

[12] European Council, *Conclusions of 21-22 June 1993* www.consilium.europa.eu para. 13. The European Council stated that membership requires that the aspirant countries demonstrate: stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities; the existence of a functioning market economy, as well as the capacity to cope with competitive pressure and market forces within the Union; the ability to take on the obligations of membership, including adherence to the aims of political, economic and monetary union. M Cremona, 'Accession to the European Union: Membership Conditionality and Accession Criteria' (2001) PolishYIL 219; F Hoffmeister, 'Earlier Enlargements' in A Ott and K Inglis (eds), *Handbook on European Enlargement*. *A Commentary on the Enlargement Process* (T.M.C. Asser Press 2002) 90; C Hillion, 'The Copenhagen Criteria and Their Progeny' in C Hillion (ed.), *EU Enlargement: A Legal Approach* (Hart Publishing 2004) 17; AF Tatham, *Enlargement of the European Union* (Kluwer Law International 2009) 202.

[13] European Council, *Conclusions of 15 and 16 December 1995 – Part III* www.europarl.europa.eu.

[14] AF Tatham, 'Towards the Formulation of the "Brussels Criteria". The values and principles underlying EU withdrawal and their application in future contexts' in Wessel and PR Polak (eds), *The Routledge Handbook on the International Dimension of Brexit* (Routledge 2021) 13 distinguishes the orderly withdrawal as a foundational concept of withdrawal, the criteria for the withdrawal decision, the main negotiating principles and the main criteria as distilled from the Withdrawal Agreement.

[15] On the relationship between admission to the EU and EU values see D Kochenov, 'The Acquis and its Principles: The Enforcement of the "Law" versus the Enforcement of "Values" in the EU' in A Jakab and D Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (OUP 2017) 13.

The European Parliament President Martin Schulz and EP political group leaders made statements to the press on 24 June 2016 highlighting that the referendum was the expression of the sovereign will of British voters.[16] In the same perspective the European Parliament in the Resolution adopted on 28 June 2016 stated that "the *will* expressed by the people must be entirely and fully respected".[17] The fundamental role of democracy in the UK decision-making process leading to Brexit is also stressed in the joint statement of the presidents of the EU political institutions making reference to the wish of British people that was expressed "in a free and democratic process".[18]

The connection between ensuring an orderly withdrawal and democracy, also marks Member States' attitude towards the UK in the immediate aftermath of the referendum.[19]

They, in fact, emphasized that the referendum embodies "the will expressed by a majority of the British people", in the Statement following the informal meeting of the Heads of State or government of the 27 Member States, the President of the European Council and the President of the Commission which took place on the 29th June 2016 (hereinafter the June 2016 Informal Meeting).[20]

Such an attitude towards Britons' decision to exit the EU is not confined to the realm of politics, but it makes it clear that democracy is a principle inspiring withdrawal.

The UK need for reassuring its partners on the respect for democracy, confirms this outcome. The British Prime Minister remarked that the decision to exit the EU bears on the value of democracy in the letter of notification of the intention to withdraw. The letter recalled that "the people of the United Kingdom voted to leave the EU and the United Kingdom Parliament confirmed the result of the referendum by voting with clear and convincing majorities in both of its Houses" and concluded that the notification gives "effect to the democratic decision of people of the United Kingdom".[21]

[16] European Parliament, *President Schulz and Political Leaders' Statements on UK Referendum Outcome* www.europarl.europa.eu. C Curti Gialdino, 'Oltre la Brexit: brevi note sulle implicazioni giuridiche e politiche per il futuro prossimo dell'Unione europea' (2016) Federalismi.it www.federalismi.it 7 has carried out an analysis of the different statements the EU institutions and its Member States released on the outcome of the UK's withdrawal from the EU referendum.

[17] Resolution P8_TA(2016)0294 of the European Parliament of 28 June 2016 on the decision to leave the EU resulting from the UK referendum (2016/2800(RSP)), Preamble 1. Italics of the author.

[18] European Council, *Joint Statement by Martin Schulz, President of the European Parliament, Donald Tusk, President of the European Council, Mark Rutte, Holder of the Presidency of the Council of the EU, Jean-Claude Juncker, President of the European Commission* euipo.europa.eu.

[19] Joint Declaration by the Chancellor of the Federal Republic of Germany, the President of the French Republic and the President of the Council of Ministers of the Italian Republic www.governo.it. See also Common Statement by the Foreign Ministers of Belgium, France, Germany, Italy, Luxemburg and the Netherlands, 26 June 2016.

[20] European Council, *Informal meeting at 27 of 29 June 2016 - Statement* www.consilium.europa.eu para. 1.

[21] Letter of 29 March 2017 from the Prime Minister of the United Kingdom to the President of the European Council, 1. The contrast between the British government and British Parliament on the

A further reference to the relationship between exiting the EU and the democratic nature of the process leading to the decision to withdraw is to be found in the judgment delivered by the CJEU in the *Wightman* case. The Court stressed that the EU is grounded on the fundamental premiss that each Member State shares with all of the other Member States, and recognises that those Member States share with it, the values of liberty and democracy. As a consequence of this premiss, Member States cannot be forced to accede to the European Union, nor to withdraw from it against their will.[22] In the reasoning of the Court, the different approach leading to the inevitability of withdrawal, once the decision to withdraw has been notified, would be inconsistent with the values of liberty and democracy. The approach would thus entail to "force the withdrawal of a Member State which, having notified its intention to withdraw from the European Union *in accordance with its constitutional requirements and following a democratic process*, decides to revoke the notification of that intention through a democratic process".[23]

II.2. The respect for the *acquis communautaire*

The second element of correspondence between the practice of admission and the practice of withdrawal is the equation between respect for the *acquis communautaire* and membership of the Union.

The Copenhagen European Council stated that European States' admission into the EU presupposes the ability to take on the obligations of membership, including adherence to the aims of political, economic and monetary union. The rationale lying behind this accession criterion, is to prevent admission of new members from slowing down the pace of the process of integration, or to dismantle the unity of the EU legal system.[24]

Although in the reverse perspective, the duty to safeguard the *acquis communautaire* also characterized the withdrawal procedure. Practice made it clear that exiting the EU entails loosing the rights which are connected to membership and prevents withdrawing States

competence to adopt the decision to withdraw has to be considered in the same perspective. On this point, see JV Louis, 'Négocier le Brexit' (2017) Cahiers de droit européen 9.

[22] *Andy Wightman and Others v Secretary of State for Exiting the European Union* cit. paras 63 and 65.

[23] *Ibid*., para. 67. Italics of the author. C Hillion, 'This Way, Please!' cit. 218 points out that the decision to exit the Union has to conform to the common values art. 2 TEU enshrines. On the role of democracy in Brexit see AF Tatham, 'Towards the formulation of the "Brussels criteria"' cit. 20.

[24] As this author see things, there is no contradiction between the practice we described above and the most recent developments of the admission procedure. The European Council which took place in December 2004, Presidency Conclusions para. 23, established that "long transitional periods, derogations, specific arrangements or permanent safeguard clauses, i.e. clauses which are permanently available as a basis for safeguard measures, may be considered" in framing future negotiating frameworks for areas such as freedom of movement of persons, structural policies or agriculture. This decision purports to achieve the same aims of the decisions on withdrawal: protecting the Union's interests and the unity of the EU legal system since the latter is functional to the former.

from choosing between rights to hold or obligations to comply with and rights to resign and obligations not to fulfill.

The Heads of State and Government set the aim of the orderly withdrawal during the Informal Meeting held in June 2016 and defined the EU's approach towards withdrawal negotiations, in order to ensure that the *acquis communautaire* cannot be separated from membership. They also stated that access to the Single Market requires acceptance of all four freedoms.[25] The same principle was reaffirmed at the following Informal Meeting of the Heads of State or Government of the 27 Member States, as well as the Presidents of the European Council and the European Commission which took place in December 2016 (hereinafter the December 2016 Informal Meeting).[26]

The Guidelines the European Council adopted on April 2017 developed the principles laid down in the June 2016 and December 2016 Informal Meetings and stressed the need for preserving the interests of the Union in negotiating the withdrawal agreement.

The European Council pointed out that the integrity of the Single Market "excludes participation based on a sector-by-sector approach. A non-member of the Union, that does not live up to the same obligations as a member, cannot have the same rights and enjoy the same benefits as a member".[27]

The UK recognised that the EU is bound to guarantee the unity of its legal system, preventing third countries from enjoying the rights EU law confers upon Member States. The UK Prime Minister pointed out that "the United Kingdom does not seek membership of the single market: we understand and respect your position that the four freedoms of the single market are indivisible and there can be no 'cherry picking'".[28]

The link between membership and *acquis communautaire* is not put into question by the laws the WA encompasses on the transition period aiming at ensuring the application of EU rules to the UK although it has become a third country.[29] It is necessary to consider that an abrupt withdrawal from the Union is to affect the rights of citizens, and workers, and businesses and other stakeholders thus jeopardising certainty and predictability

[25] European Council, *Informal meeting at 27 of 29 June 2016 – Statement* cit. para. 4. On the relevance of the integrity of the common market see NN Shuibhne, 'The Integrity of the EU Internal Market' in F Amtenbrink (ed.), *The Internal Market and the Future of European Integration* (CUP 2019) 549.

[26] European Council, *Informal meeting of the Heads of State or Government of 27 Member States, as well as the Presidents of the European Council and the European Commission, 15 December 2016 – Statement* www.consilium.europa.eu p.1.

[27] European Council, Special meeting of the European Council (Art. 50), 29 April 2017, Guidelines, para. 1, Core Principles www.consilium.europa.eu. The European Parliament adopted the same approach in its Resolution P8TA(2017)0102 of 5 April 2017 on negotiations with the United Kingdom following its notification that it intends to withdraw from the European Union (2017/2593(RSP)), para. 10 www.europarl.europa.eu.

[28] Letter of 29 March 2017 from the Prime Minister of the United Kingdom to the President of the European Council cit. 4.

[29] On the transition period see T Lock, 'In the Twilight Zone. The Transition Period in the Withdrawal Agreement' in J Santos Vara, RA Wessel and PR Polak (eds), *The Routledge Handbook on the International Dimension of Brexit* (Routledge 2021) 30.

stemming from EU law.[30] This is the rationale for the WA and the transitional arrangements the EU and the UK agreed on in the perspective of the future conclusion of a further treaty regulating their relationships. Although not mandatory for the withdrawing state, the conclusion of the withdrawal agreement is consistent with the interest of either parties. However, in ensuring legal certainty and legitimate expectations the WA fosters some of the principles of the EU legal system thus contributing to the enhancement of the founding values of the EU. The same conclusion has to be referred to those provisions of the WA which purport the protection of citizens' rights. The matter has been of concern of both, the EU and the UK. In the letter of notification of the intention to withdraw, the Prime Minister of the United Kingdom highlighted that "the hearth of our talks are the interests of our citizens."[31] The EU made it clear since the beginning that citizens' rights were one of those legal items the withdrawal agreement had to cover. In the Directives for negotiation of the agreement, the Council stated that

> "the Agreement should safeguard the status and rights derived from Union law at the withdrawal date, including those the enjoyment of which will intervene at a later date (e.g. rights related to old age pensions) as well as rights which are in the process of being obtained, including the possibility to acquire them under current conditions after the withdrawal date (e.g. the right of permanent residence after a continuous period of five years of legal residence which started before the withdrawal date). This should cover both EU27 citizens residing (or having resided) and/or working (or having worked) in the United Kingdom and United Kingdom citizens residing (or having resided) and/or working (or having worked) in one of the Member States of the EU27. Guarantees to that effect in the Agreement should be reciprocal and should be based on the principle of equal treatment amongst EU27 citizens and equal treatment of EU27 citizens as compared to United Kingdom citizens, as set out in the relevant Union acquis. Those rights should be protected as directly enforceable vested rights for the life time of those concerned".[32]

[30] The EU and the UK highlighted the need to ensure certainty and predictability. The negotiating Guidelines the European Council adopted in April 2017 stressed that "the United Kingdom's decision to leave the Union creates significant uncertainties that have the potential to cause disruption, in particular in the United Kingdom but also, to a lesser extent, in other Member States. Citizens who have built their lives on the basis of rights flowing from the British membership of the EU face the prospect of losing those rights. Businesses and other stakeholders will lose the predictability and certainty that come with EU law. It will also have an impact on public authorities." In the same vein, the UK Prime Minister outlined in the letter of notification of the intention to withdraw the UK intention to bring forward legislation addressing specific issues relating to withdrawal "with a view to ensuring continuity and certainty, in particular for businesses".

[31] Letter of 29 March 2017 from the Prime Minister of the United Kingdom to the President of the European Council cit. 4.

[32] Communication COM/2017/0830 final Recommendation for a Council Decision supplementing the Council Decision of 22 May 2017 authorising the opening of negotiations with the United Kingdom of Great Britain and Northern Ireland for an agreement setting out the arrangements for its withdrawal from the European Union. Directives XT 21016/17 ADD 1 REV 2 from the General Secretariat of the Council to Delegations of 22 May 2017 for the negotiation of an agreement with the United Kingdom of Great Britain and

The provisions the WA envisages are consistent with the need to guarantee legal certainty since they ensure the exercise of the rights EU and UK citizens were vested with pursuant to EU laws (art. 13 and 14 WA) or enable EU and UK citizens to become holders of those rights which were based on the previous exercise of the rights EU law conferred upon them such as the right of permanent residence (art. 15 WA).

Furthermore, as it has been rightly observed,[33] the protection of citizens' rights is anchored to the EU principles of social solidarity and non-discrimination. As regards social solidarity, the WA extended its application to UK citizens residing in one of the EU countries[34] through reciprocity. Non-discrimination is expressly provided for in art. 12 WA which prohibits discrimination on grounds of nationality in the host State and the State of work in respect of the persons falling within the scope of the Agreement.

In securing the rights EU law establishes, the WA did not break the connection between membership and *acquis communautaire*, but played the same role of this feature which is common to accession and withdrawal: fostering the supranational character of the EU through the enhancement of the principles on which it is grounded.

II.3. The principle of good neighbourliness

A third element of correspondence between the principles on accession and the principles on withdrawal relates to good neighbourliness. The hint at prospective members' obligation to develop good neighbour relationships, in the assessment of the Greek application,[35] has given rise to a practice widening the array of political criteria European States are called on to fulfil to enter the Union, The Corfu European Council held that the preparation of Central and Eastern Countries admission "will be helped by the development of good neighbourly relations, which will be the subject of the stability pact".[36] The application of the condition of good neighbour relationships marked the 2004 big enlargement[37] and has been marking the assessment of the Western Balkans States' applications for membership.[38]

Northern Ireland setting out the arrangements for its withdrawal from the European Union www.consilium.europa.eu para. 20. See also European Commission, Position Paper on 'Essential Principles on Citizens' Rights' (12 June 2017) ec.europa.eu para 1.

[33] AF Tatham, 'Towards the formulation of the "Brussels criteria"' cit. 20.

[34] E Spaventa, 'Mice or Horses? British Citizens in the EU 27 after Brexit as "Former EU Citizens"' (2019) ELR 589.

[35] Communication COM(76) 30 final form the European Commission of 20 January 1976.

[36] European Council Conclusions of 24-25 June 1994 para. II lett. d.

[37] KE Smith, 'The Evolution and Application of EU Membership Conditionality' in M Cremona (ed.), *The Enlargement of the European Union* (OUP 2003) 121; K Inglis, 'EU Enlargement: Membership Conditions Applied to Future and Potential Member States' in A Ott and K Inglis (eds), *The Constitution for Europe and an Enlarging Union: Unity in Diversity?* (Europa Law Publishing 2005) 244; AF Tatham, *Enlargement of the European Union* cit. 218.

[38] On the accession of Western Balkans States see C Pippan, 'The Roky 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; S Blockmans, *Tough Love: The European Union's Relations with the Western Balkans* (T.M.C. Asser Press 2007); S Blockmans, 'Raising the Threshold for Further EU Enlargement:

Imposing good neighbour relationships and the peaceful settlement of international disputes is intended to prevent admission of new members from undermining the cohesion of the EU and its working as a consequence of political conflicts in which newcomers are involved.

The same need occurs in withdrawal from the EU since the disentanglement from the rights and obligations of the EU could jeopardize the stability of the Union and give rise to political disputes between the EU Member States and the withdrawing country, or to troubling situations in some Member States. This is the reason why the European Council April 2017 Guidelines called the negotiators to find "imaginative solutions" that would not endanger the peace process on the island of Ireland. The call stemmed from the consideration that "the Union has consistently supported the goal of peace and reconciliation enshrined in the Good Friday Agreement in all its parts, and continuing to support and protect the achievements, benefits and commitments of the Peace Process will remain of paramount importance".[39]

The European Parliament adopted a similar attitude, urging the negotiators to find a congruous compromise with the 1998 Good Friday Agreement.[40]

The binding nature of the principle is confirmed, once again, by the UK's position since the letter of notification makes reference to the UK government consciousness that withdrawal could harm the peace process in Ireland and affirms its willingness "to make sure that nothing is done to jeopardise the peace process in Northern Ireland, and to continue to uphold the Belfast Agreement".[41]

Process, Problems and Prospects' in A Ott and E Vos (eds), *Fifty Years of European Integration. Foundations and Perspectives* (T.M.C. Asser Press 2009) 204; A Rizzo, 'L'Unione europea e i Paesi dei Balcani occidentali nella prospettiva dell'allargamento' (2011) Il Diritto dell'Unione europea 445; I Ingravallo, 'Osservazioni sulle prospettive di allargamento dell'Unione europea ai Balcani occidentali' in E Triggiani and others (eds), *Dialoghi con Ugo Villani* (Cacucci Editore 2017) 567. On the relationship between good neighbourliness and admission see P Van Elsuwege, 'Good Neighbourliness as a Condition for Accession to the European Union: Finding the Balance between Law and Politics' in D Kochenov and E Basheska (eds), *Good Neighbourliness in the European Legal Context* (Brill Academic Publishers 2015) 215.

[39] Special meeting of the European Council (Art. 50) cit. para. 11.

[40] Resolution P8_TA(2017)0102 of the European Parliament of 5 April 2017 on negotiations with the United Kingdom following its notification that it intends to withdraw from the European Union (2017/2593(RSP)), lett. O. and para. 20. The Council developed the European Council's Guidelines on the relationship between Ireland and the UK in Council decision of 22 May 2017 authorising the opening of negotiations with the United Kingdom of Great Britain and Northern Ireland for an agreement setting out the arrangements for its withdrawal from the European Union. Directives for the negotiation of an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union cit. para. 14 stating that "the Union is committed to continuing to support peace, stability and reconciliation on the island of Ireland. Nothing in the Agreement should undermine the objectives and commitments set out in the Good Friday Agreement in all its parts and its related implementing agreements; the unique circumstances and challenges on the island of Ireland will require flexible and imaginative solutions".

[41] Letter of 29 March 2017 from the Prime Minister of the United Kingdom to the President of the European Council cit. 5.

Practice clarified that the principle of good neighbourliness imposes the duty to find an arrangement within the withdrawal agreement in order to ensure that no political quarrels destabilising the European Union or its Member States follow the exit of the withdrawing country. The Protocol on Ireland/Northern Ireland provides full regulatory alignment between the EU and Northern Ireland in customs matters and related areas of the single market with the aim of safeguarding the 1998 Good Friday Agreement. Art. 1(1) of the Protocol establishes that it is "without prejudice to the provisions of the 1998 Agreement in respect of the constitutional status of Northern Ireland and the principle of consent, which provides that any change in that status can only be made with the consent of a majority of its people". In the same vein, art.1(3) provides that the protocol is necessary "to protect the 1998 Agreement in all its dimensions".

The correspondence between admission and withdrawal is not limited to the principles on substantial conditions that were highlighted above but concerns their procedural arrangements.

III. The emergence of intergovernmentalism in the admission and withdrawal procedures

The procedures of admission and withdrawal have a different degree of complexity pursuant to the Treaty rules.

Art. 49 TEU frames accession to the EU into two stages. The first stage focuses on the eligibility of applicant States to which solely the EU institutions take part in. The main actors of the second stage are the Member States and the applicant countries. They negotiate the accession treaty and ratify it. The treaty is a source of primary law so that it can modify the TEU and the TFEU.

The framework of withdrawal is simpler than the accession framework since art. 50 TEU vests the European Council, the Council and the European Parliament with the task to carry out the activities to conclude the withdrawal agreement. This treaty is subordinate to the TEU and the TFEU so that it cannot reform primary law.[42]

The CJEU held that the withdrawal procedure

> "consists of, first, notification to the European Council of the intention to withdraw, secondly, negotiation and conclusion of an agreement setting out the arrangements for withdrawal, taking into account the future relationship between the State concerned and the European Union and, thirdly, the actual withdrawal from the Union on the date of entry into force of that agreement or, failing that, two years after the notification given to the

[42] On the differences between the accession treaty and the withdrawal treaty see A Łazowski, 'Be Careful What You Wish for' cit. 239.

European Council, unless the latter, in agreement with the Member State concerned, unanimously decides to extend that period".[43]

Despite the existing differences, common features define the procedures of admission and withdrawal which give Member States a leading role in their working.

III.1. The interplay between law and practice

The first of these features is to be found in the framework of the two procedures that are the result of the combination of the Treaty provisions and the practice Member States have been shaping through the decisions they took in Summits, Informal Meetings or within the European Council.

The interplay between law and practice in accession goes back to the Summit of the Heads of States or Government of the Member States which took place in The Hague in 1969. The Heads of State or Government expressed "their agreement to the opening of negotiations between the Community on the one hand and the applicant States on the other" and entrusted the Communities' institutions with the task of negotiating with the applicant States.[44] The decision mixed the supranational approach of the ECSC Treaty with the intergovernmental approach of the EEC Treaty and EURATOM Treaty.[45] Art. 98 ECSC Treaty allocated the power to determine the terms and conditions of accession to the Council, which had to act unanimously after obtaining the opinion of the High Authority, and left no role to the Member States.[46] Notwithstanding the involvement of the Council and the Commission, the procedure the EEC and EURATOM Treaties envisaged was intergovernmental in nature since art. 237 EEC Treaty and art. 205 EURATOM Treaty established that the Member States and the applicant State negotiate the conditions for the latter being admitted and the adjustments to the Treaties stemming from the entry of the newcomer.[47] The decisions the Heads of States or Government took in The Hague

[43] Case C-327/18 PPU *Minister for Justice and Equality v RO* ECLI:EU:C:2018:733 para. 46; *Andy Wightman and Others v Secretary of State for Exiting the European Union* cit. para. 51.

[44] Communiqué of the meeting of Heads of State or Government of the Member States at The Hague (1-2 December 1969).

[45] On the different stance of the Treaties founding the three Communities and the practice which has developed the provisions on accession they contained see D Kochenov, 'EU Enlargement Law: History and Recent Developments: Treaty-Custom Concubinage?' (22 April 2005) European Integration Online Papers eiop.or.at 7.

[46] Art. 98 ECSC Treaty (1951) stipulated that "any European State may apply to accede to this Treaty. It shall address its application to the Council, which shall act unanimously after obtaining the opinion of the High Authority; the Council shall also determine the terms of accession, likewise acting unanimously. Accession shall take effect on the day when the instrument of accession is received by the Government acting as depositary of this Treaty".

[47] Art. 237 EEC Treaty (1957) and art. 205 EURATOM Treaty (1957) were phrased in the same manner and provided that "[a]ny European State may apply to become a member of the Community. It shall address its application to the Council which, after obtaining the opinion of the Commission, shall act by means of a unanimous vote. The conditions of admission and the amendments to this Treaty necessitated thereby shall be the

in 1969 bolstered the intergovernmental nature of the procedure, despite the participation of the institutions in the negotiations of the accession treaty.

In the framework of the provisions of the founding Treaties, admission aimed at establishing the conditions for entering the Communities, but the objective of the procedure has been widened in the different rounds of enlargement. During the negotiations with Greece, Portugal, and Spain the procedure has supported the process of democratization the three countries were carrying out. In the perspective of enlargement towards Central and Eastern European countries the 1994 Essen European Council outlined the so-called pre-accession strategy,[48] a series of legal and financial instruments that were enacted in order to channel aspirant States into membership and urge them to adopt the reforms the EU requires to fulfil the accession criteria. To put it bluntly, the accession procedure promoted applicant States' compliance with the admission conditions. The European Union has been making use of soft law and hard law instruments to foster States' efforts in the attainment of that objective. The 1997 Luxembourg European Council refined the pre-accession strategy adopting the enhanced pre-accession strategy and creating the status of States candidate to admission.[49]

The European Council envisaged the instruments the EU had to avail itself of and the conditions applicant States had to comply with to move from one stage to the following of the admission procedure.

The EU retained the recourse to pre-accession in dealing with Western Balkans States' candidatures for membership and bolstered Member States' leverage on the use of conditionality. The 2000 Santa Maria da Feira European Council set up a new step in the path towards the EU giving rise to the potential candidate State status,[50] while the 2003 Thessaloniki European Council approved the Thessaloniki Agenda for Western Balkans and established a link between the Stabilisation and Association Process, the conditionality it laid down and membership of the EU.[51]

Withdrawal is similar to admission because the procedure in Brexit was moulded by practice which made it different from the proceedings the Treaty provisions sketch.[52]

subject of an agreement between the Member States and the applicant State. Such agreement shall be submitted to all the contracting States for ratification in accordance with their respective constitutional rules."

[48] European Council Conclusions of 9 and 10 December 1994 Annex IV. M Maresceau, 'The EU Pre-Accession Strategies: A Political and Legal Analysis' in M Maresceau and E Lannon (eds), *The EU's Enlargement and Mediterranean Strategies* (Palgrave Macmillan 2001) 1; M Maresceau, 'Pre-accession', in M Cremona (ed.), *The Enlargement of the European Union* (OUP 2003) 9.

[49] European Council Conclusions of 12-13 December 1997 paras 1-36. K Inglis, 'The Pre-accession Strategy and the Accession Partnerships' in A Ott and K Inglis (eds), *Handbook on European Enlargement. A Commentary on the Enlargement Process* (T.M.C. Asser Press 2002) 103.

[50] European Council Conclusions of 19 and 20 June 2000 para. 67.

[51] European Council Conclusions of 19 and 20 June 2003 paras 40-43.

[52] On the procedure see PR Polak, 'EU Withdrawal Law After Brexit' cit. 58.

The arrangements for negotiating with the UK were set by the December 2016 Informal Meeting and later endorsed in the Guidelines the European Council laid down in April 2017.[53]

Furthermore, the European Council decided to widen the scope of the negotiations on the withdrawal agreement beyond the rules art. 50 TEU envisages. The April 2017 Guidelines identified the issues to negotiate in order to achieve the orderly withdrawal, which is the aim the June 2016 Informal Meeting established. In the following December 2017 Guidelines, the European Council decided to extend negotiations to transitional arrangements[54] and the latest Guidelines the European Council adopted on March 2018 established a set of principles "with a view to the opening of negotiations on the overall understanding of the framework for the future relationship".[55]

III.2. The role of the EU political institutions

The second common feature stems from the roles each actor plays within accession and withdrawal.

The European Council runs a leading role in both proceedings and adopts the most important political decisions on the progress within the two, while the Commission plays a technical role and the European Parliament contribution is not central since it acts within the limits the European Council sets up.

Moving from the admission procedure it has to be observed that the European Council decides on the eligibility of acceding States, the fulfilment of the accession criteria, the aspirant States' move from one status to the other, the political principles inspiring the negotiating directives, the terms of the final agreement on admission before the Council and the European Parliament approve the treaty.

The European Commission carries out a plethora of activities which are technical in nature such as drafting the Annual Reports on candidates to assess their progresses in complying with the conditions for admission, and supporting the Council in negotiating the terms for entering the Union. The Commission acts within the limits established in the political mandate the European Council and the Council conferred on it and enjoys no autonomy in the exercise of its tasks. The European Parliament runs political control on the different stages of the procedure, but its prerogatives pursuant to art. 49 TEU are limited in fact as a consequence of the role the European Council plays.

[53] Special meeting of the European Council (Art. 50) cit. para. 28.

[54] European Council (Art. 50) meeting of 15 December 2017, Guidelines. On the transitional arrangements see C Curti Gialdino, 'Dal discorso fiorentino del Primo Ministro May al quinto round delle trattative per il recesso e le future relazioni tra il Regno Unito e l'Unione europea' (15 October 2017) Ordine internazionale e diritti umani 475; P Eeckout and O Patel, 'Brexit Transitional Arrangements: Legal and Political Considerations' (20 November 2017) UCL European Institute Brexit Insights Series www.ucl.ac.uk; M Dougan, 'An Airbag for the Crash Test Dummies? EU-UK Negotiations for a Post-Withdrawal "Status Quo" Transitional Regime Under Article 50 TEU' (2018) CMLRev 57.

[55] European Council (art. 50) of 23 March 2018, Guidelines para. 5.

In the UK withdrawal, the December 2016 Informal Meeting decided that the Council had to appoint the Commission as the EU negotiator.

The European Council defined the EU negotiating position, adopting the Guidelines and updating them in the following December 2017 and March 2018 Guidelines.[56] The European Council Guidelines were developed by the Directives for Negotiations which were laid down by the Council circumscribing the negotiation mandate conferred on the Commission. Furthermore, the European Council expressed its political endorsement of the text of the agreement the EU and the UK negotiated before the consent of the European Parliament and the approval of the Council.

The appointment of the Commission as the EU negotiator fostered its role with what foreseen by art. 50 TEU. It is also worth to remind that the Commission drafted the proposals of the negotiating directives the Council adopted[57] although the Treaty provisions do not entrust it with this task. Despite such improvements, the role of the Commission is technical in nature in the withdrawal procedure too and restrained within the boundaries the activity of the European Council marked. On one side, the Guidelines established the political framework within which the Commission drafted its proposals on the negotiating directives and negotiated the withdrawal agreement. On the other, the procedural arrangements tended to bolster the States' grip on the withdrawal negotiations. To achieve the said aim the December 2016 Informal Meeting decided that the negotiators' team had to integrate a representative of the Council's Presidency while representatives of the President of the European Council had to participate, in a supporting role, in all negotiation sessions alongside the representative of the Commission.[58]

The December 2016 Informal Meeting set two further limits on the role of negotiator the Commission was allocated to. The first limit stems from the dedicated working party that assisted the Council and Coreper to ensure that negotiations were conducted in line with the European Council guidelines and the Council negotiating directives, and provided guidance to the negotiator.[59] The second limit is related to the duty of the Union's negotiator to "systematically" report to the European Council, the Council and its preparatory bodies.[60]

[56] The European Council stated in the April 2017 Guidelines that it would remain permanently seized on the matter and update the guidelines in the course of negotiations.

[57] Commission Recommendation for a Council Decision COM(2017) 218 final of 3 May 2017 authorising the Commission to open negotiations on an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union; Recommendation for a Council Decision COM(2017) 830 final of 20 December 2017 supplementing the Council Decision of 22 May 2017 authorising the opening of negotiations with the United Kingdom of Great Britain and Northern Ireland for an agreement setting out the arrangements for its withdrawal from the European Union.

[58] European Council, *Informal meeting of the Heads of State or Government of 27 Member States, as well as the Presidents of the European Council and the European Commission, 15 December 2016* cit. para. 3.

[59] *Ibid*. para. 4.

[60] *Ibid*. para. 3.

Furthermore, the procedural arrangements of the December 2016 Informal Meeting bear some relevance in assessing the role of the European Parliament in Brexit. The institution has carried out activities art. 50 TEU does not envisage,[61] trying to contribute to the definition of the principles ruling the withdrawal from the Union and the negotiating position of the EU through tre adoption of several resolutions.[62] In so doing, the European Parliament benefitted from the decisions of the December 2016 Informal Meeting which adopted the following procedural solutions: *i)* the involvement of representatives of the institution in the preparation of the European Council's meetings; *ii)* the hearing of the President of the European Parliament at the beginning of the meetings of the European Council; *iii)* the exchange of views between the President of the European Council and the European Parliament before and after each meeting of the General Affairs Council. The said procedural arrangements also called the Union negotiator to keep the institution representing the EU citizens closely and regularly informed throughout the negotiation.[63] Notwithstanding the said practice, the consent of the European Parliament on the withdrawal agreement was limited by the previous approval of the draft text by the European Council.[64]

III.3. The application of conditionality

The recourse to conditionality is the third common feature, but its assessment needs a preliminary remark on the object of conditionality and the related way in which the term is used in this *Article*. States have no right to accession to the EU, but the Treaty confers the right to withdraw upon Member States. As a consequence, the EU is empowered to subject only admission to conditionality. The conditions the EU availed itself of throughout the Brexit negotiations referred to the conclusion of the withdrawal agreement. In this framework, conditionality as a common feature of accession and withdrawal concerns the techniques and mechanisms the EU puts into place either in admission or withdrawal to achieve a stronger position *vis-à-vis* its counterparts in negotiating the conditions for entering or exiting the Union.

[61] D Harvey, 'What Role for the European Parliament under art. 50 TEU?' (2017) ELR 585.

[62] European Parliament Resolution (2017/2593(RSP)) cit.; European Parliament Resolution P8_TA–PROV(2017)0361 of 3 October 2017 on the state of play of negotiations with the United Kingdom (2017/2847(RSP)); European Parliament Resolution P8_TA-PROV(2017)0490 of 13 December 2017 on the state of play of negotiations with the United Kingdom (2017/2964(RSP)); European Parliament Resolution P8_TA-PROV(2018)0069 of 14 March 2018 on the framework of the future EU-UK relationship (2018/2573(RSP)); European Parliament Resolution P9_TA-PROV(2019)0016 of 18 September 2019 on the state of play of the UK's withdrawal from the European Union (2019/2817(RSP)).

[63] European Council, *Informal meeting of the Heads of State or Government of 27 Member States, as well as the Presidents of the European Council and the European Commission, 15 December 2016 – Statement* cit. paras 6-7.

[64] On the relationship between the widening of the role of the European Council and the institutional balance art. 50 TEU sets up see M Starita, 'Il ruolo del Consiglio europeo nella Brexit' (2019) Il diritto dell'Unione europea 571. For criticism on such a practice see M Gatti, 'Article 50 TEU: A Well-Designed Secession Clause' (2017) European Papers www.europeanpapers.eu 171.

The evolution we briefly described above about the admission procedure from a proceeding pursuing the aim of establishing the conditions for becoming a member of the European Communities into a procedure intended to promote compliance with admission conditions, urged the European Union to make use of mechanisms of conditionality.[65] The "pre-accession strategy" the Essen European Council launched was functional to the achievement of that aim for it entailed an engagement of the EU in order to monitor fulfilment of the accession conditions. The EU enacted several changes in order to adapt the admission procedure to the new objectives it was called on to attain such as: *i)* the introduction of suspension clauses in case of non-compliance with the values of the EU in the agreements with aspirant States;[66] *ii)* the reform of economic assistance;[67] *iii)* the control of the Commission over acceding States through annual reports.[68] The 1997 Luxembourg European Council enhanced that strategy envisaging the "accession partnerships". They are acts the EU adopted to distinguish between brief, medium and long term priorities in candidate States' progressing towards the eventual membership of the Union.

The use of conditionality in this arrangement of the proceedings bolstered the role of the European Council since it decided on States' fulfilment of the accession conditions and on the connected move from one stage to the following in the path towards accession.

The conditionality framework the EU shaped in the 2004 enlargement was retained in the subsequent admission procedures involving Western Balkans and Turkey. Moreover, these procedures are not only based on the same instruments of the previous

[65] On the use of conditionality in admission to the EU see E Gateva, *European Union Enlargement Conditionality* (Palgrave Macmillan 2015).

[66] Agreement between the European Economic Community and the Republic of Estonia on trade and commercial and economic cooperation [1992]; Agreement of 21 December between the European Economic Community and the Republic of Latvia on trade and commercial and economic cooperation [1992]; Agreement between the European Economic Community and the European Atomic Energy Community, of the one part, and the Republic of Lithuania, of the other part, on trade and commercial and economic cooperation [1992]; Europe Agreement of 19 December 1994 establishing an association between the European Communities and their Member States, of the one part, and the Republic of Bulgaria, of the other part. E Lannon, K Inglis and T Haenebalcke, 'The Many Faces of EU Conditionality in Pan-Euro-Mediterranean Relations' in M Maresceau and E Lannon (eds), *The EU's Enlargement and Mediterranean Strategies* (Palgrave Macmillan 2001) 104.

[67] Regulation (EEC) 3906/89 of the Council of 18 December 1989 on economic aid to the Republic of Hungary and the Polish People's Republic; Regulation (EEC) 1764/93 of 30 June 1993 of the Council amending Regulation (EEC) No 3906/89 on economic aid for certain countries of central and eastern Europe. A Mayhew, 'Enlargement of the European Union: Analysis of the Negotiations with the Central and Eastern European Candidate Countries' (Sussex European Institute Working Paper December 2000).

[68] Communication COM(95) 163 of 3 May 1995 from the Commission, Preparation of the Associated Countries of Central and Eastern Europe for Integration into the Internal Market of the Union. M Maresceau and E Montaguti, 'The Relations between the European Union and Central and Eastern Europe: A Legal Appraisal (1995) CMLRev 1327; P Muller-Graff, 'Legal Framework for Relations Between the European Union and Central and Eastern Europe: General Aspects' in M Marescau (ed.), *Enlarging the European Union. Relations between the EU and the Central and Eastern Europe* (Addison-Wesley Longman Ltd 1997) 37.

procedures, but make also use of mechanisms that were set up in order to enhance the control of Member States over the procedure as a whole.[69]

The first of these new mechanisms is embodied by the benchmarks the Council, acting by unanimity on a proposal by the Commission, defines to subject the opening and closing of negotiating chapters to the ability of the States involved to meet them. In case of failure in complying with the established benchmarks negotiating chapters will not be opened or negotiating chapters provisionally closed will be reopened.[70] Consequently, the pace of negotiations is connected to candidate countries' ability to deliver on reforms, while the appreciation of the fulfillment of benchmarks is in the hands of the Member States acting within the European Council.

The second new mechanism is the suspension of accession negotiations the EU can decide if the candidate State infringes the values of democracy, rule of law, liberty, respect for human rights and fundamental freedoms.[71] The suspension the Council establishes will be based on a previous decision of the European Council.

In both cases, the European Council acts by consensus so that each Member State enjoys the right of veto.

The withdrawal negotiations were subject to conditionality for the Member States availed themselves of the same techniques on which they framed the admission procedure. As for withdrawal the use of conditionality is of great significance for the withdrawing state might just wait for the expire of the time limit art. 50 TUE provides for.

The EU did not accept the UK proposal for running both the negotiations on the withdrawal agreement and those on future relationships. In the Guidelines adopted in April 2017, the European Council stated that "we must proceed according to a phased approach giving priority to an orderly withdrawal"[72] and decided that the agreement on the future relationships between the EU and the UK could be negotiated only after the conclusion of the withdrawal agreement.[73] This stance was based on the claim that "the main purpose of the negotiations will be to ensure the United Kingdom's orderly withdrawal so as to reduce uncertainty and, to the extent possible, minimise disruption caused by this abrupt change".[74]

[69] See C Hillion, 'The Creeping Nationalisation of the EU Enlargement Policy' (November 2010) SIEPS www.sieps.se.

[70] European Council Conclusions of 16/17 December 2004 para. 23; European Council Conclusions of 14/15 December 2006 paras 4-7. See also Communication COM(2006) 649 of 8 November 2006 from the Commission to the European Parliament and the Council, Enlargement Strategy and Main Challenges 2006 – 2007, 10. S Blockmans, 'Consolidating the Enlargement Agenda for South Eastern Europe' in S Blockmans and S Prechal (eds), *Reconciling the Deepening and the Widening of the European Union* (T.M.C. Asser Press 2009) 83.

[71] Council of the European Union of 3 October 2005, Negotiating Framework with Croatia para. 12.

[72] European Council, Special meeting of the European Council (Art. 50) of 29 April 2017 cit. 1.

[73] *Ibid*. para. 5.

[74] *Ibid*. para. 4. On the phased approach see E Bernard and C Hillion, 'La préparation européenne du Brexit. Le cadre des négociations' in C Bahurel, E Bernard and M Ho-Dac (eds), *Le Brexit: enjeux régionaux, nationaux et internationaux* (Bruylant 2018) 37 and 51 ff.

As a consequence of the phasing of the negotiations, the European Council pointed out that "in accordance with the principle that nothing is agreed until everything is agreed, individual items cannot be settled separately".[75] To say in a nutshell, negotiating chapters are only provisionally closed and can be reopened.

In the same vein, the European Council held that it will monitor the progress of negotiations and "determine when sufficient progress has been achieved to allow negotiations to proceed to the next phase".[76] Taking into consideration the connection between the withdrawal agreement and the future relationships art. 50 TEU establishes, the European Council affirmed that

> "an overall understanding on the framework for the future relationship should be identified during a second phase of the negotiations under Article 50 TEU. We stand ready to engage in preliminary and preparatory discussions to this end in the context of negotiations under Article 50 TEU, as soon as the European Council decides that sufficient progress has been made in the first phase towards reaching a satisfactory agreement on the arrangements for an orderly withdrawal".[77]

Following this approach, the assessment of the progresses of negotiations led the December 2017 European Council to adopt new Guidelines for time was ripe to "move to the second phase related to transition and the framework for the future relationship".[78] The European Council, however, called the negotiators to complete the work on withdrawal issues and warned the UK on the temporary nature of the agreement already reached since "negotiations in the second phase can only progress as long as all commitments undertaken during the first phase are respected in full and translated faithfully into legal terms as quickly as possible".[79]

The European Council retained the same stance in deciding to open the third stage of negotiations to address the overall understanding of the framework for the future relationship in the Guidelines delivered on March 2018.[80]

The brief description of the two procedures makes it clear that the exercise of discretionary power in applying conditionality was transposed from the practice of admission into the practice of withdrawal to achieve the same aim: leaving Member States a certain margin for manoeuvring and pursue national interests since decisions are taken by consensus.

At the end of the day, the arrangements of the admission and withdrawal proceedings have enhanced the role of the European Council compared to the role the Treaty provisions establish.

[75] European Council, Special meeting of the European Council (Art. 50) of 29 April 2017 cit. para. 2.
[76] *Ibid*. para. 4.
[77] *Ibid*. para. 5.
[78] European Council (Art. 50) meeting of 15 December 2017, Guidelines para. 1.
[79] *Ibid*.
[80] European Council (Art. 50) of 23 March 2018, Guidelines para. 1 in which it is stated that "negotiations can only progress as long as all commitments undertaken so far are respected in full".

IV. Making intergovernmentalism prevail over supranationalism

The brief assessment of admission and withdrawal highlights that both of them are not just regulated by the rules the TEU lays down, since their function depends also on the practice that has shaped them.

The combination of Treaty provisions and practice urges us to consider admission and withdrawal in the larger perspective of the role of the latter in EU law.

In that perspective, both procedures are part and parcel of a wider phenomenon involving different areas of the EU legal system: the integration of the rules of the Treaties by practice. The important role practice has been playing in the legal order of the European Union is the consequence of the need to fill up existing lacunae of the laws in force. Furthermore, practice ensures flexibility and the continuous adjustment of rules that the dynamic nature of the process of European integration entails.[81]

The CJEU has adopted a narrow approach towards practice ruling that it cannot run counter to the Treaties so that Member States' practice as well as EU institutions' practice derogating from the rules the Treaties lay down has been found in breach of EU law.[82] The Court's attitude towards practice is related to the statement that the founding Treaties, unlike ordinary international treaties, established a new legal order.[83]

Despite the hostility stemming from this consistent case law, the CJEU made use of practice in order to construe EU law in the judgment delivered in the *Ecowas* case.[84] In its reasoning, the Court referred to several policy documents that were adopted either by

[81] JP Jacqué, 'La pratique des institutions communautaires et le développement de la structure institutionnelle communautaire' in R Bieber and G Ress (eds), *Die Dynamik des Europäischen Gemeinschaftrechts – The Dynamics of EC Law* (Nomos 1987) 377; O Porchia, 'Il diritto non scritto nel funzionamento delle istituzioni dell'Unione europea' in P Palchetti (ed), *L'incidenza del diritto non scritto sul diritto internazionale ed europeo* (Editoriale Scientifica 2016) 349.

[82] Case C-59/75 *Pubblico Ministero v Flavia Manghera and others* ECLI:EU:C:1976:14 para. 21; case C-43/75 *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena* ECLI:EU:C:1976:56 paras 56-58; case C-141/78 *French Republic v United Kingdom of Great Britain and Northern Ireland* ECLI:EU:C:1979:225 paras 7 and 11; case C-68-86 *United Kingdom of Great Britain and Northern Ireland v Council of the European Communities* ECLI:EU:C:1988:85 para. 24 and 38; case C-327/91 *French Republic v.Commission of the European Communities* ECLI:EU:C:1994:305 para. 36; case C-417/93 *European Parliament v Council of the European Union* ECLI:EU:C:1995:127 paras 10-11; case C-426/93 *Federal Republic of Germany v. Council of the European Union* ECLI:EU:C:1995:367 para. 21; case C-41/95 *Council of the European Union v European Parliament* ECLI:EU:C:1995:431 paras 23 and 26; case C-271/94 *European Parliament v Council of the European Union* ECLI:EU:C:1996:133 para. 24; case C-444/11 P *Team Relocations NV and Others v European Commission* ECLI:EU:C:2013:464 para. 82; case C-227/14 P *LG Display Co. Ltd and LG Display Taiwan Co. Ltd v European Commission* ECLI:EU:C:2015:258 para. 67; case C-28/12 *European Commission v Council of the European Union* ECLI:EU:C:2015:282 para. 42.

[83] Case C-26/62 *NV Algemene Transport– en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* ECLI:EU:C:1963:1, p. 12; Opinion 2/13 *Accession of the European Union to the ECHR* ECLI:EU:C:2014:2454 para. 157.

[84] Case C-91/05 *Commission of the European Communities v Council of the European Union* ECLI:EU:C:2008:288.

the Council or by different institutions acting jointly with the aim of establishing the dividing line between the Common Foreign and Security Policy and Community Development Cooperation.[85] The judgment shows the Court readiness to consider practice an interpretative tool in line with the rule art. 31(3)(b) VCLT envisages.[86]

Furthermore, it can be argued that the approach of the Court towards practice overriding Treaties' provisions does not bar the admissibility of practice which is *preater legem* in nature for it integrates the laws in force.[87]

This is the general framework against which to assess the practice of admission and withdrawal that was described above.

The minimum content of the Treaty provisions on accession and withdrawal is only one of the reasons for integrating the written rules on conditions and procedural arrangements by practice.

Admission and withdrawal are political in nature because they affect the process of European integration urging Member States and the EU institutional framework to adapt the making of entry and leaving the club to the specific needs of candidates or withdrawing countries.

Moreover, admission and withdrawal are located in a grey area between EU law and international law. Such a position within the EU legal system is a further reason for subjecting either admission or withdrawal to mechanisms of adjustment which are widespread in international law.[88]

Practice has transformed admission into a procedure pursuing the intertwined aims of safeguarding the values the EU relies upon and promoting their acceptance by aspirant States. In the case of Brexit, the EU conceived the withdrawal agreement to conclude with the UK as an instrument functional to the protection of its interests and values.[89]

[85] See PJ Kuijper, 'The European Courts and the Law of Treaties: The Continuing Story' in E Cannizzaro (ed.), *The Law of Treaties Beyond the Vienna Convention* (OUP 2011) 266.

[86] Art. 31(3)(b) VCLT provides that "there shall be taken into account together with the context [...] any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation".

[87] O Porchia, 'Il diritto non scritto nel funzionamento delle istituzioni dell'Unione europea' cit. 356. In the same vein, case C-133/06 *European Parliament v Council of the European Union* ECLI:EU:C:2007:551, Opinion of AG Poiares Maduro, paras 26-36. For a different point of view see R Baratta, 'Diritto e prassi evolutiva dell'Eurogruppo' (2015) Il Diritto dell'Unione europea 515 who argues that social rules become legal rules only if the Court of justice assesses their validity. On custom in the EU legal order see P Pescatore, *L'ordre juridique des Communautés européennes: étude des sources du droit Communautaire* (Bruylant 2006) 174; T Blanchet and J Keller-Nöellet, 'Peut-on parler de « coutume » en droit de l'Union européenne?' in I Hachez and others (eds), *Les sources du droit revisitées*, *Vol. 1, Normes internationals et constitutionnelles* (Presses de l'Université Saint-Louis 2011) 207; P Marcisz, *Custom in European Union Law* (2012) Studia Juridica LIV Uniwersitet Warsawski 141.

[88] The development of practice raises the problem of its legal nature. It is out of the scope of this *Article* to assess the said issue with which this Author is to deal in a future research paper.

[89] European Council, Special meeting of the European Council (Art. 50) of 29 April 2017 cit.1.

The enhancement of the EU values in admission and withdrawal shows that practice has been filling up the lacunae of the rules the Treaties envisage and no infringement of primary law stemmed from its enactment. As a consequence, practice has been restricted to integrating the Treaty provisions so that it appears to be consistent with the case law of the CJEU. Grounding the admission and withdrawal procedures on the values of democracy, rule of law, protection of fundamental rights, equality, good neighbour relationships, non-discrimination could be considered as a contribution to the strengthening of supranationalism in the process of European integration.[90]

In the opinion of this author, the main outcome of the practice that has been enacted within the framework of admission and withdrawal is making intergovernmentalism prevail over supranationalism since the Member States bolster their control over the two procedures acting through the European Council which has worked mainly as a conference of States.

Notwithstanding the reform of the institutional framework the Lisbon Treaty introduced (art. 13 TEU), the European Council is still hybrid in nature so that it could act as an institution of the European Union or as a Summit of the Heads of State or Government of the Member States.[91] This is the reason why there is the need for establishing in each case if the activities the European Council carried out and the decisions it took are related to its institutional nature or if they are to be attributed to its being an international conference.

The decisions on enlargement of the European Union are still part of the definition of the general political directions and priorities of the Union action so that in taking them the European Council acts as an international conference. Furthermore, in the assessment of compliance with the admission criteria and conditionality requirements Member States are vested with the right of veto, for the decisions of the European Council are adopted by consensus, which is the tradional way of working of international conferences. It has to be added that Member States enjoy a wide margin of discretion. The recent veto France opposed to the opening of admission negotiations with Albania and North Macedonia is the last act of intergovernmentalism in accession to the EU.[92]

[90] C Hillion, 'Withdrawal under Article 50 TEU: An Integration-Friendly Process' (2018) CMLRev 49 argues that the UK withdrawal contributed to the constitutionalization of the EU legal order. In the same vein, S Lattanzi, 'La costituzionalizzazione della procedura di recesso alla luce della Brexit (2020) Studi sull'integrazione europea 668. For a constitutional reading of art. 50 TEU see P Eeckhout and E Frantziou, 'Brexit and Article 50 TEU: A Constitutionalist Reading' (UCL European Institute Working Paper 2016); ME Bartoloni, 'La disciplina del recesso dall'Unione europea: una tensione mai sopita tra spinte "costituzionaliste" e resistenze "internazionaliste"' (29 May 2016) Rivista AIC www.rivistaaic.it highlights the tension between constitutionalizing EU law and anchoring it into international law that is embedded in the laws on withdrawal; J Vidmar, 'Unilateral Revocability in *Wightman*: Fixing Article 50 with Constitutional Tools' (2019) EuConst 374.

[91] On the hybrid nature of the European Council see U Villani, *Istituzioni di diritto dell'Unione Europea* (6th edn, Cacucci Editore 2020) 164.

[92] L Cvetanonoska, 'North Macedonia Won't be Joining the EU Anytime Soon. Did the EU Lose its Peak Leverage?' (14 November 2019) The Washington Post www.washingtonpost.com.

Art. 50 TEU enshrines the role of the European Council as an EU institution. Nevertheless, Brexit has witnessed the reinforcement of the role of the European Council and its working not only as an institution of the EU, but also as an international conference of states.

In fact, the European Council has in time proceeded both as formal or informal meetings. Moreover, the European Council has adopted formal acts as well as acts which are not provided for by the Treaties, and all the decisions were taken by consensus.[93]

Member States laid down the framework of withdrawal negotiations in the Statements of the June and December 2016 Informal Meetings even before the UK filed the withdrawal notification. The first meeting defined the aim of the orderly withdrawal, while the second emphasized the need for the integrity of the Single Market. Both of these principles were developed by the Guidelines the European Council adopted. The disentanglement of the UK from the commitments of membership in an orderly manner is also the rationale for the Council's assessment of art. 50 TEU as a law conferring an all-encompassing competence upon the Union to cover in the withdrawal agreement "all matters necessary to arrange the withdrawal".[94]

Moreover, the procedural arrangements the December 2016 Informal Meeting established created an unprecedent control of Member States over the conduct of the negotiations of EU international agreements.[95]

The Guidelines on negotiations are to be connected to the political impetus the European Council gives the Union, so that they are related to its international conference's nature, although they are contained in a formal act the Treaty provides for.

In assessing the nature of the European Council within the withdrawal procedure it is also worth to remind that the recourse to conditionality strengthened the Member States leverage on the course of negotiations because the Guidelines neither specify the criteria of the assessment nor lay down the threshold for moving forward throughout the procedure. As a consequence, the European Council enjoyed a wide margin of discretion in taking the decisions concerning the pace of negotiations, while the practice of consensus enabled each Member State to veto any decision.

The outcome of this practice has to be outlined taking into consideration the legal framework art. 49 and art. 50 TEU lay down.

Unlike the admission procedure in which the accession agreement is an international treaty the Member States conclude with the incoming countries after negotiations within an intergovernmental conference, art. 50 TEU establishes that the withdrawal agreement is an agreement the EU enters into with the withdrawing States. The reference to some

[93] On the emergence of both natures during Brexit see M Starita, 'Il ruolo del Consiglio europeo nella Brexit' cit. 570.

[94] Council decision of 22 May 2017 cit. ANNEX para. 5.

[95] See PR Polak, 'EU Withdrawal Law After Brexit' cit. 62.

of the provisions art. 218 TFEU lays down is consistent with the nature of the agreement as an EU agreement.

The control Member States exercised on the negotiations of the withdrawal agreement with the United Kingdom has shifted the balance between supranationalism and intergovernmentalism the Treaty envisages towards the second approach.[96]

Adopting an intergovernmental approach is consistent with the nature of the issue admission and withdrawal deal with: the membership of the EU. The decisions on admission are the expression of Member States' sovereignty for they concern the composition of the EU. In the same vein, Member States are interested in regulating the way in which withdrawal takes place and the relationships with the state exiting the Union. Moreover, the connection between sovereignty and membership is to be found in the opposite perspective of the candidate or withdrawing states since sovereign powers are entrenched in the application for entering the European Union or in the decision to leave it. As regards this latest issue, the CJEU in the *Wightman* case stated that the decision to exit the European Union "is for the Member State alone to take [...] and depends solely on its sovereign choice".[97]

Moreover, the practice on admission and withdrawal has to be evaluated against a more extensive trend of intergovernmentalism in the process of European integration.[98] There are several examples of this trend such as: *i)* the activity the European Council carried out to face the debt crisis, because it mainly acted as an international conference of States;[99] *ii)* the decision of the Heads of State or government within the European Council on a new settlement for the UK;[100] *iii)* the EU-Turkey Statement of 18 March 2016,[101] which clarified that the use of international instruments "may shift the centre of gravity to the Member States".[102] The European Council has recently bolstered the process at

[96] *Contra* C Hillion, 'Withdrawal under Article 50 TEU' cit. 36 who argues that the procedure is embedded in the institutional framework of the European Union since the influence of the Member States is channelled through the European Council which acted as an institution of the EU.

[97] *Andy Wightman and Others v Secretary of State for Exiting the European Union* cit. para. 50.

[98] E Cannizzaro, *Il diritto dell'integrazione europea* (3rd edn, Giappichelli Editore 2018) 7 ff.

[99] M Starita, 'Il Consiglio europeo e la crisi del debito sovrano' (2013) RivDirInt 385.

[100] European Council, *Conclusions of 18-19 February 2016. A new settlement for the United Kingdom within the European Union* www.consilium.europa.eu. On the European Council Conclusions see S Peers, 'The Draft UK/EU Renegotiation Deal: Is It "Legally Binding and Irreversible"?' (10 February 2016) EU Law Analysis eulawanalysis.blogspot.com; G Rossolillo, 'Patti chiari, amicizia lunga: l'accordo sullo status del Regno Unito nell'Unione europea' (29 February 2016) SIDIBlog www.sidiblog.org; P Eleftheriadis, 'On the New Legal Settlement of the UK with the EU?' (12 February 2016) Verfassungblog verfassungsblog.de; E Pistoia, 'Brexit: Should They Stay...' (15 june 2016) SIDIBlog www.sidiblog.org.

[101] EU-Turkey Statement of 18 March 2016, in European Council Press Release 144/16 of 18 March 2016.

[102] E Cannizzaro, 'Disintegration through Law?' (2016) European Papers www.europeanpapers.eu 6. On the legal nature of the Statement see case T-192/16 *NF v European Council* ECLI:EU:T:2017:128; case T– 193/16 *NG v European Council* ECLI:EU:T:2017:129; case T-257/16 *NM v European Council* ECLI:EU:T:2017:130; joined cases C-208/17 P and 210/17 P, *NF and Others v European Council* ECLI:EU:C:2018:705. See further, O Corten and M Dony, 'Accord politique ou juridique: Quelle est la nature du "machin" conclu entre l'UE et la Turquie en matière d'asile?' (10 June 2016) EU Immigration and Asylum Law and Policy eumigrationlawblog.eu; M Gatti, 'La Dichiarazione

stake through the declaration on the implementation of 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 since it affects the independent role of the Commission and jeopardizes the effective application of the rules the Regulation enacted.[103]

In this scenario, admission and withdrawal foster intergovernmentalism in the process of European integration as a whole,[104] limiting the significance of the bolstering of the Union's values within both procedures.

UE-Turchia sulla migrazione: un trattato concluso in violazione delle prerogative del Parlamento?' (11 April 2016) Eurojus rivista.eurojus.it; L Marotti, M Marchegiani, 'La natura giuridica dell'accordo in ambito migratorio tra l'Unione europea e la Turchia' (2016) Diritto, immigrazione, cittadinanza 59; S Peers, 'The Draft EU/Turkey Deal on Migration and Refugees: Is it Legal?' (16 March 2016) EU Law Analysis eulawanalysis.blogspot.com; E Cannizzaro, 'Denialism as the Supreme Expression of Realism: A Quick Comment on NF v. European Council' (2017) European Papers www.europeanpapers.eu 251; M Jackowski, 'Conventional Rights of Migrants in the Agreement between the European Union and Turkey of 18 March 2016' in J Iliopoulos-Strangas and others (eds), *Migration: New Challenges for Europe, for State Sovereignty and for the Rule of Law and the Welfare State* (Nomos 2017) 59; G Fernández Arribas, 'The EU-Turkey Statement, the Treaty-Making Process and Competent Organs. Is the Statement an International Agreement?' (2017) European Papers www.europeanpapers.eu 303; B Nascimbene and I Anrò, 'La tutela dei diritti fondamentali nella giurisprudenza della Corte di giustizia: nuove sfide, nuove prospettive' (2017) Rivista italiana di diritto pubblico comunitario 355; D Vitiello, 'La dimensione esterna della politica europea' in M Savino (ed), *La crisi migratoria tra Italia e Unione europea* (Editoriale Scientifica 2017) 331; F Casolari, 'L'insosteninbile "leggerezza" della soft law: sul ricorso a strumenti informali nella gestione della dimensione esterna del contasto all'immigrazione irregolare da parte dell'Unione europea' in *Liber Amicorum Angelo Davì. La vita giuridica internazionale nell'età della globalizzazione* (Editoriale Scientifica 2017) 1422; G Syropolou, 'The EU Charter of Fundamental Rights and Asylum Procedures in View of the Recent Developments in Greece Following Implementation of the EU-Turkey Statement' in A Crescenzi, R Forastiero and G Palmisano (eds), *Asylum and the EU Charter of Fundamental Rights* (Editoriale Scientifica 2018) 121.

[103] E Cannizzaro, 'Neither Representation nor Values? Or, "Europe's Moment" – Part II' (2020) European Papers www.europeanpapers.eu 1101.

[104] On the relationship between supranationalism and intergovernmentalism see U Villani, 'Metodo comunitario e metodo intergovernativo nell'attuale fase dell'Unione europea' (2019) Studi sull'integrazione europea 259.

ARTICLES

INTERPRETATION IN EU MULTILINGUAL LAW

BOYAN BAHANOV*

TABLE OF CONTENTS: I. Introduction. – II. The multilingual European Union law. – III. Guarantees of clarity in Union law. – IV. Common European legal discourse as a way to overcome relativism. – V. Conclusion.

ABSTRACT: The European Union as a supranational entity that unites many different legal systems, each with its own linguistic category and distinct legal vocabulary, presents unique challenges in legal translation of European legislation. This *Article* examines the process of legal-linguistic finalization of EU multilingual law and considers the difficulties arising from interpretation of EU acts in light of the linguistic diversity of the Union's 27 Member States. The inquiry reaffirms the importance of the role of the Court of Justice of the European Union to guarantee the uniform functioning of law. Joining the views of some leading researchers in the field, this *Article* defends the view that a shared European legal discourse is necessary to achieve clarity in European Union law.

KEYWORDS: Court of Justice – language translation – linguistic relativity – multilingual European Union law – common European discourse – uniform language interpretation.

I. INTRODUCTION

Increased supranational cooperation between Member States, part of the European family, has undoubtedly changed the face of public relations in Europe. As a result, in recent decades, there has been a significant increase in Union legal sources and in their role in regulating public relations within individual domestic legal systems. EU law has specific principles of functioning that determine the need for equal linguistic meaning of its norms in all official languages. Linguistic meaning is a property of the norms' linguistic expression preserved in translation or interpretation and explains what the subjects of law understand and apply in their behaviour as a consequence of those norms. It can even be said that EU law's legitimate action needs this presumption of linguistic meaning

* Doctor of Philosophy, Sofia University St. Kliment Ohridski, boqn.bahanov@gmail.com. I would like to sincerely thank Prof. (Ph.D.) Aneta Karageorgieva from Sofia University St. Kliment Ohridski for her comments on the drafting of this *Article* and her precious support during my doctoral studies. I would also like to deeply thank the Bulgarian section of the Directorate for the Legislative acts of the European Parliament for their warm welcome and for their precious support during my traineeship. Especially, I would like to thank the Lawyer-linguists Sibila Stoyanova and Deliana Kasavetova. Impressed by their work, I wrote this *Article*.

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uniformity. Otherwise, fundamental principles of law, equal treatment for instance, would not hold. For the European Union to function correctly and thoroughly its law should be established, applied, and respected by all Member States. It is incumbent upon individual Member States to take care that the necessary action is taken to ensure compliance with the European rule-making framework within their domestic legal systems with the proviso that the corresponding set of rules must be first clearly expressed in an accessible way in the language of the respective countries. Given the cultural and linguistic diversity that European Union comprises, coming to a clear understanding is not an easy task for the European and national legislators. This *Article* considers some of the difficulties in legal translation and interpretation of the multilingual EU law and possible ways of overcoming them. Section II draws the contours of the current situation with legal translations in the EU. Section III, in the light of culture relativity and Quine's thesis about indeterminacy of translation first addresses the issue of legal drafting and legal translation of the European legislation. Even though *de jure* all language versions are authentic, *de facto*, we usually have European legislation drafted in English or French and only subsequently laws are translated in all official languages. The question here is whether we achieve equal linguistic meaning of legal norms in all official languages. Perhaps we can only rely on multiple language versions of the same normative act? This Section also argues that the different methods European institutions use are insufficient to provide uniformity in EU law. Considering the procedure of legal-linguistic finalization and so-called culture free EU rule-making style, a comparative analysis of relevant examples is preformed to highlight differences between multiple language versions of European legislation. Based on the examples and the nature of the existing translation/interpretation procedures, an argument against extreme culture relativity is offered. Then further ways of overcoming linguistic discrepancies are critically examined. In section IV, joining the views of some leading researchers in EU law, this *Article* offers an argument for the thesis that only via a common European legal discourse as a system of interpretative rules and methods, the consequences of indeterminacy of translation and cultural relativity would be minimized. The author suggests that a common European discourse is realizable through uniformity that will not be a result of uniform interpretation, but of mutually recognised linguistic meaning accepted by all. Thus, clarity – *i.e*. coherence and intelligibility – in European Union law would be achieved and the ideal of function with equal meaning in all official languages will be neared.

II. The multilingual European Union law

Currently, the European Union unites 27 Member States and is host to 24 official languages which are all accorded equal footing according to EU's language equality policy. Such linguistic diversity creates challenges in the drafting of European legislation as EU law shall function in a corresponding manner for each of its official languages. These difficulties can be described by the so-called strong language theory, whose main

proponent is Legrand.[1] He insists that the meanings of words and expressions are basically objective and therefore stable and depend mainly on the language as a system of rules and not as actual usage. The ensuing legal order, says the theory, can be only monolingual. As one of this theory's critics, Engberg, puts it, "in such an approach a number of equally stable and fixed relations, which are not compatible, will clash as every language tends to characterize the world differently, which, for example, makes automated translation a difficult task".[2] As McAuliffe affirms: "ideally, EU legislation would be drafted simultaneously in all languages. However, – she continues – this is neither feasible nor possible in the EU".[3]

Since the establishment of the Union, it has been agreed that legislation should be drafted in one main language (English or French) and then translated into the other official languages. As López-Rodríguez maintains, "multilingualism causes a considerable delay in the legislative procedure",[4] because every act issued within the European Union shall be translated into all the official languages. "Without that they cannot be binding",[5] according to Semov. Moreover, it is not officially stated that the texts are to be subsequently "translated, but that they are prepared, written or created. The term 'translatio' has also been deliberately omitted, as from a legal point of view it is an authentic language version".[6] In practice, translation is used in the process of implementing the act by the individual Member States. This translation is then seen as manner by which the act acquires its specific fixed meaning in each of the 24 official languages. Further, all these language versions have to be standardized, which means that each shall be the same – the content and formatting of the text shall be strictly adhered to (each article, paragraph, and subparagraph shall be located in the same place in all language versions). Furthermore, it is essential that the linguistic meaning of each of these translations coincides entirely with the meaning embedded in all 24 of official language versions.

According to Sarcevic, "to guarantee the underlying principle of equal treatment, plurilingual communication in the law is based on the presumption that all the authentic

[1] P Legrand, 'Law's Translation, Imperial Predilections and the Endurance of the Self' (2014) The Translator 290–312.

[2] J Engberg, 'Word Meaning and the Problem of a Globalized Legal Order' in P Tiersma e LM Sokan (eds), *The Oxford Handbook of Language and Law* (Oxford University Press 2012) 177-178.

[3] K McAuliffe, 'Language and Law in The European Union: The Multilingual Jurisprudence of the ECJ' in P Tiersma e LM Sokan (eds), *The Oxford Handbook of Language and Law* cit. 18.

[4] A M López-Rodríguez, 'Toward a European Civil Code Without a Common European Culture? The Link Between Law, Language and Culture' (2004) BrookJIntlL 1212.

[5] A Semov, *Kakvo tryabva da znaem za Evropeyskiya sayuz: Narachnik za rabota s evropeyskite institucii prilagane na pravoto na ES* (Far BG 2004) 170.

[6] S Šarčević, 'Die Übersetzung von mehrsprachigen EU-Rechtsvorschriften: der Kampf gegen Sprachdivergenzen' in M Gotti and S Šarčević (eds), *Insights into Specialized Translation* (Peter Lang 2006) 127.

texts of a legal instrument are equal in meaning, effect, and intent".[7] But can we achieve equal meaning in the European legislation and can it function in a uniform manner in all the official languages? Perhaps the more important derivative question here is how should a translation be rendered in order to sufficiently reproduce the legislative intention of the European lawmaker, if Quine is right that the translation itself is always indeterminate? "The thesis is then this: manuals for translating one language into another can be set up in divergent ways, all compatible with the totality of speech dispositions, yet incompatible with one another. In countless places they will diverge in giving, as their respective translations of a sentence of the one language, sentences of the other language which stand to each other in no plausible sort of equivalence however loose".[8] Roughly put, this means that there are various ways to say one and the same thing that are equally appropriate. Thus, we don't have an objective criterion for determining the best way. Similarly, Sarcevic says that "indeterminism says we cannot be sure of communicating anything, at least not in any exact sense. We cannot assume there is a meaning that is encoded on one side and then decoded on the other".[9] Probably, that is the reason why when discussing linguistic equivalence in EU legislation, many researchers are inclined to limit it to, as Paunio puts it, "visual equivalence. [...] Equivalence is symbolic. This trait becomes visible when one considers how directives and other EU legislative instruments are drafted: the number of paragraphs has to match, and headings and subheadings have to be located in the same place as in other language versions. In fact, the policy of linguistic equality reduces translation to literal rendering and consequently equivalence to linguistic correspondence".[10]

In such a case, hypothetically, we could always achieve multiple language versions of the same normative act, which are authoritative, but function with a different meaning. However, we should ask ourselves to what extent such explanation situation satisfies the aim of the integrating European legal order. Leung asked: "[i]s 'equivalence' a legal fiction?".[11] Given that one of the most important requirements for the full functioning of European Union law is that of its uniform operation throughout the Union, an equal linguistic meaning becomes a prerequisite for unambiguous interpretation. But what is equal meaning and is it achievable? One answer comes from Pym who says that "the opposite of indeterminism might then be a theory that assumes 'codes', or 'transmission', or 'meaning transfer', or a 'conduit' [all those metaphors have been used] that is

[7] S Šarčević, 'Legal Translation and Translation Theory: A Receiver-Oriented Approach' (2003) Tradulex tradulex.com.

[8] WVO Quine, *Word and Object* (The MIT Press 1960) 24.

[9] A Pym, *Exploring Translation Theories* (Routledge 2014) 91.

[10] E Paunio, *Legal Certainty in Multilingual EU Law: Language, Discourse and Reasoning at the European Court of Justice* (Ashgate 2013) 8.

[11] J Leung, 'Translation Equivalence as a Legal Fiction' in A Wagner, L Cheng and KK Sin (eds), *The Ashgate Handbook of Legal Translation* (Ashgate 2016) 57-69.

somehow able to guarantee equivalence".[12] Probably this is the reason that there are different ways the European institutions attempt to provide the needed guarantees for the uniform functioning of the European law with equal meaning throughout the Union.

III. Guarantees of clarity in Union law

Once translated by translators who know the linguistic specificity of the language concerned, European legislation undergoes legal-linguistic finalization by a lawyer-linguist. This becomes a key prerequisite for achieving clarity and uniform interpretation, given that the European Union, as a supranational union, forms a community that brings together different legal systems and cultures, each with its legal institutions and regulatory means, where the latter in many cases may be absent in one or more of the other legal systems in the Union. This is most evident if we look at the decision-making process in the ordinary legislative procedure (OLP). Given that the majority of EU legislation is adopted by means of the OLP, it is becoming the main legislative method in the Union. In this process of co-decision between the Parliament and the Council, legal meanings are exchanged between legislators coming from very different legal linguistic backgrounds. Such diversity is frequently offered as an argument for the particular difficulties inherent in legal translation. In addition, the final text of a piece of legislation is repeatedly the result of a compromise between the Commission, the Parliament and the Council, so that it is "often formulated with deliberate deviations in meaning".[13] It can be seen clearly in the processes of political trialogues following the negotiations between these institutions.

It is in such a context that the figure of the lawyer-linguist is most salient. For McAulife this role is "something distinct from both a lawyer and a translator: lawyer-linguist is a perfect synthesis of a lawyer and a linguist".[14] Experts from the EU institutions have extensive specialized knowledge on the one hand in linguistics and on the other in the field of legal vocabulary. Therefore, the minimum requirement for these experts is that they must have a thorough knowledge of at least two other official languages of the Union in addition to their mother tongue (which must be one of the 24 official languages). Other essential requirements for experts holding this position are to have acquired legal education in a Member State and have some practical experience in the field.

To illustrate this process of legal-linguistic finalization, let me consider a relevant example from European legal acts. This is a decision of the European Parliament of 9 March 2021,[15] to waive the immunity of a Portuguese MEP who has had the *status* of a party to a lawsuit. Examining the Bulgarian version of the decision in question, we find the

[12] A Pym, *Exploring Translation Theories* cit. 91.

[13] S Šarčević, 'Die Übersetzung von mehrsprachigen EU-Rechtsvorschriften' cit. 128.

[14] K McAuliffe, 'Language and Law in The European Union' cit. 211.

[15] Decision P9 TA(2021)0063 of the European Parliament of 9 March 2021 on the request for waiver of the immunity of Nuno Melo (2020/2050(IMM)) europa.eu.

following translation of the matter: private complainant (*частен тъжител*) and private complaint (*тъжба*). These terms in the English version are formulated as civil party ("граждански ищец")[16] and civil indictment ("граждански обвинителен акт").[17] Taking a closer look at the linguistic context of this decision, it may be seen that these terms come in the Portuguese legal system and that the person whose immunity is requested to be waived is constituted as a civil party following a civil indictment due to the alleged commission of several offences of insulting and defamation.

Though such a wording seems nominally satisfactory from a linguistic point of view, it raises certain questions of a legal and technical nature, for expression as "civil indictment" is absent in the Bulgarian legislative vocabulary. It can be easily established that in Bulgarian law, the cases that concern the offences of insulting and defamation, there are no formulations like the ones mentioned above. Therefore, when translating or understanding a culture other than one's own the task is complicated by such determining differences in the legal vocabulary. Such linguistic differences can be explained by the so-called "real local relativity".[18] According to it, each community has its own, unique concepts for describing the world, which may be missing in other communities. Difficulties in translating of legal texts arise precisely because of these determining differences in each legal system, which decide the specifics of its vocabulary. Therefore, carrying out this legal translation, it can be said that the expert's task is not to translate texts, but rather "to translate another culture".[19]

The expert's primary aim is to transform the normative text so that it becomes sufficiently close to the Bulgarian national language. That will allow its seamless understanding and will enable those familiar with the national law to get acquainted with the act. To achieve this, we must first ask ourselves the question of Buzov: "How can we know that two cultures are so different that neither mutual understanding nor translation of their fundamental norms and values is possible between them?"[20] To make such a comparison, a common criterion is needed to serve as a "frame of reference",[21] to find and compare the extent to which two cultures or societies differ from each other. Such "a meta-system"[22] can be discovered in our common shared world because, notwithstanding the many discrepancies in rules and categories, all natural languages refer to the same world, serve to describe the same things, and organize similar relationships. The Bulgarian philosopher Gerdjikov argues: "[o]ntology may be relative, but language is not. There is something absolute in the

[16] My translation.

[17] My translation.

[18] S Gerdjikov, *Filosofiya na otnositelnostta* (Ekstrem Press 2008, 2012) 83.

[19] D Katan, *Translating Cultures: An introduction for Translators, Interpreters, and Mediators* (Routledge 2014) 325.

[20] V Buzov, *Filosofiya na ezika* (Odri Press 2002) 112.

[21] *Ibid*.

[22] *Ibid*.

world, i.e., beyond the confines of the individual and the community. Because of this, language is possible, while only because they live the world can people transmit and receive something to and from each other".[23] In this way, we are able to speak of "a partial impossibility of translation"[24] rather than of "complete impossibility"[25]. Similar thoughts can be found in the works of the American 20th century philosopher Davidson who points out that "a language that organizes similar things should be a language very similar to ours".[26] This applies no less to the languages of law. Although different for each legal system, they perform mainly similar functions, as law governs similar social relations. Otherwise, "no meaning can be found in the total impossibility of translation".[27]

This in itself implies that the respective normative text should be translatable in any legal system precisely due to its universality and generality. We can define this as "operative convention which derives from a sequence of phenomenological assumptions about the coherence of the world, about the presence of meaning in very different, perhaps formally antithetical semantic systems, about the validity of analogy and parallel".[28]

In such a hypothesis, only after accepting this as a principle, despite the inevitable semantic discrepancies in the translations, we can accept the translation into Bulgarian as equivalent and reproducing as accurately as possible the text of this decision. It seems to me that here Gerdjikov's principle of "global relativity"[29] is applicable because it states that "all communities are still human forms and therefore the transfer of meanings is possible. This is confirmed in translations between different cultures. One meaning cannot be transferred from one life process to another but only induced (author's emphasis) in search of the strongest resemblance".[30] However, if in the translation we find "a lack of equivalents, shifts in meaning, diverging systems, desemantization",[31] then probably the foreign legal formulation, unknown to the Bulgarian legal system, could be understood by comparing it with the language solutions – the language formulations that the Bulgarian legislation in similar hypotheses gives. In the latter case, Sarcevic maintains that the expert "is mainly forced to carry out a comparative analysis of the law in addition to a linguistic comparison in order to determine whether there is a potential equivalent in the target legal system that adequately reflects the meaning of the term legal system of origin to be translated".[32] Now let me return to the example considered above: in the Bulgarian Penal Code, the offences

[23] S Gerdjikov, *Filosofiya na otnositelnostta* cit. 203-204.

[24] D Davidson, 'On the Very Idea of a Conceptual Scheme' (1973-1974) Proceedings and Addresses of the American Philosophical 7.

[25] *Ibid*.

[26] *Ibid*. 14.

[27] *Ibid*. 7.

[28] G Steiner, *After Babel: Aspect of Language and Translation* (3rd edn, Oxford University Press 1998) 312.

[29] S Gerdjikov, *Filosofiya na otnositelnostta* cit. 105.

[30] *Ibid*. 106.

[31] R Masiola and R Tomei, *Law, Language and Translation: From Concepts to Conflicts* (Springer 2015) 5.

[32] S Šarčević, 'Die Übersetzung von mehrsprachigen EU-Rechtsvorschriften' cit. 13.

of insulting and defamation are qualified as some of the few crimes of a private nature. They are subject to prosecution, and in these cases, the legal means by which the Court is seized of such acts is called private complaint, not a civil indictment. The person who filed the private complaint is constituted as a private complainant, *i.e.*, in the Bulgarian legal system, this person is not qualified as a civil party. In the Bulgarian translation of the decision in question, the terms used are private complaint and private complainant. But although, in this way, the linguistic expression differs in the two language versions, the meaning of these expressions can be defined as partially equivalent. Here, the expert "produces texts that are equal in legal effect".[33] He translates a normative text, so to speak, transferring the meaning embedded in the context or the meaning from the point of view of pragmatics, and not the pure mechanical reproduction of the semantic meaning. But in such a case, as Sarcevic points out, vagueness can arise from the so-called "semantic differences".[34] Thus, Pym purports that if we try to "make sense of the foreign text, we turn it into our sense, our culture, which can only lead to ethnocentric translation".[35] Translation viewed in this way is understood by Nobles and Schiff as "an attempt to re-create the meanings of one culture using the language of another",[36] which shows that language is dependent on the culture of a given society. Therefore, the linguistic transposition of concepts immanent to one legal system/culture to another is the most challenging task in translating legal texts. This is due to this cultural conditioning of legal vocabulary. Consequently, in European Union law, a legislative style is established that avoids vague, too abstract formulations and the use of so-called culturally charged linguistic expressions. Thus, a more neutral legal language is being developed in European law.

On one hand, such a (allegedly) universal, culture-free rulemaking style aims to mediate the translation and transposition of European legal texts into the individual legal systems of the Member States. On the other hand, in the process of interpretation of these acts in the national context of the Member States, such "a neutral position is an illusion".[37] In a language which transmits information about the phenomenal world between different individuals, there are, naturally, discrepancies.

Engberg's weak language theory emphasizes the contingent aspect of communication in that it

> "lays more weight on the individual side of a language, on the importance of the parole. The communicative experiences and activities of these individuals are of major importance, as each individual experience will possibly have an impact on the 'copy' of the

[33] S Šarčević, 'Legal Translation and Translation Theory' cit.

[34] S Šarčević, 'Die Übersetzung von mehrsprachigen EU-Rechtsvorschriften' cit. 143.

[35] A Pym, *Exploring Translation Theories* cit. 100.

[36] R Nobles and D Schiff, 'Legal Pluralism: A System Theory Approach to Language, Translation and Communication' in M Freeman and F Smith (eds), *Law and Language: Current Legal Issues* (Oxford Scholarship Online 2013) 114.

[37] S Gerdjikov, *Filosofiya na otnositelnostta* cit. 28.

> language system present in the mind of the individual. And the individual will use this copy in subsequent communicative interaction and thus has at least the potential to influence the 'copy' of other individuals and thus gradually adjust the collective system, which is seen as inherently unstable and subject to constructions by the individuals".[38]

Therefore, discrepancies appear in meaning derived from the various subjects in this process.

As Paunio notes, although the European legislator uses terminology and linguistic apparatus which presuppose their uniform interpretation, regardless of the legal system or the national language in which the process of interpretation is carried out, "even when we are talking about concepts belonging to the autonomous sphere of EU law, some confusion as to their meaning (intension and extension [intension is what is being thought about the object and extension is the referred object itself – author's note]) may nonetheless exist when 'imported' into the national context by national judges and authorities".[39]

On this basis, we may assume that although it is practicable to reach a formally correct translation of the same semantic content equivalent in the two legal systems, each of the interpreters can hypothetically reach different interpretive results, or in other words, the pragmatic content will be different. The main reason for this is the initial indefinability of language, as a result of which Quine tends to attribute uncertainty even to cases where no translation is needed: these are cases of "communication between individuals using identical language; of an individual's attempt to specify (for himself) the objects of his own thinking and language".[40] If we were to arrive at a parallel linguistic expression that reproduces the linguistic meaning in a way as close as possible to the original text, the meaning found by the addressees – even when representatives of the same language – might differ. According to Quine, this phenomenon is due to the fact that interpreters from the same language group may decide not to apply a similar interpretive approach at all but choose to interpret the messages embedded in the text in a completely different way. These difficulties in the processes of interpretation are most evident when European law uses concepts that are absent from the legal vocabulary of one or more Member States. One such a term is entity. This term can be found in several Union regulations. In its essence, "is an entity" is an underdetermined predicate, uniting in itself many potential referents, the exact definition of which presupposes the need for further refinement. Only through legal interpretation can the respective concretization of the addressees of the concept be realized. In this process, we can often reach divergent and even contradictory results. The national law of Bulgaria knows concepts such as natural entity as well as legal entity. Nevertheless, such a concept as "an entity" is missing in the national legal system. So, the translator's task here is not to translate a legal concept, but to create a new one for the Bulgarian legal system. In this sense, it can be said that in

[38] J Engberg, 'Word Meaning and the Problem of a Globalized Legal Order' cit. 177-178.
[39] E Paunio, *Legal Certainty in Multilingual EU Law* cit. 9.
[40] B Mollov, *Lekcii po filosofiya na ezika* (Proektoria Press 2014) 38.

determining the referents that unite this underdetermined predicate, the interpreters from the same language group would apply divergent interpretive criteria. This problem is further complicated when it comes to interpreters that are representatives of multicultural and multilingual communities, as such are united within the EU. In order to be more precise, Masiola and Tomei say that "an original text is 'interpreted', and its multilingual translation is re-interpreted. In this sense, there is 'one linguistic translation' and 'two' conceptual interpretations which come from one translation".[41] This is because, like any type of thinking, the legal one cannot be separated from the language in which it is performed. It is, so to speak, determined by it. López-Rodríguez writes: "law and language are closely connected in that they usually are products of the same social, economic and cultural influences. In the same sense, cultural heritage is embedded in law, including the linguistic dimension."[42] This becomes obvious if we look at a particular category of legal norms, namely the relatively defined ones. They are very broad and are being used to determine the elements of the factual composition of the legal norm (its formative hypothesis) or the legal consequences (the respective disposition), and they are concepts – as V. Petrov states – "the content of which is necessarily imprecise, variable and elastic".[43]

Most often such wording is avoided in the European legislative process, though their use is inevitable. Such broad concepts can be found even in the primary legislation itself. There are many examples to support this. However, here we will only mention the second paragraph of art. 4 TEU, which states: "the Union shall respect the equality of the Member States before the Treaties and their national identity inherent in their basic political and constitutional structures, including concerning local and regional self-government".

The use of broad concepts as "respect for national identity" requires the experts/lawyers in the individual Member States, through legal interpretation, to make the appropriate specification about the meaning of the text in a given legal discourse within the domestic legal system of a particular Member State. Given that respect for the national identity of the Member States is one of the fundamental principles of European Union law, in some cases, it could lead to the non-application of a certain legal provision of that law. Thus, a precise legal assessment of the applicability of the principle in the specific case is required.

This happens because, as Semov writes: "although this is an important real possibility of incidental limitation of the effect of individual Union legal norms, it is only a minimal

[41] R Masiola and R Tomei, *Law, Language and Translation* cit. 58.

[42] A M López-Rodríguez, 'Toward a European Civil Code Without a Common European Culture?' cit. 1211.

[43] V Petrov, 'Otnositelno opredeleni pravni normi' (2010) Ezik: Nasoki za pisane I redaktirane na pravni tekstove 142.

exception to the general effect (and meaning) of the principle of the supremacy of European Union law".[44]

It is probable that in the interpretation process contradictory results may appear, which would hinder the full functioning of these prescriptions as a uniform meaning, as here the determinant is, according to Masiola and Tomei, "the personal, social and cultural context in which any reader's reaction to the written text takes place".[45] From the latter perspective, a person or a society can find meaning in the text that exceeds the intention of its author. Therefore, Masiola and Tomei assert that in such cases "the original intention embedded in the relevant text may in a sense be displaced by the reader's interpretive results".[46]

This may mean that in some cases the original rulemaking intention remains partially or entirely incomprehensible when understanding the act in the social, political, and linguistic discourse of the individual society.

> "Therefore, whenever he/she considers that an applicable Union law is contrary to national constitutional identity, the national judge is obliged to ask the Court of Justice of the European Union to interpret this Union law, and only the Court of Justice can establish/declare whether the specific union legal norm is in contradiction with the national constitutional identity of the state in order to "allow" the non-application of this union legal norm".[47]

This explains why the European legislator uses terminology and linguistic apparatus though presupposing clarity in European law that does not depend on the legal system and the national language in which the translation is performed, there is often a discrepancy. It is because, as argued previously, it is difficult to ensure a neutral position in the processes of interpretation. Thus on the one hand, we observe cultural relativity and the inevitable indeterminacy of the foreign text, which probably leads to the gap in meaning between the two languages. On the other hand, there is the requirement for proper and accurate law enforcement, requiring the text to be interpreted as precisely as possible.

The requirement of proper and accurate law enforcement is largely the reason for the existence of a specialized procedure for the interpretation of EU acts, carried out directly by the Court of Justice of the European Union (ECJ). ECJ has undoubtedly established itself as an authority, ensuring the uniform interpretation and correct application of European law. As Borchard puts it: "any system will endure only if an independent authority supervises its rules. What is more, in a union of states, the common rules – if they are subject to control by the national courts – are interpreted and applied differently

[44] A Semov, 'Neprilagane na pravoto na ES poradi zachitane na natsionalnata identichnost' (16 November 2020) NewsLex news.lex.bg.

[45] R Masiola and R Tomei, *Law, Language and Translation* cit. 14.

[46] *Ibid*.

[47] A Semov, 'Non-application of EU Law Due to Respect for National Identity' cit.

from one state to another. The uniform application of Union law in all Member States would thus be jeopardized".[48]

According to Popova, the ECJ is empowered by the founding treaties with the exclusive competence to "interpret EU law, and rule on the validity of the Secondary law".[49] The Court of Justice of the European Union exercises this exclusive competence through the so-called preliminary rulings proceedings. The purpose of the reference for a preliminary ruling is to ensure that EU law is uniformly applied throughout the Member States. Popova maintains that through this specialized legal method "differences in the interpretation of Union law to be applied by national courts are prevented. It seeks to ensure this application by providing the national judge with a means of eliminating the difficulties that the requirement of ensuring the full functioning of Union law within the judicial systems of the Member States may cause".[50]

According to art. 36 of the rules of procedure of the Court of Justice of the European Union, any proceedings may be conducted in any of the official languages of the EU. As regards preliminary ruling proceedings, the language in which it is conducted must always be the national language of the Court that has made the reference.

To eliminate the possibility that one of the language versions of a legislative act may take precedence over the others, the Court of Justice has developed an interpretative method by which it interprets the meaning by comparing the different language versions of the same legislative act. Semov writes: "the provision must not be considered in only one of the language versions, but must be interpreted in the light of their entirety, without one of them being decisive in the absence of precise linguistic version compliance".[51] In cases where the language versions of the same legislative act differ from each other, the Court conducts an interpretation that establishes the most appropriate meaning among "competing interpretations".[52] For these reasons, Paunio concludes that in cases where the Court found any discrepancy between the different translations (*i.e.*, there is a discrepancy of meaning in the language versions of the same normative act), "a choice must be made between different meanings in language versions. This implies that the ECJ needs to create a new meaning for one or more languages involved".[53] In this process, the Court uses as an interpretative basis the context of EU law as a whole, thus enabling the Court of Justice to provide a correct interpretative result based on the objectives or, in other words, on the

[48] K Dieter-Borchardt, *The ABC of EU Law* (Publication of the European Union 2017) 80.

[49] J Popova, *ravo na Evropeyskiya sayuz* (2nd edn, Ciela Press 2012) 425.

[50] *Ibid*. 429.

[51] A Semov, 'Nay-vajni resheniya na Sada na Evropeyskite obshtnosti: S komentari' (2007) Institut po Evropeysko pravo 107.

[52] J R Siegel, 'The Inexorable Radicalization of Textualism' (2009) UpaLRev 117-130.

[53] E Paunio, *Legal Certainty in Multilingual EU Law* cit. 119.

intention of the legislator, and not based only on the objective literal linguistic expression. In literature, this method is defined as "a teleological or contextual method".[54]

Similar to the rulemaking process in national law, where preparatory work can provide an initial interpretative basis on which the interpreter could extrapolate the initial intention embedded in a normative act when it comes to the interpretation of acts of secondary Union legislation, the Council minutes may provide a parallel interpretative basis. Of course, it should be borne in mind here that "the statements recorded in the minutes reflect the positions of their authors. They may not in any way limit the scope or legal consequences of the legal act, which the content of the act itself can only determine".[55]

When interpreting a provision, the statements based on which the interpretation itself is made should be used only as a guaranty confirming or rejecting the meaning obtained in interpreting the linguistic expression of the norm itself. Where semantics and pragmatics, taken separately, are incapable of serving as a solid basis for extrapolation of the correct linguistic meaning of the normative text, the recourse to semantics in context – *i.e*. paired with pragmatics – could give correct meaning to the acts of the Union.

All this aims at the following: when an act has been interpreted, regardless of the language in which it is created or translated, the process must lead to the establishment of the actual intention that underlies its creation by the rulemaking body, and to determining the applicability of the text in the specific discourse. In this sense, if we return to the considered principle of respect for national identity, we will find that (as Semov writes): "[b]ased on an active dialogue between the constitutional and other jurisdictions in the Member States, the Court has not only clarified and expanded the concept of protected national identity of the Member States but also required a comprehensive common understanding of the integration structure".[56]

This is just one of many examples based on which we can say without a doubt that the Court of Justice of the EU serves as a guaranty for the preservation of the unity and proper functioning of Union law in the territory of all Member States. Without the ECJ, it would have different meanings and different consequences. Therefore, "aid of the ECJ is constantly required. To the extent that EU law is multilingual, national courts and administrative authorities cannot rely solely on their own understanding of the European law drafted in their language".[57]

[54] K Davies, *Understanding European Union Law* (Routledge 2013) XXXI.

[55] Council of the European Union, *Comments on the Council's Rules of Procedure European Council's and Council's Rules of Procedure* www.consilium.europa.eu.

[56] A Semov, 'Neprilagane na pravoto na ES poradi zachitane na natsionalnata identichnost' cit.

[57] A M López-Rodriguez, 'Toward a European Civil Code Without a Common European Culture?' cit. 1213.

IV. Common European legal discourse as a way to overcome relativism

Difficulties in the process of interpreting EU multilingual law could be overcome through a shared unified legal culture because, like Katton notes: "[c]ulture, in fact, is not a factor but rather the framework (the context) within which all communication takes place".[58] That is why, through such a common intercultural legal discourse which is the necessary specific system of interpretative rules and methods and thus provides unambiguous interpretation within the specific legal system, a shared uniform linguistic meaning can be achieved in European legislation. In the context of Engberg's weak language theory, this shared European discourse could be seen as possible only "in the form of convergence between conventional relations of material entities and meant entities across languages. The primary prerequisite is that there are communicative instances in which communicators may engage with each other and build up experiences, which they will have recourse to in subsequent communicative instances and thus in subsequent semiotic processes".[59] This shared legal discourse could be achieved, apart from the legal lexicon used in a given legal system, by picking the totality of the shared European normative discourse. The totality of the shared European discourse includes all those specifics which constitute the language conventions and normative structures that are immanent to the individual legal order. Here I follow Davidson's views about linguistic conventions, who notes that "the conventional element in language can only be linked to people's desire to speak like the other participants in the communication process".[60] Thus, through this common European discourse, the linguistic conventions can be seen as equally recognised word's meaning, but not as an interpretative result. Fiss declares that "interpretation is constrained by disciplining rules and by the existence of an interpretative community which recognises standards and "a set of norms that transcend the particular vantage point of the person offering the interpretation".[61] Equal meaning in European legislation would not be the result of uniform interpretation, but rather of mutually recognised meaning. They would not have their meaning without the necessary context for their proper use, clarification of their specific origin, the way they are included, and their cultural contingency. The most appropriate method for achieving these ends is the epistemological analysis, as Sage-Fuller and others state: "epistemology requires a historical, ethical, and metaphysical inquiry to understand the meaning of words and expressions in a tradition. Semantics are insufficient as they are often ahistoric".[62] As López-Rodríguez writes, it is only within a shared general legal discourse that "even linguistic diversity will be a minor

[58] D Katan, *Translating Cultures* cit. 324.

[59] J Engberg, 'Word Meaning and the Problem of a Globalized Legal Order' cit. 177.

[59] A Pym, *Exploring Translation Theories* cit. 178.

[60] V Buzov, *Filosofiya na ezika* cit.

[61] OM Fiss, 'Objectivity and Interpretation' (1982) Stanford Law Review.

[62] B Sage-Fuller, F Prinz Zur Lippe and S Ó Conaill, 'Law and Language(s) at the Heart of the European Project: Educating Different Kinds of Lawyers' (2013) Law and Language: Current Legal Issues 500.

problem".[63] This will significantly facilitate the interpretation and application of European law by the various courts and administrative authorities in the Member States. Moreover, according to López-Rodríguez, "even the solutions for many legal issues could be "taken for granted" without having to constantly resort to the ECJ for a preliminary ruling".[64]

When we talk about a common European legal discourse linked to a single language, the question arises as to which language should this be? The question cannot be answered unequivocally, as the problem of linguistic diversity in the EU and respect for the national and linguistic identity of the Member States re-emerges. As a comparison, in the Middle Ages this problem did not exist, because then "Latin was used as a common legal language throughout Europe".[65] Common legal discourse, built on a single language, seems rather impossible, in light of the linguistic diversity in the Union. According to Sage-Fuller and others, such considerations motivate the need for "bilingual legal education or legal education through a language other than the dominant language of the jurisdiction",[66] that would allow students to act as a link between the various legal systems in the EU, as they would be able to observe "how the law of the EU cannot be affected by the linguistic diversity that exists in Europe".[67] This bilingual education is very reminiscent of the so-called by Gerdjikov "cross-cultural experience"[68] through which individuals adopt a culture that is new and unknown to them. In this process, students learn to create cognitive connections by which to recognize and understand their new culture, and thus to communicate with it. Such a procedure is inevitable in modern society, and it would be a logical continuation of the centuries-old tradition of intercultural and multilingual communication within European Union. In this regard, Habermas thinks that "translingual citizenship uniting such a numerous variety of different language communities is a novelty. But Europeans already share the principles and values of largely overlapping political cultures".[69] A common European legal discourse can be built only through direct cultural experience exchange between the various legal traditions. As Buzov points out, fruitful communication between cultures is at the heart of their better mutual understanding and shows the only alternative to a better future for humanity. Probably this is the process Katton refers to when he says that the first level of integration is the process in which "someone attains the ability to analyze and evaluate situations from one or more cultural perspectives".[70]

[63] A M López-Rodríguez, 'Toward a European Civil Code Without a Common European Culture?' cit. 1220.

[64] *Ibid*.

[65] *Ibid*. 1218.

[66] B Sage-Fuller, F Prinz Zur Lippe and S Ó Conaill 'Law and Language(s) at the Heart of the European Project' cit. 499.

[67] *Ibid*. 497.

[68] S Gerdjikov, *Filosofiya na otnositelnostta* cit. 252.

[69] J Habermas, 'An Exploration of the Meaning of Trans Nationalization Democracy, Using the Example of European Union' in P Deutscher and C Lafont (eds), *Critical Theory in Critical Times: Transforming the Global Political and Economic Order* (Columbia University Press 2017) 12.

[70] D Katan, *Translating Cultures* cit. 337.

Perhaps similar considerations shape the views of Sage-Fuller and others who write that "the relationship between European legal traditions is at the heart of the European Union and is indispensable to the creation of coherent European law and effective and efficient legal structures".[71] Thus, integration law would be uniform, discrepancies would be minimized, and coherence, clarity, and unanimity would be achieved. Here we can say that in this process, a significant role is played by the translator, who is, according to Kattan, "a cultural interpreter or mediator and has a supra-cultural mission: to improve cross-cultural cooperation, and build trust and understanding between communities".[72]

V. Conclusion

The EU is a supranational entity that unites many different legal systems. All these united legal systems have their own linguistic arsenal and legal vocabularies, which causes many difficulties in legal translation of European legislation.

There is much evidence for the thesis that translation indeterminacy and cultural relativity engender impossibility of uniformity and clarity of EU law, as many authors and I have shown. Notwithstanding the multitude of ways in which the European institutions attempt to provide uniformity, differences between the language versions of the European legislation can still be found, and ambiguity frequently appears in the interpretation of European legislation and in the national context of the Member States. So, this equality is often assessed as a legal fiction.

In this *Article*, I have argued that only through shared European legal discourse as a common system of interpretative rules and methods can overcome linguistic differences and ambiguities. The ultimate goal, or, as we may say, the ideal of the European law is that it come to function with equal linguistic meaning in all official languages. Without this, fundamental principles of law will be violated. A shared legal discourse could provide much-needed uniformity of meaning. This meaning would not result from incorrigibly uniform interpretation but from mutually recognised linguistic meaning that is accepted by all.

As I have already shown, a common legal discourse could contribute to the achievement of uniformity, minimizing the differences in meaning or even destroying the fiction, transferring the uniform meaning into reality. Therefore, only when we replace cultural relativism with cross-cultural interaction and only when we learn to use linguistic and cultural differences as a source of potential opportunities for development and enrichment of our own culture (which does not erase its own specifics and differences) and only if we share a common European discourse, then we can rationally discuss equality and share common linguistic conventions and unequivocal supranational law.

[71] B Sage-Fuller, F Prinz Zur Lippe and S Ó Conaill, 'Law and Language(s) at the Heart of the European Project' cit. 496.

[72] D Katan, *Translating Cultures* cit. 337.

ARTICLES

European Institutions Acting Outside the EU Legal Order: The Impact of the Euro Crisis on the EU's 'Single Institutional Framework'

Flore Vanackère* and Yuliya Kaspiarovich**

Abstract: In the aftermath of the global financial crisis, the EU and its Member States had to face very pragmatic issues: how to avoid the economic collapse of Greece, Portugal and Ireland? Decisions had to be taken quickly in any institutional or legal forum that was immediately available. For this specific reason, legal solutions entailing the conclusion of international agreements by some of the EU Member States outside the EU legal framework were taken as a new normal. Due to a close legal relationship between these new international treaties and the EU legal order, a decision was also taken to "borrow" already existing EU institutions and entrust them with new tasks. In this *Article*, we question the role of EU institutions outside the EU legal framework. We first address the evolution of the EU institutional framework in the context of the euro crisis in relation to art. 13 TEU and recital 7 of the TEU preamble and the requirement of "unity of the institutional framework". Section II shows that "borrowing" the EU institutions outside the EU legal framework does not seem to alter the nature of the single EU institutional setting. Section III questions whether the tasks entrusted to the EU institutions outside the EU legal framework do not undermine the existing institutional equilibrium within the EU legal order. Section IV addresses the EU response to the Covid-19 pandemic from an institutional perspective as raising similar concerns within the EU legal order. The last section concludes.

Keywords: EU institutional framework – eurozone crisis – European Stability Mechanism – Covid-19 – Next Generation EU – institutional adaptability.

* Teaching and research assistant, Global Studies Institute, University of Geneva, flore.vanackere@unige.ch.

** Assistant professor, University of Groningen, y.kaspiarovich@rug.nl.

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I. Introduction

"Desiring to enhance further the democratic and efficient functioning of the institutions to enable them better to carry out, within a single institutional framework, the tasks entrusted to them […]". This is the wording of para. 7 of the Treaty on the European Union's (TEU) preamble. The history of the TEU and its preamble is a relatively recent one. It was adopted in 1993 with the entry into force of the Treaty of Maastricht, creating a framework for European communities and other existing "pillars". This explains the desire to further enhance the functioning of already existing institutions.[1]

This *Article* aims at investigating the current role of existing institutions within the complex legal architecture of the European Union (EU) and outside the EU legal framework. In relation to para. 7 of the preamble, art. 13 TEU lists these institutions as a "single institutional framework" within the EU. According to para. 7 and art. 13 TEU, the EU institutions should "act within the limits of the powers conferred [on them] in the Treaties" or "carry out […] the tasks entrusted to them". In other words, the institutions established by the Treaties shall act only in respect of the competencies conferred upon them by the Member States in the Treaties. As established, the Court of Justice of the European Union's (CJEU) case-law allows tasks to be attributed to the EU institutions by the Member States outside the EU legal order.[2] Those tasks, however, cannot alter the essential character of the powers conferred on the institutions by the EU Treaties. What happens if the EU institutions are "used" outside the EU legal framework? Or even worse, what happens if the EU institutions are empowered to act outside the EU treaties circumventing the obligations enshrined in them?

Even though these questions seem to be completely hypothetical, they could not be more concrete, especially for the last decade. Indeed, in the aftermath of the 2008-2009 worldwide economic and fiscal crisis, the EU Member States had to take urgent measures aimed at helping the most vulnerable eurozone economies (particularly, the countries nicknamed the "PIIGS": Portugal, Italy, Ireland, Greece, and Spain). To this end, the eurozone Member States established some *ad hoc* mechanisms outside the EU legal framework. The last of them was the European Stability Mechanism (ESM), an international law institution, put in place *via* the conclusion of an intergovernmental treaty. Though it is situated outside the EU legal order, the ESM mobilizes EU institutions in its functioning. As we will see in more detail *infra*, some of the EU institutions negotiate and conclude agreements

[1] The institutional structure conceived "in pillars" by the authors of the Maastricht Treaty was not the same as the one conceived by the authors of the Treaty establishing a Constitution for Europe. The purpose of this *Article* is to focus on the current challenges posed by the evolution of EMU to the institutional structure of the Union. Therefore, we will not address the transition from the "pillar structure" of the EU to the "single institutional framework", as announced in the preamble of the Lisbon Treaty.

[2] Joined cases C-181/91 and C-248/91 *European Parliament v Council and Commission (Emergency aid to Bangladesh)* ECLI:EU:C:1993:271; case C-316/91 *Parliament v Council (Lomé Convention)* ECLI:EU:C:1994:76; or more recently, case C-8/15 P *Ledra Advertising v Commission and ECB* ECLI:EU:C:2016:701.

containing economic assistance to EU Member States in difficulty. Thus, they seem to act outside the EU legal framework, far beyond the "tasks entrusted to them", and even exceeding the "essential character of the powers conferred" on them by the Treaties.

In this *Article*, we will question the role of EU institutions outside – but at the margins of – the EU legal framework. We will first address the evolution of the EU institutional framework in the context of the euro crisis in light of the requirement to ensure the unity of the institutional framework. Then, our analysis will focus on the institutional setting of the ESM. The first Section will show that the "empowerment" of the EU institutions with tasks outside the EU legal framework does not seem to alter dramatically the nature of the EU institutional setting. After all, the same institutions are simply just act to preserve "general interest of the Union". As example, we will discuss the evolution of the eurozone governance on the margin of the EU legal order and its implications on the unity of the EU institutional framework (II). The following Section will question whether the tasks entrusted to the EU institutions outside the EU legal framework do not undermine institutional equilibrium as it exists within the EU legal order (III). In the light of this analysis, the fourth Section will examine the EU emergency response to the Covid-19 pandemic and the role of the EU institutions in it (IV).

II. The case of the ESM: why the eurozone's governance system does not question the unity of the EU institutional framework

On September 15, 2008, one of the most spectacular bankruptcies in the history of the U.S. banking sector occurred. With the subprime mortgage crisis already well underway, the collapse of Lehman Brothers sounded the death knell for fundamentally reckless speculative practices. Given the significant intertwining of various financial markets and actors, a series of doubts emerged about the solvency of the financial system as a whole. As early as the end of 2008, some economists spoke about a "systemic" crisis and rightly so. Regulatory changes were too few and far too late.[3] In 2008-2009, the global financial crisis immediately followed this failure, triggered by the collapse of the derivatives market, which then spread to the real economy and affected the whole complex network of financial interrelations and interdependencies. Reckless practices, questionable lending to economically and financially weaker or vulnerable States,[4] the lack or insufficiency of adequate regulations and controls, poorly designed, if not "rotten" financial products and their rapid dissemination in the global financial market, a serious loss of confidence in the credit institutions' capacity to value their financial assets… All of

[3] AJ Menendez, 'The Structural Crisis of European Law as a Means of Social Integration from the Democratic Rule of Law to Authoritarian Governance' (ARENA Working Paper 2-2016).

[4] Think of the practices developed in Greece by the financial institution Goldman Sachs. See M Lynn, *Bust: Greece, the Euro and the Sovereign Debt Crisis* (John Wiley & Sons 2010).

these are interconnected factors which led to the eruption of a large-scale financial crisis, which rapidly turned into a public debt crisis affecting some euro area countries.

Indeed, some States, particularly in Europe, had some financial institutions and a number of credit institutions investing in their debt that were in difficulty. As a result of this "financing" of their debt, the economies of the States became highly dependent on the financial markets, mainly by means of the emission of bonds. In turn, some of these States have invested in the assets of several financial institutions, without necessarily having carried out any control on the quality of the assets in which these investments were made. Thus, in order to avoid some systemic banking institutions to collapse, it became necessary to inject capital, acquire "toxic" assets or extend conditional guarantees. Accordingly, the financial institutions concerned were absolved of any responsibility due to an erroneous assessment of the risks.[5] In addition, when some credit institutions ran into serious difficulties due to their speculative practices and started to incur irrecoverable losses, a series of national public institutions intervened to support the bail-out of too-big-to-fail financial institutions, either by injecting capital directly or by acquiring stakes in "dangerous" or "rotten" assets of the financial institutions.

As a result, some countries got into significant economic difficulties in terms of public debt, as they were already under strain from previous decisions establishing increasingly strict fiscal rules and had suffered a decline in tax revenues since the beginning of the crisis.[6] A major failure of the banking sector at global level, which caused a massive increase in public debt, was the main cause of this systemic crisis. In response to the crisis, a legal framework was established very quickly at a European and global level, despite the great technical complexity of the failures to be addressed. In this – for some EU countries – dramatic context, the setting up of an intergovernmental institutional framework *via* the European Financial Stability Facility (EFSF), the ESM and the Fiscal Compact outside the EU legal framework[7] was justified by the urgency of the financial and economic crisis that hit the eurozone hard from 2009. The establishment of this new governance system, however, calls into question certain principles contained in primary law, notably the unity of the institutional framework of the Union contained in para. 7 TEU's preamble.

In the following Section, we propose to investigate the complex legal setting of the ESM and some issues related to the "borrowing" of EU institutions outside the EU legal framework. We will start by briefly explaining how this mechanism was set up (II.1); we will then explore the functioning of the ESM and provide some elements of the answer to the question raised in the introduction (II.2).

[5] AJ Menendez, 'The Structural Crisis of European Law as a Means of Social Integration' cit. 3.

[6] C Bradley, 'From Global Financial Crisis to Sovereign Debt Crisis and Beyond: What Lies Ahead for the European Monetary Union?' (2013) TransnatlL&ContempProbs 9, 17.

[7] B de Witte, 'Using International Law in the Euro Crisis: Causes and Consequences' (ARENA Working Paper 2013).

II.1. The establishment of the ESM

The ESM is an international institution established by an intergovernmental treaty in 2012 by 17 Member States of the eurozone. This treaty replaces the European Financial Stability Mechanism (EFSM)[8] and the EFSF and consists of an international financial institution set up which finds its source in the primary law of the Union. The establishment of the ESM was theoretically possible only by amending the TFEU, as the existence of such a mechanism was not provided for in the Treaties – even though in its *Pringle* judgment, the CJEU stated the opposite arguing that the participation of the EU Member States in the ESM was not in violation of the EU Treaties and was thus possible without amending them.[9]

Indeed, one should remember that on the basis of art. 48 TEU, following the simplified revision procedure,[10] the European Council adopted a decision on March 11, 2010, to amend art. 136 TFEU, which is found in the chapter specifically concerning those Member States whose currency is the euro. Since its amendment in 2011, art. 136 TFEU contains a third paragraph which states that: "The 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". However, this amendment was not in force when the ESM entered into force,[11] and the ESM was thus put in place as an intergovernmental organization based on an international treaty between the euro area Member States.

There were several reasons for setting up the ESM as an intergovernmental structure. First of all, the economic emergency in which the eurozone found itself when the first structures for providing financial assistance to Member States were adopted justified the need to quickly set up an assistance structure *via* an intergovernmental route – with the lack of legitimacy[12] that this solution implies – rather than the "community" route. Furthermore, the capacity of the previous mechanisms – EFSM and EFSF – to act was very poor. The former, based on art. 122 TFEU, had a very limited lending capacity which did

[8] Established on the basis of art. 122 TFEU, thus within the legal and institutional framework of the EU.

[9] Case C-370/12 *Pringle* ECLI:EU:C:2015:400 paras 68, 72, 109 and 184, when the Court states that "the amendment of Article 136 TFEU by Article 1 of Decision 2011/199 confirms the existence of a power possessed by the Member States" (para. 184).

[10] Art. 48(6) TEU provides with a simplified procedure for revising the Treaties and contains two substantial conditions in addition to the procedural conditions required for amending the Treaties. First, the revision can only concern the third part of the TFEU; second, the amendment cannot increase the competencies that are attributed to the EU in the Treaties.

[11] This amendment entered into force in 2013.

[12] About legitimacy in the functioning of the EMU, see V Schmidt, *Europe's Crisis of Legitimacy Governing by Rules and Ruling by Numbers in the Eurozone* (Oxford University Press 2020). On the consequences of euro-crisis institutional upheaval and legitimacy concerns, see M Dawson and F de Witte, 'Constitutional Balance in the EU after the Euro-Crisis' (2013) ModLRev 817.

not allow it to address the difficulties faced by Greece. The later mechanism had a greater capacity of action but was limited in time.

As it has often been pointed out, the establishment of the ESM raised numerous questions of compatibility with primary EU law.[13] These issues were addressed by the Court first in its famous *Pringle* judgment. In this case, the Court not only decided on the delicate issue of allocation of powers (economic v. monetary policy) but also concluded that the ESM was not in violation of the no bail-out clause laid down in art. 125. The Court also checked the compatibility of the ESM with arts 122[14] and 123 TFEU[15], art. 13 TEU and its principle of institutional balance,[16] and finally with principle of loyal cooperation as set out in art. 4(3) TEU[17]. With no surprise, the conclusion was that the ESM is perfectly consistent with the EU law. While, in a context of economic and financial emergency, the Court considers the ESM to be compatible with primary law on all the points raised by

[13] P Craig, 'Pringle and Use of EU Institutions outside the EU Legal Framework: Foundations, Procedure and Substance' (2013) EuConst 263, 273; J Tomkin, 'Contradiction, Circumvention and Conceptual Gymnastics: The Impact of the Adoption of the ESM Treaty on the State of European Democracy' (2013) German Law Journal 169, 172. More nuanced, other authors have argued that the Court in its *Pringle* case played with the ambiguous terms of the "no bail-out clause". See PA Malleghem, 'Pringle: A Paradigm Shift in the European Union's Monetary Constitution' (2013) German Law Journal 141, 162.

[14] Regarding the question related to the compatibility of the ESM with art. 122 TFEU raised by Irish Supreme Court, the CJEU answers that the action of Member States in establishing an assistance mechanism such as the ESM does not in any way impede the Union's powers to set up a mechanism on the basis of art. 122 TFEU. According to the CJEU, art. 122 TFEU is not a satisfactory legal basis for the establishment of the ESM. See *Pringle* cit. paras 115-122. The failure to rely on existing Treaty provisions has been heavily criticized, not only by legal scholars, but also by the European Parliament (see European Parliament, Resolution of 23 March 2011 on the Draft European Council Decision Amending Article 136 of the Treaty of the Functioning of the European Union with Regard to a Stability Mechanism for Member States Whose Currency Is the Euro, and the ECB (see European Central Bank, Opinion of 17 March 2011 on a Draft European Council Decision Amending Article 136 of the Treaty on the Functioning of the European Union with regard to a Stability Mechanism for Member States Whose Currency Is the Euro para. 8).

[15] Art. 123 TFEU enshrines the prohibition on the ECB to acquire Member States' debt directly, just like does art. 125 TFEU, with the aim that Member States should pursue a sound budgetary policy. As it has been noted, and rightly so in our view, a link can be established between the ESM and what was called the ECB's "unconventional policy" (the Outright Monetary Transaction – OMT – program). Indeed, the OMT program foresees that, if a Member State is assisted by the ESM via the conclusion of a memorandum of understanding, the ECB can buy State's debt unlimitedly – in contradiction with art. 123(1) TFEU. One could thus see the ESM and its aid programs as a way to circumvent the prohibition of art. 123 TFEU *stricto sensu*. We will not elaborate further on this point, as the OMT program and other "unconventional policies" led by the ECB is not the main topic of this article. For more details see K Pantazatou and IG Asimakopoulos, 'Conventional and Unconventional Monetary Policy' in F Fabbrini and M Ventoruzzo (eds), *Research Handbook on EU Economic Law* (Elgar Publishing 2019) 173.

[16] Section III of this *Article* will discuss in detail the consequences of the *Pringle* judgment on the principle of institutional balance laid down in art. 13 TEU. Indeed, even if the Court does not clearly raise the question of institutional balance in its *Pringle* judgment, this principle is however at stake in Court's reasoning on art. 13 TEU. See M Chamon, "The Institutional Balance, an Ill-fated Principle of EU Law?" (2015) EPL 371, 388.

[17] *Pringle* cit. paras 148-152.

the complainant[18], there are several arguments on which this decision has to be criticized. Although, the purpose of this *Article* is not to provide yet another commentary on the Pringle judgment[19], some critical considerations shall be addressed below.

First, the way the Court differentiates monetary and economic policy – a delimitation which is the fundamental condition for the validity of the ESM under art. 48(6) TEU – is not satisfactory.[20] Indeed, and as it was already suggested by Paul Craig, the argument that the ESM was primarily about monetary policy, in the light of the wording of arts 3 and 12 of the ESM Treaty[21], is the key.[22] However, the Court's argumentation in the Pringle case can be summarized as follows: stability of euro within the EU monetary policy and stability of the euro area within the ESM are completely different objectives. According to the Court, the ESM cannot be seen as pursuing a "monetary policy" (exclusive EU competence) objective but an "economic policy" (Member States' competence that EU can only coordinate).[23] In our view, the Court, by displaying its tautological legal formalism and not elaborating sufficiently enough its reasoning on the delimitation of both competences, misses the opportunity to clarify the real *raison d'être* of the ESM in the light of economic realities.[24] As it was shown in the Section II, the systemic nature of the economic crisis and the intertwined nature of current economic realities makes such a distinction if not technically impossible,

[18] It was not surprising as the opposed solution "would have precipitated further crisis in the financial markets" (see P Craig, 'Pringle: Legal Reasoning, Text, Purpose and Teleology' (2013) Maastricht Journal of European and Comparative Law 1).

[19] See among others PA van Malleghem, 'Pringle: A Paradigm Shift in the European Union's Monetary Constitution' (2013) German Journal of Law 141, 163; B de Witte, 'The Court of Justice approves the creation of the ESMS outside the EU legal order: Pringle' (2013) CMLRev 805, 831; P Craig, 'Pringle: Legal Reasoning, Text, Purpose and Teleology' cit.

[20] As a reminder, the simplified revision procedure of art. 48(6) TEU could only be mobilized if, *inter alia*, the parts of the Treaties other than part III of the TFEU were not affected by the envisaged amendment. However, according to the complaint raised by Thomas Pringle as related in the first preliminary question of Irish Supreme Court, the Member States of the Eurozone acted in the field on EU monetary policy by establishing the ESM (which is an exclusive competence of the EU) and not economic policy as argued by the Court (which is primarily a Member States' competence exercised under the coordination of the competent EU institutions). This amendment of EU Treaties thus affected the provisions on the division of competences contained in the first part of the TFEU which could not be done *via* a simplified revision procedure.

[21] These two dispositions express the main objective pursued by the ESM, the stability of the Euro area as whole.

[22] P Craig, 'Pringle: Legal Reasoning, Text, Purpose and Teleology' cit. 5. According to the author, and we follow him on this, "the reasoning [of the CJEU on this distinction] was strained".

[23] According to the Court, "the objective pursued by [the ESM], which is to safeguard the stability of the euro area as a whole, [is] clearly distinct from the objective of maintaining price stability, which is the primary objective of the Union's monetary policy". See *Pringle* cit. para. 56.

[24] Indeed, the two objectives do not seem to us, on economic grounds, to be so distinct as the Court claims it to be in *Pringle* cit. para. 56.

at least intellectually problematic. As we shall see below,[25] this unsatisfactory distinction raises concerns with regard the ECB's action and liability in the context of the ESM.

Second, one may ask whether the establishment of such a mechanism on the fringe of primary law has circumvented certain provisions of primary law, in particular the no bailout rule,[26] as well as the already existing possibility of providing financial aid to a Member State facing extraordinary difficulties within the framework of the Union.[27] Indeed, initially adopted in the Maastricht Treaty, the non-bailout clause was intended to create a monetary union, which excluded, among other things, the bailing out of Member States in difficulties. In this respect, the establishment of a financial assistance mechanism such as the ESM raises obvious questions of compatibility with arts 123 and 125 TFEU. Furthermore, as the records of the negotiations show, Member States explicitly agreed that the EMU should be a "no bailout" EMU.[28] However, in its *Pringle* judgment, the Court validates the ESM as being compatible with the EU Treaties' "no bail-out clause". According to the Court, the objective of this provision is to ensure that Member States pursue sound budgetary policies, an objective which is consistent with the strict conditionality attached to the aid granted under the ESM.[29] Court argues that financial assistance is granted to Member States on the basis of strict conditionality. Thus, an assisted Member State should be encouraged to pursue a fiscal policy that respects the spirit and the objective of art. 125 TFEU. This reading of art. 125, if it allows the validation of the ESM, is not entirely convincing. The prospect of financial assistance in the case where a Member State would be unable to finance itself on the markets seems to us, on the contrary, to fundamentally impact the way in which Member States shall conduct their budgetary policy in the Union. The Court with its understandable concern to validate the ESM is however unconvincing in its legal reasoning.

[25] See section II.2 concerning the institutional functioning of the ESM.

[26] Art. 125 TFEU states that: "[t]he Union [or a Member State] shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of any Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project".

[27] Art. 122 TFEU states that: "1. Without prejudice to any other procedures provided for in the Treaties, the Council, on a proposal from the Commission, may decide, in a spirit of solidarity between Member States, upon the measures appropriate to the economic situation, in particular, if severe difficulties arise in the supply of certain products, notably in the area of energy". 2. Where a Member State is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control, the Council, on a proposal from the Commission, may grant, under certain conditions, Union financial assistance to the Member State concerned. The President of the Council shall inform the European Parliament of the decision taken".

[28] European Parliament, *EP Analytical Summary of the Debates on EMU for the ICG* (11 June 1991) ec.europa.eu.

[29] The Court states that "[g] iven that that is the objective pursued by Article 125 TFEU, it must be held that that provision prohibits the Union and the Member States from granting financial assistance as a result of which the incentive of the recipient Member State to conduct a sound budgetary policy is diminished [...]". See *Pringle* cit. para. 136.

One could elaborate further and further on this judgment, as it is one of the fundamental cases not only in the field of EMU policy but also more largely concerning the institutional balance within the EU. We shall remind our reader however that the objective of our *Article* is not to draw a comprehensive critical analysis of this case, but rather to show that the establishment of the ESM continues to raise constitutional questions of fundamental importance for the EU. In spite of previous considerations, one should acknowledge that the ESM is closely entangled with EU law and, therefore, evolves in parallel with it. This closeness is indicated by several observations. Indeed, the very existence of the ESM is based on a provision of EU primary law. Moreover, its structure is a continuation of previous mechanisms adopted in the framework of the Union's economic policy.[30] And finally, an ongoing reform of the ESM and of the Banking Union will further contribute in bringing the institutional frameworks of the ESM and of the Union closer together.[31]

II.2. The institutional functioning of the ESM

As we said above, the purpose of the ESM is to provide stability support – *i.e.*, financial assistance – to Member States in serious financial and economic difficulties or at risk of such difficulties, but only on the condition that such assistance is essential to preserve the stability of the euro area (art. 3 of the ESM Treaty). The ESM has a lending capacity of EUR 700 billion, and the States Parties contribute to it in accordance with the distribution key set out in art. 8 and detailed in the Annex to the ESM Treaty. This distribution key is based on the relative contribution capacities of the Member States and, therefore,

[30] Especially the "six-pack" and "two-pack" which aim at strengthening the economic governance in the Eurozone, both *via* a preventive and a corrective branch. See the consideration of the CJEU in *Pringle* cit. paras 58-59. The Court states that "the stability mechanism whose establishment is envisaged by art. 1 of Decision 2011/199 serves to complement the new regulatory framework for strengthened economic governance of the Union".

[31] At the Euro Summit meeting of 29 June 2018, the EU leaders agreed that "[t]he ESM will provide the common backstop to the SRF" (see the statement of the Euro Summit: European Council, *Meeting on 29 June 2018* www.consilium.europa.eu). The ESM common backstop would take the form of a revolving credit line and would be a last resort tool subject to the principle of fiscal neutrality in the medium term. This reform is now about to take place, as the international agreements amending the ESM on the 27 January 2021. Among others, art. 3 of the ESM Treaty has been supplemented by a paragraph indicating that "The ESM may provide the backstop facility to the SRB for the SRF to support the application of the resolution tools and exercise of resolution powers of the SRB as enshrined in European Union law". For further details, see European Council, *Statement by the Eurogroup President, Paschal Donohoe, on the signature of ESM Treaty and the Single Resolution Fund Amending Agreements* www.consilium.europa.eu. For further details about this reform, see JP Keppenne and Others, 'An ESM Backstop Facility to the Single Resolution Board: The Difficult Marriage of an EU Mechanism and an Intergovernmental Institution' in D Fromage and B de Witte (eds), 'Recent Evolutions in the Economic and Monetary Union and the European Banking Union: A Reflection' (Maastricht University Working Paper 2019) 38. This *Article* shall not address this topic further on.

influences the voting rights in the Board of Governors.[32] It is important to recall that the assistance granted to the requesting Member State is strictly conditional: indeed, the third paragraph of art. 136 TFEU provides that the granting of financial assistance is subject to strict conditionality. This corresponds to conditions linked to reforms that the Member State concerned must carry out to benefit from financial assistance from the ESM.[33] The principle of conditionality is central to the financial assistance policy of the ESM and is mentioned several times in the ESM Treaty. The "language" of conditionality depends on the situation of the assisted Member State and shall be elaborated in the Memorandum of Understanding concluded with such.[34]

"[T]he EU and the ESM are closely linked, notably because of their partially parallel membership and objectives [and] a number of factors indicate a strong link and even interdependence with Union law".[35] Even more than simply existing "in parallel", which would imply that both structures do not overlap, the ESM operates essentially by mobilizing both the institutions of the Union, as understood in the strict sense – *i.e.*, within the meaning of art. 13(1) of the TEU – and institutions whose existence is provided for by primary law but which are not included in art. 13 TEU. In fact, although it is an intergovernmental institution with a distinct legal personality, its operational power is based on the institutions of the Union. The Board of Governors is the decision-making body of the ESM and is composed of the Ministers of Finance of the Member States whose currency is the euro… just like the composition of the Eurogroup.[36] Eurogroup is an informal body whose existence is not formally mentioned in the Treaties under of art. 13 TEU alongside other institutions of the Union but can be found in art. 137 TFEU. Protocol 14 to the Treaties defines it as an informal meeting of the Ministers of Finance of the Member States.[37]

[32] This preponderant weight of the general creditor states in the decision-making process, while easily understandable due to the different contribution capacities of each Member State, nonetheless results in a notable imbalance between Member States of the Eurozone. For further details, see F Fabbrini, 'States' Equality v States' Power: The Euro-crisis, Inter-State Relations and the Paradox of Domination' (2015) CYELS 3, 16. The author states that "the Euro-crisis and the legal and political responses to it have also produced relevant constitutional implications for the horizontal relations of power between the Member States".

[33] This will often involve some of Member States' social and economic policies - removal of "employment disincentives" for example, or increased budgetary imperatives generating so-called "austerity" (budget cuts for certain policies); also structural reforms linked to programs or funds for privatization of state's assets, programs for recapitalization of certain financial institutions by the debtor Member State, etc. Looking at the Memorandum of Understanding between the ESM and Greece, it appears that the main areas of reform are fiscal and other structural policies: policy concerning social welfare, financial stability (*i.e.*, support for financial institutions), labor and product markets, privatization policy, and modernization of public administration.

[34] We will examine further on the procedure to conclude such instruments.

[35] JP Keppenne and others, 'An ESM Backstop Facility to the Single Resolution Board' cit. 31.

[36] Treaty establishing the European Stability Mechanism (ESM Treaty) [2012] art. 4.

[37] Art. 1 of Protocol n. 14 on the Euro Group [2008] in particular that: "The ministers of the Member States whose currency is the Euro shall meet informally among themselves".

In addition to Eurogroup, two additional EU institutions are also involved in the functioning of the ESM: The ECB and the European Commission. We will now focus on the role played by the Commission. It is indeed the Commission that negotiates and concludes, on behalf of the ESM, the Memoranda of Understanding containing financial assistance plans. After receiving a request from a Member State in difficulty, it is up to the Board of Governors to decide whether to grant it financial aid or not.[38] If the decision to grant the assistance is positive, art. 13(3) of the ESM Treaty stipulates that it is up to the Commission (and, to a lesser extent, the ECB, possibly assisted by the IMF), to negotiate and conclude the Memorandum of Understanding containing a macroeconomic adjustment program.[39] This assistance instrument may consist of a range of tools listed in arts 14 to 21 of the ESM Treaty.

The Commission has a central role in the ESM's action towards assisted Member States. Initially, and on the basis of a mandate from the Board of Governors, it must assess whether the situation of the Member State that has requested financial assistance jeopardizes the stability of the eurozone as a whole and what the assistance to the debtor Member State would consist of.[40] Subsequently, based on a second decision adopted by the Governing Council, the Commission is responsible for negotiating and signing the Memorandum of Understanding with the concerned Member States in the name and on behalf of the ESM.[41] Finally, the Commission, possibly assisted by the ECB, is responsible for monitoring whether the terms of the Memorandum of Understanding and strict conditionality are being respected, *i.e.*, whether the Member States receiving financial assistance complies with the conditions contained in the agreed economic adjustment program. The Commission's surveillance is carried out in conjunction with the European Semester, which aims at coordinating the economic policies of the EU Member States.

The significant involvement of the Commission in the negotiation and conclusion of the Memoranda of Understanding raises the question of the respect of Union law by the institutions acting in the framework of the ESM, including the respect of fundamental rights. It also questions who - the EU or the ESM - is the responsible entity in the event of an alleged occurrence of damage arising from the execution of these Memoranda of Understanding. More specifically, the question arises as to the unity of the Union's institutional framework in the field of economic and monetary policy.

Following the CJEU's reasoning in the *Pringle* case,[42] it is indeed the ESM that concludes Memoranda of Understanding and must insure the compliance of those with Union law. In this judgment, the Court considers that the institutions of the Union

[38] ESM Treaty cit. art. 13(2).

[39] This macroeconomic adjustment program is composed of financial assistance instruments depending on the situation of the assisted country.

[40] The stability of the Eurozone is, let us recall, the main goal of the ESM in pursuing its financial assistance policy.

[41] ESM Treaty cit. art. 13(1).

[42] *Pringle* cit.

mobilized in the context of the operation of the ESM triggers potential responsibility of the ESM and not of the Union. However, the Court takes care to temper this distinction between the structure of the Union and of the ESM and balance the aim pursued by the ESM against the one pursued by the Union. Thus, it affirms that even when it participates in the first place in the operation of the ESM, the Commission retains its role as guardian of the treaties. The Court goes further in its reasoning and states that the tasks entrusted to the Commission and the ECB in the context of the ESM Treaty do not distort the powers conferred on it by the EU and FEU treaties.[43]

The Court confirms this line in its *Ledra Advertising* judgment,[44] giving it the opportunity to rule more concretely on the role played by the institutions in the functioning of the ESM. This judgment followed on a claim for compensation for the damage caused as the result of application of the Memorandum of Understanding concluded between the Commission and Cyprus.[45] The Court once again tempered the distinction between the institutional framework of the Union and the ESM. It considered that in the case of a dispute arising under a Memorandum of Understanding concluded by the Commission in the framework of the ESM, damages may indeed be claimed from the Commission acting on the EU's behalf.[46] Again, in the context of the ESM, as the Commission pursues an aim similar to that entrusted to it by art. 17 TEU, it retains its role as guardian of the Treaties also in this context.

Thus, according to the CJEU, the involvement of the EU institutions in the negotiation, conclusion and supervision of the Memoranda of Understanding does not call into question the unity of the EU's institutional framework. Admittedly, the Commission and the ECB are acting outside of EU primary law. However, they are still bound to respect it. Moreover, when the Commission acts in the context of the ESM, it pursues, according to the Court, an objective identical to that prescribed by art. 17 TEU which is to "promote the general interest of the Union" and to "oversee the application of Union law".[47]

There is however an institutional issue that the Court fails to address in its *Ledra Advertising* judgment. While it expressly says that the Commission shall act in respect of fundamental rights and freedoms as guaranteed in the EU legal order, the Court does not settle this question with regard to the action of the ECB. Indeed, the ECB is only mentioned

[43] *Ibid*. paras 158-159.

[44] *Ledra Advertising v Commission and ECB* cit.

[45] A Memorandum of Understanding had been concluded with the Cypriot government and was aimed at reorganizing several banking institutions that were experiencing significant difficulties. Several Cypriot individuals as well as Cyprus-based companies had deposits with concerned financial establishments, which are the Bank of Cyprus and the Laiki Bank. The implementation of the measures agreed between the Commission and the government of Cyprus caused a substantial reduction in the value of these deposits.

[46] Which is a surprising conclusion, considering that the Commission does not have its own legal personality. It would imply that the EU would be responsible for damages caused by the Commission in the framework of the ESM.

[47] *Pringle* cit. para. 163.

in the para. 64 of the judgment.[48] The question with regard the ECB's liability in the context of the ESM would however be an important issue to address mainly for two reasons. First, the ECB, unlike the other institutions listed in art. 13 TEU, has its own legal personality.[49] Furthermore, art. 340(3) TFEU, requires it to "make good any damage caused by its actions or by its servants in the performance of their duties". It would have been an important legal development should the Court have assessed the conditions for extra-contractual liability of the ECB with regard its action outside the EU legal framework (within the ESM).

Secondly and even more fundamentally, it seems that the Court contradicts its reasoning previously held in *Pringle* case. According to the Court, Commission's action within the ESM is in accordance with primary law because it continues to exercise its mission as "guardian of the Treaties" enshrined in art. 17 TEU (ensuring the stability of the euro area). In other words, and following the Court's reasoning, it seems that the Commission does not simply act in accordance with the Treaties, it is also somehow extends the reach of EU law beyond EU (in the ESM framework). Similar reasoning cannot be applied to the ECB's action which does not promote the general interest of the Union, but guarantees stability of the euro. Furthermore, the Court said in the *Pringle* judgment that the aim pursued by the ESM (maintaining stability of the eurozone as a whole) must be clearly distinguished from that pursued in the context of monetary policy by the ECB (price stability). In its *Ledra* judgment, the Court is confronted with the question of whether the Commission and the ECB can be held liable in case of a damage resulting from an action or an omission stemming from a Memorandum of Understanding. The Court examined this issue only with regard to a potential action by the Commission but not the ECB. Furthermore, if the Court were to accept that the ECB is required to conduct economic policy, would its action still be considered as being in conformity with the principles of attribution of competences and institutional balance stemming from art. 13 TEU?

Finally, it is important to mention that the CJEU is also involved in the operation of the ESM. Indeed, following art. 37(2) of the ESM Treaty, the Board of Governors shall rule on any dispute arising between a member of the ESM and the ESM or between members of the ESM, relating to the interpretation and application of the ESM Treaty, including any dispute concerning the compatibility of decisions adopted by the ESM with that Treaty. Following art. 37(3) ESM, if a member of the ESM disputes the decision referred to in para. 2, the dispute shall be referred to the CJEU. It seems that "borrowing" the CJEU in a treaty between certain Member States outside of the EU legal framework is consistent with the

[48] The Court says in para. 63 of the judgment that the complaints concerned are related "to compensation for the damage allegedly suffered as a result of, first, the inclusion by the Commission and the ECB of the disputed paragraphs in the Memorandum of Understanding of 26 April 2013 and, secondly, the Commission's inaction in breach of the obligation to ensure, in the context of the adoption of the Memorandum of Understanding, that the latter was in conformity with EU law" (we emphasize).

[49] Art. 282(3) TFEU.

idea of a single institutional framework. The jurisdiction of the CJEU, in this particular case, is based on art. 273 TFEU.[50]

If we were to stick to what is developed above, we could simply answer in the affirmative to the question raised in the introduction to this *Article*. First, the ESM is based on the primary law of the Union – in particular, art. 136 TFEU – and it operates in close coherence with the already-existing "Community" framework concerning the economic governance of the Union – in particular, the "Six-Pack" and the "Two-Pack" and the European Semester. Second, as we have also seen, the institutional framework of the Union – the Commission, the ECB, the CJEU and the Eurogroup in the form of the ESM's Board of Governors – is largely mobilized in the very functioning of the ESM. According to the case law of the Court, this does not call into question the powers entrusted to the institutions by the treaties – even though this case-law leaves some institutional questions that are not fully answered. Third, the ongoing reform of the ESM in relation to the Single Resolution Fund (SRF) makes the relationship between the institutional framework of the ESM and the Union even closer, insofar as the Banking Union is an integral part of Union law – even though the SRF is also set up by an intergovernmental treaty.

However, this conclusion must be tempered. In the second part of this *Article*, we will explore the impact of the task entrusted to the EU institutions under the ESM on the institutional equilibrium within the EU legal order (III).

III. The impact of tasks entrusted to the EU institutions under the ESM on the institutional equilibrium within the EU legal order

As already discussed *supra*, the ESM was established by an international treaty concluded between certain Member States outside the EU legal framework to confront the financial crisis emergency. Following the issue that led to the decision in the above-mentioned *Pringle* case,[51] namely the compatibility of the ESM with various substantive provisions of the EU primary law,[52] it might appear that the international legal framework was mainly used to circumvent the prohibition on the bailout in art. 125 TFEU.[53] It is not the first legal instrument of such a kind usually named in the legal literature as a particular form of intergovernmental cooperation, or a new form of EU law,[54] or even part of differentiated

[50] Such as indicated by recital 16 of the Preamble of the ESM Treaty: "Disputes concerning the interpretation and application of this Treaty arising between the Contracting Parties or between the Contracting Parties and the ESM should be submitted to the jurisdiction of the Court of Justice of the European Union, in accordance with Article 273 of the TFEU".

[51] *Pringle* cit.

[52] P Craig, 'Pringle and Use of EU Institutions outside the EU Legal Framework' cit.

[53] Art. 125 TFEU; De Witte, 'Using International Law in the Euro Crisis: Causes and Consequences' cit.

[54] S Peers, 'Towards a New Form of EU Law?: The Use of EU Institutions Outside the EU Legal Framework' (2012) EuConst 37, 56.

integration within the EU.[55] Its main characteristics are partial participation of the EU Member States, a strong link with EU law, and "borrowing" of EU institutions outside the EU legal framework. We will discuss here the last characteristic about a possible impact of such use of the EU institutions on the institutional equilibrium within the EU.

As a reminder, according to art. 13(2) TEU: "Each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them."[56] In other words, the EU institutions are established by the EU Treaties concluded by the EU Member States. Each institution is entrusted with specific powers in these Treaties and must act in accordance with them. The whole legal structure, as well as the decision-making activity within the EU legal order[57] is part of a certain institutional equilibrium under the rule of EU law.[58]

Apart from the provision enshrined in art. 273 TFEU,[59] the EU Treaties do not have any particular legal basis for granting extra-EU Treaties powers or tasks to EU institutions. How can the EU institutions thus be entrusted with new tasks following the conclusion of an international agreement by certain EU Member States outside the EU legal framework? We will investigate this legal question about the ESM in the first Section by analyzing CJEU's case law on this particular issue (III.1). In the second Section, we will examine whether these new tasks impact the institutional equilibrium and the distribution of powers between the EU institutions within the EU (III.2)

III.1. How are new tasks entrusted to the EU institutions?

There is a fundamental paradox in the very essence of this question regarding the ESM Treaty. Let us remind our readers that the ESM Treaty was concluded outside the EU legal framework by 17 Member States for two main reasons. First, the EU lacked exclusive or even shared competence to proceed with a legislative initiative, which allowed the eurozone Member States to conclude a separate international treaty. Second, the rationale behind the ESM Treaty was contrary to art. 125 TFEU[60] and needed art. 136

[55] C Lacchi, 'How Much Flexibility Can European Integration Bear in Order to Face the Eurozone Crisis? Reflections on the EMU Inter Se International Agreements Between EU Member States' in T Giegerich and others (eds), *Flexibility in the EU and Beyond* (Nomos 2017); B De Witte, 'Treaties between EU Member States as Quasi-Instruments of EU Law' in M Cremona and C Kilpatrick (eds), *EU Legal Acts: Challenges and Transformations* (Oxford Scholarship Online 2018).

[56] Art. 13(2) TEU.

[57] Notably, arts 288-294 TFEU.

[58] See especially: P Craig, 'Pringle and Use of EU Institutions Outside the EU Legal Framework' cit.

[59] Art. 273 TFEU: "The Court of Justice shall have jurisdiction in any dispute between Member States, which relates to the subject matter of the Treaties if the dispute is submitted to it under a special agreement between the parties".

[60] *Pringle* cit. para. 136 and the following reasoning of the Court in paras 137-147, concluding the opposite.

TFEU to be amended.[61] These questions led Thomas Pringle, a member of the Dáil Éireann, the lower house of the Irish parliament, to question whether it was consistent with EU law for Ireland to ratify the ESM Treaty. With no surprise, and as we said *supra*, considering the emergency of the situation, in a full court of 27 judges taking less than four months, the CJEU decided on the compatibility of the ESM Treaty with EU law.[62] This case is also important for another reason: the legal reasoning of the Court when considering the use of the EU institutions outside the EU legal framework.

The referring court in *Pringle* asked whether the allocation of new tasks to the Commission, the ECB and the Court is compatible with the powers of these institutions as enshrined in the EU treaties.[63] The Court responded to this question about the role of the Commission and the ECB in the ESM, stating: "The Member States are entitled, in areas which do not fall under the exclusive competence of the Union, to entrust tasks to the institutions, outside the framework of the Union such as the task of coordinating a collective action undertaken by the Member States or managing financial assistance".[64] In order to justify such a conclusion, the Court quotes its previous case-law dating from 1993[65] and 1994.[66] In the 1993 jurisprudence, *European Parliament v Council and Commission*, the EP challenged the validity of the decision taken collectively by Member States within the Council to grant financial aid to Bangladesh and to confer power upon the Commission to ensure the duty of coordination.[67] The Court ruled that the provision of the TEEC mentioned by the EP "does not prevent the Member States from entrusting the Commission with the task of coordinating a collective action undertaken by them on the basis of an act of their representatives meeting in the Council."[68] Furthermore, the Court added that Member States are free to make use outside the Community legal framework of the criteria taken from the budgetary provisions within the Community.[69] However, regarding the action brought by the EP against the Commission on the violation of the Treaty provisions relating to the budget, the Court simply concluded that as the decision on financial aid was not made within the Community framework, the EP

[61] Para. 3 was added to art. 136 TFEU. Also, see the discussion in section II of the *Article*.

[62] See this case note: B de Witte and T Beukers, 'The Court of Justice Approves the Creation of the European Stability Mechanism Outside the EU Legal Order: Pringle' (2013) CMLRev 805, 816.

[63] *Pringle* cit. para. 154. We mentioned the role of the Court in the ESM under section II.2. But as this *Article* investigates the "borrowing" of the Commission and the ECB, we will not elaborate further on the participation of the CJEU in the ESM.

[64] *Ibid*. para. 158.

[65] *Parliament v Council (Emergency aid to Bangladesh)* cit.

[66] Case C-316/91 *Parliament v Council (Lomé Convention)* ECLI:EU:C:1994:76.

[67] The EP argued that: "According to the fourth indent of Article 155 of the Treaty [TEEC], however, powers of implementation may be conferred on the Commission only by a decision of the Council", *Parliament v Council (Emergency aid to Bangladesh)* cit. para. 19.

[68] *Ibid*. para. 20.

[69] *Ibid*. para. 22.

prerogatives could not have been affected. At that time, it is worth noting that the EP was entitled to bring proceedings before the Court only to safeguard its own prerogatives. The action was thus dismissed, and for the first time, the Commission was entitled to act outside the EU legal framework to coordinate the distribution of financial aid to foreign countries. In his conclusions, AG Jacobs framed the principle as follows:

> "In cases where the Member States decide to act individually or collectively in a field within their competence, there is nothing in principle to prevent them from conferring on the Commission the task of ensuring coordination of such action. It is for the Commission to decide whether or not to accept such a mission, provided, of course, that it does so in a way that is compatible with its duties under the Community Treaties".[70]

The same issue was raised in the *European Parliament v Council* case concerning the Lomé Convention.[71] The EP challenged a decision issued by the Council to establish a special procedure to administer financial aid from Member States to African, Caribbean and Pacific countries within the framework of the Lomé Convention. This procedure was distinct from the EU's budgetary procedure. The Court confirmed its finding from the *Bangladesh* case.[72] Furthermore, AG Jacobs, in his opinion, provided the Court with much more detailed reasoning, touching upon the nature of the Lomé Convention as a mixed agreement. He rejected the EP's argument that the Community institutions could not act on the basis of a mandate conferred upon them by the Member States. He especially illustrated it with the Lomé Convention *per se*, a mixed agreement. He also gave the example of accession negotiations and foreign policy cooperation, in which EU institutions are acting in the realm of Member States' competencies and thus might entrust the EU institutions with extra-EU Treaties tasks.[73] AG Jacobs again confirmed his position in a slightly more detailed way than in the *Bangladesh* case, stating that: "It is, therefore, possible for a Community institution to undertake on behalf of the Member States certain functions outside the framework of the Treaty provided that such functions, and the way in which it performs them, are compatible with its Treaty obligations. Whether that is the case is subject to the control of the Court".[74]

[70] Case C-316/91, *Parliament v Council (Emergency aid to Bangladesh)* ECLI:EU:C:1992:520, opinion of AG Jacobs, para. 26.

[71] *Parliament v Council (Lomé Convention)* cit.

[72] *Ibid*. para. 41: "No provision of the Treaty prevents Member States from using, outside its framework, procedural steps drawing on the rules applicable to Community expenditure and from associating the Community institutions with the procedure thus set up".

[73] *Parliament v Council (Lomé Convention)* opinion of AG Jacobs cit., paras 82, 86-88.

[74] *Ibid*. para. 84; for further discussion, see: S Peers, 'Towards a New Form of EU Law?' cit.; P Craig, 'Pringle and Use of EU Institutions outside the EU Legal Framework' cit.; B de Witte, 'Euro Crisis Responses and the EU Legal Order: Increased Institutional Variation or Constitutional Mutation?' (2015) EuConst, 434; A Karatzia and M Markakis, 'What Role for the Commission and the ECB in the European Stability Mechanism?' (2017) Cambridge International Law Journal 232, 243.

In the *Pringle* case, the CJEU used exactly the same approach that it adopted in the *Bangladesh* and *Lomé Convention* cases mentioned above. It also added that "borrowing" EU institutions outside the EU legal framework is possible as long as new tasks entrusted to the institutions "do not alter the essential character of the powers conferred on those institutions by the EU and FEU Treaties".[75] The Court draws this very principle from its case-law concerning international agreements.[76] It concludes that duties allocated to the Commission and the ECB in the ESM do not alter the essential character of the powers of these institutions under the EU legal framework. In order to do so, the Court first notes that the ESM falls within the sphere of economic policy, which is not an EU exclusive competence.[77] Second, it states that neither the Commission nor the ECB has a decision-making power under the ESM, and their activities under this treaty only commit the ESM.[78] Thirdly, and most interestingly, the Court proposes a quite astonishing rationale to conclude that the tasks conferred on the Commission and the ECB "do not alter the essential character of the powers conferred on those institutions by the EU and FEU Treaties".[79] The Court looks exclusively at the objectives guiding the action of the Commission, first, within the EU legal framework[80] and within the ESM. It concludes that as the Commission is tasked with promoting the general interest of the EU within the EU legal order, and as the objective of the ESM Treaty is to ensure the financial stability of the euro area, the Commission, by its involvement in the ESM, promotes the general interest of the Union![81] The Court does not make any substantial analyses of a potential effect on the institutional equilibrium within the EU regarding the decision-making process. It does not seem to be bothered at all that basically EU Member States circumvent EU legal order constraints, including the distribution of competences between the EU and its Member States, to facilitate the decision-making process with the same institutional actors.[82]

The Court is similarly concise regarding the role of the ECB within the ESM: it looks at the objectives behind the functioning of the ECB within the EU and within the ESM and concludes that all tasks are perfectly "in line" with the Treaties.[83] This is even more problematic considering the special role played by the ECB within the EU legal order and

[75] *Pringle* cit. para. 158.

[76] For example: Opinion 1/92 *Accord EEE – II* ECLI:EU:C:1992:189 paras 32, 41; Opinion 1/09 *Accord sur la création d'un système unifié de règlement des litiges en matière de brevets* ECLI:EU:C:2011:123 para. 75.

[77] *Pringle* cit. para. 160.

[78] *Ibid*. para. 161.

[79] *Ibid*. para. 162.

[80] Art. 17(1) TEU: "The Commission shall promote the general interest of the Union and take appropriate initiatives to that end. It shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them […]".

[81] *Pringle* cit. para. 164.

[82] See also: P Craig, 'Pringle and Use of EU Institutions outside the EU Legal Framework' cit., for the analysis of the *Pringle* judgement.

[83] *Pringle* cit. para. 165.

considering its significant independence from other institutions' scrutiny. Unlike other EU institutions listed in art. 13 TEU, the ECB "shall have legal personality".[84] This distinct legal personality of the ECB and the EU is also reflected in art. 340 TFEU regarding the separate non-contractual liability of the Union[85] and the ECB.[86]

This very short and vague reasoning of the CJEU on the issue of "borrowing" the EU institutions by an international agreement concluded by some Member States among themselves indicates a profound malaise behind such a practice. On the one hand, it shows the blurring border between the EU and its Member States substantive competencies under the EU and FEU Treaties. On the other hand, it also hides a potential institutional disequilibrium within the EU legal framework following the attribution of new tasks to the EU institutions outside the EU.

III.2. What impact do these new tasks produce on the institutional equilibrium within the EU?

Critical of the Court's reasoning in *Pringle*, Paul Craig argued: "If the essential character, for example, of the Commission's powers, is to be judged in terms of the very general objectives contained in art. 17(1), then it is difficult to imagine any instance in which it could not be claimed that it was acting to "promote the general interest of the Union" or "oversee the application of Union law".[87] It is true that if the test proposed by the Court to verify whether new tasks entrusted to the EU institutions to act outside the EU legal framework respect the EU Treaties remains that general, numbers of treaties can be concluded by the EU Member States outside the EU granting such tasks to the EU institutions. However, it doesn't mean that these new tasks won't alter the institutional equilibrium within the EU regarding the powers attributed by the EU and FEU Treaties to the EU institutions.

Such reasoning also creates a paradox. As Craig underlines, in order to act within the EU legal framework, the EU institutions must ground their action on a particular legal basis enshrined in the Treaties. The same is true for the international agreements concluded by the EU, alone or jointly with its Member States, with third States. However, following CJEU case-law, the EU institutions can participate in international agreements concluded by the EU Member States outside the EU legal framework and exercise any kind of tasks entrusted to them, as long as they "don't alter the essential character of the powers conferred on them by the treaties".[88] This very reasoning cannot be consistent with basic principles of the EU law. Bruno de Witte explains such a "liberal attitude" of the Court towards the use of the EU institutions outside the EU legal framework, despite the

[84] Art. 282(3) TFEU.
[85] Art. 340(2) TFEU.
[86] Art. 340(3) TFEU.
[87] P Craig, 'Pringle and Use of EU Institutions outside the EU Legal Framework' cit. 278.
[88] *Ibid*. 280.

strict wording of art. 13 TEU, in terms of the difference between "powers" and "tasks". If powers are entrusted to the EU institutions by the Treaties and can only be changed through a complex procedure modifying those Treaties;[89] extra tasks may be given to the EU institutions more easily. The EU institutions may accept new tasks outside the EU legal framework as long as they don't affect already existing powers and as long as all EU Member States agree to "lend" them.[90]

Furthermore, in her conclusions in the *Pringle* case, AG Kokott raises an important issue of consent granted by other Member States that are not participating in the ESM to "borrow" the Commission and the ECB within the ESM.[91] She reminds us that the representatives of all Member States governments adopted a decision on 20 June 2011, according to which "the ESM Treaty is to contain provisions under which the European Commission and the European Central Bank are to perform the tasks provided for in the Treaty". However, the legal scholarship is not unanimous as to whether the consent of all Member States is necessary to "lend" the EU institutions to be entrusted with new tasks outside the EU legal framework the necessary powers. Steve Peers argued that such consent is not necessary as long as concerned EU institutions act in accordance with their competencies enshrined in EU and FEU Treaties.[92] Paul Craig defended the opposite view and argued that the consent of all EU Member States is necessary,[93] which was the case for the ESM mentioned above.

We tend to agree with Paul Craig. In its *Pringle* judgment, the Court relies on its external relations case-law to assess the premise that new tasks entrusted to the EU institutions are perfectly fine as long as they do not alter the essential character of the powers conferred on those institutions by the EU and FEU Treaties.[94] However, the comparison made between, on the one hand, the ESM, concluded by some EU Member States outside of the EU legal framework and involves "borrowing" some of the EU institutions, and, on the other hand, international agreements concluded by the EU alone or with the participation of its Member States, is not entirely appropriate.[95] The EU is not participating as a contracting party in the ESM. It means that the ESM Treaty has not gone through the procedure enshrined in art. 218 TFEU.[96] Especially, para. 11 of this art. allows any international agreement to be submitted to the legal scrutiny of the CJEU, which usually clearly says whether or not an international agreement is compatible with the essential character of the EU institutions' powers.

[89] Art. 48 TEU.
[90] B de Witte, 'Using International Law in the Euro Crisis' cit. 20.
[91] Case C-370/12 *Pringle* ECLI:EU:C:2012:756, opinion of AG Kokott.
[92] S Peers, 'Towards a New Form of EU Law' cit. 54–55.
[93] P Craig, 'Pringle and Use of EU Institutions outside the EU Legal Framework' cit. 272-273.
[94] *Pringle* cit. para. 158.
[95] P Craig, 'Pringle and Use of EU Institutions outside the EU Legal Framework' cit. 277.
[96] Art. 218 TFEU.

In its more recent, and already mentioned, judgment *Ledra Advertising*, the Court clarified the extent of the legal duties of "borrowed" EU institutions under the ESM.[97] The Court stated that the Commission and the ECB[98] acting within the ESM remain fully bound by EU law and by the Charter of Fundamental Rights of the EU and may be held liable under arts 268 and 340(2)(3) TFEU in cases of violation of EU law provisions.[99] This judgment seems to ensure some output legitimacy for the actions of the EU institutions used within the ESM Treaty. The very fact that the EU institutions might have engaged their extra-contractual responsibility by negotiation and signing Memoranda of Understanding in violation of EU law and the Charter, in particular, adds some accountability to their actions outside the EU legal framework.[100] The above developments highlight the existence of an institutional imbalance in the EMU's system of governance. These developments in the field of the EU economic governance architecture raise further questions: is there a systemic approach to crisis governance within the EU? To what extent can institutional balance and long-term legitimacy concerns be sacrificed on the account of efficiency and emergency? In the following Section and in order to provide answers to these interrogations, we will examine the reforms introduced by the EU institutions following the Covid-19 pandemic (section IV).

IV. The post-Covid institutional set-up: back to a "Community" mode of governance?

The outbreak of Covid-19 at the beginning of 2020 has been an unprecedented shock for our societies and a great challenge for our democracies. Since the beginning of the pandemic, both the EU institutions and its Member States have taken unprecedented measures to address this crisis and its devastating far-reaching health, social, economic and legal consequences. Surprisingly quickly, and after the early emergency support

[97] *Ledra Advertising v Commission and ECB* cit.

[98] The Court's solution, in this case, should have emphasized that it is not a question of sharing responsibility between the Commission and the ESM but between the EU and the ESM. As a reminder, according to art. 13(4) of the TESM states that the Commission negotiates and signs the Memorandum "on behalf of the ESM". For what concerns the liability of the ECB, the solution would be different. Indeed, the ECB enjoys its own legal personality, in accordance with art. 282(3) TFUE – this legal personality being the reason why art. 340 TFEU contains a third paragraph concerning the responsibility of the ECB that is distinct from the EU.

[99] *Ledra Advertising v Commission and ECB* cit. 65; case C-8/15 P *Ledra Advertising Ltd and Others v European Commission and European Central Bank* ECLI:EU:C2016:701, opinion of AG Wahl, paras 85–91.

[100] P Dermine, 'The End of Impunity: The Legal Duties of Borrowed EU Institutions under the European Stability Mechanism Framework ECJ 20 September 2016, Case C-8/15 to C-10/15, Ledra Advertising et al. vs. European Commission and European Central Bank Case Notes' (2017) EuConst 369; A Karatzia and M Markakis, 'What Role for the Commission and the ECB in the European Stability Mechanism?' cit. These considerations must obviously be seen in the light of the developments we have outlined above concerning the *Ledra* judgment.

measures were introduced by the European Commission, the ECB and the Eurogroup,[101] the European Council adopted a 750 billion euros EU Recovery Fund known as "Next Generation EU" (NGEU) to reinforce the EU's 2021-2027 multiannual financial framework (MFF).[102] Federico Fabbrini argued in this respect that: "[a]s such, by endowing the European Commission, for the first time, with significant power to borrow money on the financial markets, and to transfer funds to the Member States, NGEU represents a paradigm change in the functioning of EMU, pushing the EU architecture of economic governance towards an arrangement akin to that of federal regimes".[103] Let us have a closer look at this new mechanism established by the EU institutions to face the pandemic. We will argue that the adoption of the NGEU can be seen as a paradigm shift in the way the EU adopts crisis management instruments.

The adoption of the NGEU had a significant impact on the institutional structure of EMU. Indeed, in addition to the suspension of several rules concerning state aids,[104] tax rules,[105] and introduction of a series of solidarity measures,[106] one could also observe the extended role granted to the EU institutions involved in the EMU. In the early days of the crisis, a series of decisions were taken at the intergovernmental level by the Eurogroup. Initial calls for aid in the form of a common debt instrument adopted by the EU institutions were rejected by some states in favor of the ESM and its conditionality.[107] The Eurogroup, whose formation corresponds to that of the ESM's Board of Governors, was tasked with negotiating initial aid instruments for Member States affected by the pandemic. Firstly, the Eurogroup decided to create a guarantee fund at the EIB aiming at financing companies affected by the pandemic, thus significantly extending the powers of the EIB.[108] Then, and

[101] Communication COM(2020) final from the Commission of 20 March 2020 on the Temporary Framework for State aid measures to support the economy in the current Covid-19 outbreak.

[102] European Council of 17–18–19-20-21 July 2020 on the recovery plan and multiannual financial framework for 2021-2027; AD 'Alfonso, 'Next Generation EU : a European instrument to counter the impact of the coronavirus pandemic' (2020) European Parliament Research Service Briefing.

[103] F Fabbrini, 'The Legal Architecture of the Economic Responses to COVID-19: EMU Beyond the Pandemic' (2022) JComMarSt 186, 187.

[104] Communication COM(2020) final cit.

[105] As allowed by the clause in the Stability and Growth Pact. See European Commission Press Release, *Coronavirus: Commission proposes to activate fiscal framework's general escape clause to respond to pandemic* ec.europa.eu.

[106] Particularly, the activation of the EU solidarity fund and the proposed establishment of European instrument for temporary support to mitigate unemployment risks in an emergency. For a useful summary of these measures, see the independent academic report commissioned by the Irish Department of Finance and realized by F Fabbrini, 'Europe's Economic & Monetary Union Beyond Covid-19' (December 2020) An Roinn Airgeadais www.gov.ie 14-15.

[107] See Dutch Finance Minister Wopke Hoekstra, Statement at the Tweede Kamer, 7 April 2020 debatgemist.tweedekamer.nl.

[108] EIB press release, *EIB Board Approves €25 Billion Pan-European Guarantee Fund in Response to Covid-19 Crisis*, 26 May 2020 www.eib.org.

in relation to the action of the ESM, the Eurogroup took the decision to create the possibility for the ESM to establish a specific credit line (the "Pandemic Crisis Support Line"), open to the Member States of the eurozone and intended to cover costs, in particular health costs, related to the pandemic. This aid was established in the form of loans not submitted to the classical "strict conditionality" requirement.[109]

Although effective on a short-term basis, the ESM was not a sufficient tool for managing a pandemic. An innovative solution to deal with Covid-19 was needed, rather than a conditionality-based approach which would mobilize the ESM. A more general recovery plan was to be put in place, based on an ambitious Spano-Franco-German initiative.[110] At the end of May 2020, the European Commission proposed, using "multi-faceted legal constellation"[111] and in connection to the multiannual financial framework (MFF), to establish a recovery fund intended to assist Member States and companies affected by the pandemic within the EU. The NGEU financial plan was established to finance the rebuilding of the EU economy according to the Commission's priorities: Green deal, digitalization, and social inclusion. The broad scope of the plan has been seen by some as a sign of the sustainability of this fiscal construct, and not only as a way to temporarily absorb the shock of the Covid-19 crisis.[112] Let us clearly highlight the differences between the response to the eurozone crisis a decade ago and the response to the recent Covid-19 crisis.

There are indeed a number of differences between the assistance mechanisms previously put in place in the context of the eurozone crisis (particularly the ESM), on the one hand, and the NGEU adopted to face the pandemic, on the other hand.[113] Firstly, and

[109] Consilium, *Term sheet: ESM Pandemic Crisis Support*: www.consilium.europa.eu. This aid from the ESM is devoid of the conditionality usually attached to the functioning of this institution. The Term Sheet only requires that "ESM Member States would commit to use ESM Pandemic Crisis Support to support domestic financing of direct and indirect healthcare, cure and prevention related costs due to the COVID 19 crisis". For further details on the action of the ESM in this crisis, see G Zaccaroni, 'The Future of the ESM within a Hybrid EMU law' (BRIDGE Working Paper 2020) 11.

[110] See S Dennison, 'Spain goes Eisenhower: Coronavirus, cohesion, and the return of MFF talks' (23 April 2020) European Council on Foreign Relations ecfr.eu; Élysée, *French-German Initiative for the European Recovery from the Coronavirus Crisis* www.elysee.fr.

[111] F Fabbrini, 'The Legal Architecture of the Economic Responses to COVID-19' cit. 191. Four different legal ways were indeed followed in order to establish the NGEU. First, an EU Recovery Instrument, in the form of a regulation enacted by the Council on the basis of art. 122 TFEU and specifying the size of NGEU and the allocation of funds. Second, a regulation was enacted by the EP and the Council to establish the RRF, based on art. 175 TFEU. Third, a revision of the EU Own Resources Decision (ORD), in that increasing EU spending ceilings and enabling the EU to issue debt securities. Fourth, a regulation allowing to both connect the NGEU with the MFF and to put forward the conditionality linking the respect of the rule of law and the receipt of funds.

[112] C Alcidi and D Gros, 'Next Generation EU: A Large Common Response to the COVID-19 Crisis' (2020) Inter Economics 202-203.

[113] Arts 122 and 175(3) TFEU.

most obviously, the legal basis used to set up the ESM,[114] and the one mobilized to establish the NGEU are quite different. The former is an *ad hoc* financial assistance instrument based on strict economic conditionality and established on the margins of EU law as an international treaty. The latter is a genuine fiscal mechanism based on a "more political than economical" conditionality (respect for the rule of law) and developed within the EU legal order. Furthermore, one could notice that art. 122 TFEU – among other articles which served as legal basis for pandemic-related legal instruments – was invoked in the *Pringle* case as being violated in the context of establishment of the ESM. If in the case of the ESM, the decision was taken to conclude an international treaty by fear that a permanent financial assistance mechanism would be contrary to EU Treaties provisions. To face the Covid-19 pandemic, an emergency instrument could rely on appropriate legal basis in EU primary law.

Another important difference is the way this recovery plan is financed (two thirds in grants and one third in loans)[115] was called not only a "radical change" but also a "major breach" in the field of economic governance. Indeed, it is not financed by States' contributions to a common budget – nor by an external intergovernmental construction such as the ESM – but by the issuance of EU debt on the financial markets. This recovery plan gives the Commission a totally new and crucial role of "quasi-EU treasury"[116] allowing to borrow large amounts of funds on behalf of the Union on the capital markets.[117]

Furthermore, the NGEU grants to the EU, even though on a temporary basis, new powers in fiscal matters. It is a significant development as it allows in a way the rebalancing of an asymmetric relationship between the economic (including fiscal) and monetary branches of the EMU. The Union is thus empowered to levy new taxes of a European nature to increase the expenditure ceilings within the framework of the MFF.

The EU response to the crisis caused by the Covid-19 pandemic goes much further than the one given to the eurozone crisis. Indeed, the EU response to the pandemic seems to strengthen the European integration project empowering the EU institutions with some federal prerogatives. It shows a notable adaptability of the Treaties and the ability with which the Union's institutions can adapt their actions – and therefore the letter of the Treaty – to the exogenous upheavals affecting the EU economy. Neither the modification of the Treaties, nor the creation of an institutional instrument at the margins of the Union's legal order was necessary to provide this original and audacious response. Thus, one may wonder whether the nature of legal and institutional responses to this latest crisis is – or not – the beginning of a more general institutional rebalancing. Time

[114] *Ibid*. 136(3) TFEU, even though let us remind here that according to the Court, its modification was not indispensable, as the Member States already had the competence to establish such a mechanism.

[115] 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, 341.

[116] F Fabbrini, 'The Legal Architecture of the Economic Responses to COVID-19' cit. 193.

[117] European Council of 17–18–19-20-21 July 2020 on the recovery plan and multiannual financial framework for 2021-2027 cit.

will show whether new EU tools for crisis management are here to push for an "ever closer union among the peoples of Europe" without denaturalizing the EU's "single institutional framework".

V. Conclusion

In this *Article*, we proposed an answer to an uneasy question as to whether the EU really consists of a single institutional framework, as recital 7 of the TEU's preamble states. We have especially focused on the issue of "borrowing" of already existing EU institutions, namely the Commission and the ECB, outside the EU legal framework in the context of eurozone governance. We did not look at different institutional creations going beyond art. 13 TEU, such as EU agencies, for example. Furthermore, we acknowledge that the internal structure of the European Monetary Union is quite complex per se and was the subject of an extensive pan of academic literature on differentiated integration within the EU. In examining the specific case of the ESM, we did not focus on the internal dimension of the functioning of the EMU, but rather on the problematic external "borrowing" of EU institutions.

In the aftermath of the global financial crisis, the EU and its Member States had to face very pragmatic issues: how to avoid the economic collapse of Greece, Portugal and Ireland and the eurozone as a whole? Decisions had to be taken quickly in any institutional or legal forum that was immediately available. For this reason, legal solutions consisting of the conclusion of international agreements by some of the EU Member States outside the EU legal framework were accepted as a new normal. Because of close legal relationships between these new international treaties and the EU legal order, a decision was also taken to "lend" already existing EU institutions and entrust them with new tasks. We have seen this process implemented through the analysis of the ESM Treaty concluded between 17 Member States and mobilizing the Commission, the ECB and the CJEU for its effective functioning. We have mainly analyzed the role of the Commission and the ECB through the prism of EU constitutional law.

It appeared to us that the EU technically still consists of a single institutional framework, even when it "lends" its institutions to other international legal bodies, such as the ESM. After all, the Commission and the ECB remain the same institutions, and their powers within the EU remain technically unchanged, even though they are entrusted with new tasks *via* the ESM Treaty. However, it does not mean that the institutional equilibrium within the EU is not affected by such new tasks conferred upon the EU institutions. We have demonstrated this difficult legal conundrum through CJEU's case-law on the issue of "institutional borrowing". More fundamentally – and this is hardly evident from the jurisprudence of the CJEU – this disruption of institutional balance has important consequences for the conduct of democracy in the Union, insofar as, firstly, the parliamentary branch is clearly side-lined from the functioning of the ESM and, secondly, "the balance between State power and State equality, which had characterized the EU

constitutional settlement"[118] is notably challenged. The latest institutional reforms adopted in response to the crisis caused by the Covid-19 pandemic demonstrate, however, the great adaptability of the EU institutions to exogenous upheavals and the possibility, in the absence of treaty changes, of taking the "Community route", neglected during the eurozone crisis.

[118] F Fabbrini, 'States' Equality v States' Power' cit. 32.

Articles

The EU's Shifting Borders Reconsidered: Externalisation, Constitutionalisation, and Administrative Integration

edited by Evangelia (Lilian) Tsourdi, Andrea Ott *and* Zvezda Vankova

The EU's Shifting Borders Reconsidered: Externalisation, Constitutionalisation, and Administrative Integration

Evangelia (Lilian) Tsourdi*, Andrea Ott** and Zvezda Vankova***

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Abstract: Borders have gone far beyond their traditional static function of merely demarcating nation-states. Alongside physical border barriers, such as walls and barbwire fences, new technologies driven by sophisticated legal innovations have contributed to the multiplicity of border controls. These legal techniques have turned the border into an individualised moving barrier, conceptualized as a "shifting border" by Ayelet Shachar. Against this backdrop, this *Article* introduces, conceptually and thematically, the contributions to this *Special Section* which critically assess the paradigm of the shifting border

* Assistant Professor, Maastricht University and Maastricht Centre for European Law, e.tsourdi@maastrichtuniversity.nl. For writing this *Article*, the author was supported by a VENI programme grant (project n. VI. Veni.191R.040), which is financed by the Dutch Research Council (NWO).

** Professor of EU External Relations Law, Maastricht University, a.ott@maastrichtuniversity.nl.

*** Postdoctoral Fellow, Lund University, zvezda.vankova@jur.lu.se. This *Article* has been supported by a Rubicon grant (project n. 019.191SG.008) of the NWO.

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in the EU and analyse its implications. We first map out intricate legal issues invoked by the rise of hybridity and informality in the EU's cooperation with third countries on migration and the resulting accountability deficit. Next, we scrutinize the physical and legal infrastructures of mobility regulation (and often deflection) that are currently employed at the EU's external territorial borders. We highlight the emergence of increasing horizontal (between the EU and national level) and vertical (across national levels) administrative integration as a prevailing mode of policy implementation at the EU's borders and reflect on the implications, including both challenges and opportunities, of this development. Finally, we scrutinise the Commission's proposals as part of a New Pact on Migration and Asylum with respect to the envisaged processes at the borders and the streamlining of external border control, asylum, and return in a seamless process finding that they create further risks for fundamental rights and procedural guarantees.

KEYWORDS: borders – EU migration policy – EU asylum policy – externalisation – constitutionalisation – EU migration agencies.

I. EU'S SHIFTING BORDERS: AN INTRODUCTION

Over the past two decades researchers from different disciplines have exhibited the complex and transformative nature of borders that have gone far beyond their traditional static "world-configuring function"[1] of merely demarcating nation-states.[2] Contemporary borders have become characterized by "polysemy" and "heterogeneity",[3] multifunctionality and elasticity,[4] serving equally as "devices of inclusion that select and filter people" as well as exclusionary measures.[5] Alongside physical border barriers, such as walls and barbwire fences, new technologies and instruments driven by "sophisticated legal innovations",[6] have contributed to the "multiplication and multiplicity of border controls".[7] These legal techniques are characterised by what Inder refers to as "hyper-legalism",[8]

[1] É Balibar, *Politics and the Other Scene* (Verso 2002) 79.

[2] See for instance S Sassen, 'When National Territory is Home to the Global: Old Borders to Novel Borderings' (2005) New Political Economy 523; D Bigo, 'Globalized (in)Security: the Field and the Ban-Opticon' in D Bigo and A Tsoukala (eds), *Terror, Insecurity and Liberty: Illiberal Practices of Liberal Regimes after 9/11* (Routledge 2008) 10; D Newman and A Paasi, 'Fences and Neighbours in the Postmodern World: Boundary Narratives in Political Geography' (1998) Progress in Human Geography 186.

[3] É Balibar, *Politics and the Other Scene* cit. 76-79.

[4] E Weizman, *Hollow Land: Israel's Architecture of Occupation* (Verso 2007) 6.

[5] B Neilson and S Mezzadra, *Border as Method, or, the Multiplication of Labor* (Duke University Press 2013) 7.

[6] A Shachar, *The Shifting Border: Legal Cartographies of Migration and Mobility. Ayelet Shachar in Dialogue* (Manchester University Press 2020) 7.

[7] See further A Kraler, M Hendow and F Pastore, 'Introduction: Multiplication and Multiplicity. Transformations of Border Control' (2016) Journal of Borderlands Studies 145-149.

[8] C Inder, 'International Refugee Law, "Hyper-Legalism" and Migration Management: The Pacific Solution' in M Geiger and A Pécoud (eds), *The Politics of International Migration Management. Migration, Minorities and Citizenship* (Palgrave Macmillan 2010) 220.

enabling states to "pay lip service to their international obligations", while in practice subverting their purpose and substance to keep asylum seekers away.[9] The "hyper-legalism" approach is essential ingredient of the "architecture of repulsion"[10] and the "shifting border" paradigm, which have turned the border into an individual moving barrier.[11]

The shifting border is rooted in migration control that is exercised to selectively restrict the unwanted and "spontaneous migrants" and at the same time to facilitate mobility for the wealthy and those with desired skills. As its name prompts, the location of this border is not fixed in time or place – it shifts inwards and outwards of the territory – while simultaneously exhibiting features of a static border transformed into "the last point of encounter, rather than the first".[12] Through the use of "law's admission gates", this "everywhere-and-nowhere border" moves into the interior of the territory to create "constitution free zones", referred also as "barbicans",[13] where the rights of those non-citizens without a proper legal status become suspended or severely limited. At the same time, relying on legal means of deterrence,[14] the border also becomes externalized beyond the limits of its territory. Despite the flexibility of the shifting border while exercising migration control, when it comes to granting rights and protection, driven by "hyper-legalism"[15] states shift back to the static notion of borders signifying a narrow and strict interpretation of spatiality which curbs their responsibility and liability.[16]

As Shachar demonstrates, the EU has been a "leading contributor" to the "shifting-border book"[17] by establishing "one of the world's most complex, inter-agency, multi-tiered visions of the shifting border, comprised of pre-entry controls at countries of origin and transit all the way through to removal of irregular migrants after they have reached EU territory".[18] This ongoing process had already been captured by other authors in the wake of the so-called "migration and refugee crisis", from an EU as well as Member State perspective. For instance, Davitti refers to this phenomenon as the "EU's liquid borders" which have partially lost their spatial and territorial significance, as well as their legal and political meaning.[19] She distinguishes between two types of non-linear externalized and

[9] D Ghezelbash, 'Hyper-Legalism and Obfuscation: How States Evade Their International Obligations Towards Refugees' (2020) AmJCompL 479.

[10] D FitzGerald, *Refuge beyond Reach: How Rich Democracies Repel Asylum Seekers* (Oxford University Press 2019) 6.

[11] A Shachar, *The Shifting Border* cit.

[12] *Ibid*. 5.

[13] D S FitzGerald, *Refuge beyond Reach* cit. 9.

[14] See further J Hathaway and T Gammeltoft-Hansen, 'Non-Refoulement in a World of Cooperative Deterrence' (2015) ColumJTransnatlL 235, 235–284.

[15] C Inder, 'International Refugee Law, "Hyper-Legalism" and Migration Management' cit.

[16] A Shachar, *The Shifting Border* cit. 8.

[17] *Ibid*. 15.

[18] *Ibid*. 55.

[19] D Davitti, 'Biopolitical Borders and the State of Exception in the European Migration "Crisis"' (2018) EJIL 1178.

outsourced enforcement infrastructures of the liquid borders: "physical infrastructures", as corridors and spaces of confinement for managing refugees on the one hand, and "borderline legal apparatus" – such as "safe third country" concepts and readmission agreements – whose main objective is to avoid international obligations, on the other.[20] Taking a Member States' perspective, Godenaua and López-Salab conceptualize the dynamic nature of the "shifting border" in the context of Spain's "comprehensive multi-layered deterrence strategy".[21] They capture two processes: the "gradual geographical extension and elasticity of borders" displayed by "the novel multi-sited and multiple character of migration control", and at the same time the introduction of "creative forms of manipulating" the location and the physical demarcation of the border "as evolving through mobile and retractable limits".[22]

Drawing on this literature, this *Article* aims to further exemplify the nature of the shifting border in the EU and to critically analyse its implications. While we employ the shifting-border paradigm, our analysis goes beyond its inward-outward binary and focuses on what Davitti frames as "liquid borders of the EU".[23] On one hand, we examine the "legal apparatus", denoting the EU's "contactless control" and externalisation policies. The concept of "contactless control" signifies a shift in the "deterrence paradigm" from the mere prevention of spontaneous arrivals and deflection of flows to other destinations, to the hindering exit of "risky" migrants.[24] These policies are part of "the new toolbox of consensual containment" which is exercised by the EU and its Member States through the outsourcing of pre-emptive migration control beyond the EU's physical borders.[25] They are implemented by securing the strategic partnership of key transit and origin countries which are persuaded to contain, as well as readmit, potential asylum seekers in exchange of political and financial gains, such as promises for funding, visa facilitation or accession negotiations.[26]

On the other hand, we focus on "physical infrastructures" of mobility regulation currently employed at the EU's external territorial borders, such as hotspots, physical walls and other means of fortification and deflection of "risky" migrants, as well as the emergence of

[20] *Ibid*. 1176-1177.

[21] D Godenau and A López-Sala, 'Multi-layered Migration Deterrence and Technology in Spanish Maritime Border Management' (2016) Journal of Borderlands Studies 151, 153.

[22] *Ibid*.153-154.

[23] D Davitti, 'Biopolitical Borders and the State of Exception in the European Migration "Crisis"' cit. 1176-1177.

[24] M Giuffré and V Moreno-Lax, 'The Rise of Consensual Containment: From "Contactless Control" to "Contactless Responsibility" for Migratory Flows' in S Juss (ed.), *Research Handbook on International Refugee Law* (Edward Elgar Publishing 2019) 84. On contactless control see further V Moreno-Lax, 'The Architecture of Functional Jurisdiction: Unpacking Contactless Control – On Public Powers, S.S. and Others v. Italy, and the "Operational Model"' (2020) German Law Journal 385, 385-416.

[25] M Giuffré and V Moreno-Lax, 'The Rise of Consensual Containment' cit. 97.

[26] *Ibid*. 84.

administrative integration as a prevailing mode of policy implementation at the EU's shifting borders. From our understanding, the legal apparatus and the physical infrastructures are not only "liquified"[27] beyond territorial borders areas *stricto sensu*, but at times are also overlapping, with the hotspots approach presenting a notable example further discussed in this issue. Finally, we analyse the EU's vision for the future when it comes to its legal apparatus and physical infrastructures at the borders as envisaged in the proposals forming part of the New Pact on Migration and Asylum: are we going to witness a new chapter being added to the "shifting-border book" or is the "fresh start" an illusion?'[28]

II. Protecting borders and respecting human rights

Protecting its territory and borders is every state's sovereign right.[29] However, the setting of borders is restricted by international human rights and refugee rights under international conventions. Modern constitutions (and especially the European ones) have translated rights of refugees in the form of a right to seek asylum and have recognised the principle of *non-refoulement*.[30] The EU's area of freedom, security of justice also reflects these two aspects in arts 77 and 78 TFEU for the European Union. While ensuring internally frictionless travel and the absence of any controls on the internal border, the external border of the Union is to be protected and regulated. At the same time, the status of third country nationals in need of international protection and in line with the *non-refoulement* principle, must be respected; these rights are further underlined by the EU Charter of Fundamental Rights. The EU's constitutional system and the Member States' national constitutional systems have the constitutional mandate to reconcile these conflicting aims and find solutions without undermining either objective.[31] This constitutional balancing has become a gargantuan exercise for a Union in perpetual "crisis mode". Shifting or liquid borders lead to a new toolbox of containment described above. Two of the main legal and constitutional challenges arising from shifting or liquid borders are

[27] D Davitti, 'Biopolitical Borders and the State of Exception in the European Migration "Crisis"' cit. 1176 drawing form the work of Z Bauman, *Liquid Modernity* (Polity 2000); Z Bauman, *Liquid Times: Living in an Age of Uncertainty* (Polity 2006).

[28] See analysis in D Thym, 'European Realpolitik: Legislative Uncertainties and Operational Pitfalls of the "New" Pact on Migration and Asylum' (28 September 2020) EU Immigration and Asylum Law and Policy eumigrationlawblog.eu.

[29] S Besson, 'Sovereignty' (April 2011) Max Planck Encyclopedia of International Law opil.ouplaw.com.

[30] A Farahat and N Markard, 'Forced Migration Governance: In Search of Sovereignty' (2016) German Law Journal 923. See for a statistical overview: L Kowalczyk and M Versteeg, 'The Political Economy of the Constitutional Right of Asylum' (2017) Cornell Law Review 1219, 1262.

[31] This can be understood as achieving practical concordance as promoted by German constitutional lawyer Konrad Hesse, see on this D P Kommers, 'German Constitutionalism: A Prolegomenon' (1991) Emory Law Journal 837.

the hybridity of actions and actors and the informality of the tools employed when externalizing the borders and their management. This section explores the evolution and implications of hybridity and informality, as well as the resultant deficit of accountability.

II.1. How to reconcile diverging constitutional objectives in light of hybridity and informality?

Hybridity and informality raise intricate issues for the determination of the proper constitutional framework for limiting or guiding EU and Member States actions. Firstly, the practice of shifting responsibilities between actors (EU Member States, EU institutions and agencies) implementing EU border controls in the integrated European administrative space,[32] and with the cooperation of third countries externally, raises questions as to who is accountable under EU and international law for human rights breaches and whether the extraterritorial application of the EU Charter of Fundamental Rights should be considered.[33]

Secondly, the informal legal instruments employed to externalize border and migration management demand constant reflection on its constitutional limits and constraints, as Catarina Molinari emphasizes in her *Article* in this *Special Section*.[34] More specifically, the same rules and principles framing binding international action and agreements also apply to the informal tools employed variably by EU institutions, Member States or third country actors in complicity with the EU and Member State actors. Hybridity and informality are the consequences of what Vladislava Stoyanova explained as follows: "[s]trategic human rights litigation laying bare the gaps is countered by more inventive and adapted measures by states and EU to evade achieving control over the physical border: preventing asylum seekers, migrants to reach and cross EU border and deport non-recognised asylum seekers".[35]

Thus, lawyers and civil society ask the right questions concerning the legality of tools invented by governments and administration, but cannot provide immediate answers – either the state actors escape with their action into the twilight of legality, or further scrutiny is avoided by more inventive or clandestine follow-up measures. The disputed and dubious 18 March 2016 EU-Turkey Statement has become the most famous example of

[32] See further E Tsourdi, 'Beyond the "Migration Crisis": the Evolving Role of EU Agencies in the Administrative Governance of the Asylum and External Border Control Policies' in J Pollak and P Slominski (eds), *The Role of EU Agencies in the Eurozone and Migration Crisis: Impact and Future Challenges* (Palgrave Macmillan, 2021) 175 and below section III.

[33] V Moreno-Lax and C Costello, 'The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facticity, the Effectiveness Model' in S Peers, T Hervey and J Kenner (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart/Beck 2014) 657.

[34] See in this *Special Section*, C Molinari, 'The EU Readmission Policy to the Test of Subsidiarity and Institutional Balance: Framing the Exercise of a Peculiar Shared Competence' (2022) European Papers www.europeanpapers.eu 151.

[35] V Stoyanova, 'The Right to Life Under the EU Charter and Cooperation with Third States to Combat Human Smuggling' (2020) German Law Journal 436.

this hybridity and informality.[36] The text of this deal, published as a press release on the website of the European Council and of the Council of the European Union, conceals its legal nature, its authorship,[37] and entangles financial, political, and legal objectives of the EU and its Member States in their relations with Turkey.[38] It combines readmission objectives with financial commitments, expresses promises of Turkish visa liberalization and accession talks, and is embedded in other actions and instruments such as the EU-Turkey Joint Action Plan and the Statement of the EU heads of 7 March 2016.[39] Finally, it also reinforced parallel Member State informal and formal arrangements.[40]

It is difficult to envisage greater legal hybridity than embodied by the EU-Turkey Statement and doubts are cast over its authorship, categorisation and legality. Often seen as a blueprint for future deals with third countries of Northern Africa,[41] doubts remain over its role model character when referring to the special circumstances under which it was negotiated and the EU's and its Member States' byzantine and layered relations with Turkey.[42] At the end, its notoriety led both sides to withdraw from the negotiations of its renewal outside the public eye. The Statement is part and parcel of the ongoing informalization by the EU and Member States to externalize EU border management and control.

It was not or could not be legally challenged by the European Parliament or individuals.[43] As it is undetermined who authored this document, the inter-institutional relationship can be only assessed when an assumption is made that the Member States concluded a non-binding arrangement or binding agreement[44] or that the European Council has acted. In both situations, further legal issues arise. In the former situation, Member States action

[36] See M Gatti and A Ott, 'The EU-Turkey Statement: Legal Nature and Compatibility with EU Institutional law' in S Carrera, J Santos Vara and T Strik (eds), *Constitutionalizing the External Dimension of EU Migration Policies in Times of Crisis: Legality, Rule of Law and Fundamental Rights Reconsidered* (Edward Elgar 2019) 179.

[37] See also E Kassoti and A Carrozzini, 'One Instrument in Search of an Author: Revisiting the Authorship and Legal Nature of the EU-Turkey Statement' in E Kassoti and N Idriz (eds), *The informalization of the EU's external action in the field of migration and asylum* (TMC Asser Press 2022) 433.

[38] A Ott, 'EU-Turkey Cooperation in Migration Matters: a Game-Changer in a Multi-Layered Relationship?' in F Ippolito, G Borzoni and F Casolari (eds), *Bilateral relations in the Mediterranean* (Edward Elgar Publishing 2020) 185.

[39] See on the background and analysed in light of informal institutional governance: S Smeets and D Beach, 'When Success is an Orphan: Informal Institutional Governance and the EU-Turkey deal' (2020) West European Politics 129.

[40] See, for instance, F L Gatta, 'Migration and the Rule of (Human Rights) Law: Two "Crises" Looking in the Same Mirror' (2019) Croatian Yearbook of European Law and Policy 99, 108-109.

[41] R Lehner, 'The EU-Turkey Deal: Legal Challenges and Pitfalls' (2019) International Migration 176.

[42] S Smeets and D Beach, 'When Success is an Orphan' cit. 147; A Ott, 'EU-Turkey Cooperation in Migration Matters' cit.

[43] Case T-192/16 *NF v European Council* ECLI:EU:T:2017:128; case T-193/16 *NG v European Council* ECLI:EU:T:2017:129 and case T-257/16 *NM v European Council* ECLI:EU:T:2017:130; joined cases C-208/17 P to C-210/17 P *NF and others v European Council* ECLI:EU:C:2018:705.

[44] This assessment is provided by the General Court *NF v the European Council* cit., *NG v the European Council* cit. and *NM v European Council* cit.

outside the procedural rule of EU treaty-making is not *per se* illegal[45] but, for instance, a hybrid EU/Member States international agreement would be illegal and would breach art. 218 TFEU.[46] If Member States chose to employ a non-binding instrument, then they would still have to respect the competence divide and not interfere with EU exclusive competence[47] and EU law supremacy.[48] If considered a European Council action, it could not be adopted as an international agreement because this would breach art. 15 TEU and the principle of institutional balance (art. 13(2) TEU). However, when adopted as non-binding instrument, there is no breach of art. 218 TFEU but questions nonetheless arise regarding the prerogative of the EP. The last option is less likely to raise constitutional compatibility issues, but the EU fundamental rights protection remains a major concern.

Leaving aside whether the EU Charter has extraterritorial effect, the EU institutions and its Member States are bound by the principle of *non-refoulement*. The Statement's content, as argued by the majority of commentators, is in breach of this principle[49] because it allows for collective expulsion, denies asylum-seekers access to procedural protection, and declares Turkey a safe country.[50] To understand the questions on accountability arising from its implementation on the ground, we need to assess the emerging European integrated administration of hotspots and interagency collaboration assisted by national administrations and addressed in detail in section III of this *Article*.

II.2. Which way forward with accountability?

Hybridity and informality raise novel legal questions, among them whether they can be tackled with existing accountability tools (political, financial, and legal), or a better coordination of existing tools, or more innovative accountability mechanisms as social accountability (see below section III.1). We adopt the understanding of accountability developed by Bovens, Goodin, and Schillemans, according to whom accountability may be

[45] Joined cases C-181/01 and C-248/91 *Parliament v Council (Bangladesh Aid*) ECLI:EU:1993:271.

[46] Case C-28/12 *Commission v Council (hybrid act)* ECLI:EU:C:2015:282 para. 54.

[47] And the disputable claim is made that the Statement breaches EU exclusive competences, see S Carrera, L den Hertog and M Stefan, 'It Wasn't Me, The Luxembourg Court Orders on the EU-Turkey Refugee Deal' (2017) CEPS Policy Insights 8.

[48] A Ott, 'Informalization of EU Bilateral Instruments: Categorization, Contestation, and Challenges' (2021) Yearbook of European Law 569.

[49] See, however N Oudejans, C Rijken and A Pijnenburg, 'Protecting the EU External Border and the Prohibition of Refoulement' (2018) Melbourne Journal of International Law 1, 7 addressing which international law questions arise with the externalisation of border controls.

[50] M Gatti, 'The EU-Turkey Statement: A Treaty that Violates Democracy' (2016) EJIL: Talk! www.ejiltalk.org; J Poon, 'EU-Turkey Deal: Violation of, or, Consistency with, International Law?' European Papers (European Forum Insight 22 December 2016) www.europeanpapers.eu 1195.

conceptualized as "an institutional relation or arrangement in which an agent can be held to account by another agent or institution".[51] It consists of three elements or stages:

i) The actor should be obliged to inform the forum about his or her conduct, by providing various sorts of information about the performance of tasks, about outcomes, or about procedures;

ii) there needs to be a possibility for the forum to interrogate the actor and to question the adequacy of the explanation or the legitimacy of the conduct; and finally,

iii) the forum may pass judgment on the conduct of the actor.[52] The mention of a "judgment" in this context should not be equated with a legally binding final pronouncement by a court or tribunal. Rather, what is meant is the possibility of concrete consequences following the information provision and debate stages.

Political accountability in the context of hybridity and informality entails that the EU's executive, its main EU external actors, including the Member States, have to justify their action towards the European Parliament and the national parliaments.[53] In the case of soft law measures such as the EU-Turkey Statement it can be observed that national parliaments and the EP have regularly assessed this instrument and its related financial tools.[54] In addition, the Statement and its tools have come regularly and critically to the fore in the reports of the Court of Auditors.[55]

Concerned individuals will not be able to challenge such informal instruments. In the case of the EU-Turkey Statement before the General Court and European Court of Justice, this option was disabled by the Statement's hybridity which excluded that it could be considered an action associated to the Union. It also becomes clear that legal review mechanisms are inaccessible not only due to strict standing conditions in the annulment procedure and Union liability claims but also due to the hybridity of actions and actors. Other venues for legal accountability are national courts and the European Court of Human Rights by not challenging the Statement directly but national measures implementing the Statement. For the latter court, the case *JR and Others* addressed in 2018 the human rights implications of the Statement in the Greek without finding concretely a violation or addressing

[51] See M Bovens, T Schillemans and R E Goodin, 'Public Accountability' in M Bovens, T Schillemans and R E Goodin (eds), *The Oxford Handbook of Public Accountability* (Oxford University Press 2014) 1, 9, building on the previous works of Bovens and notably on M Bovens, 'New Forms of Accountability and EU-Governance' (2007) Comparative European Politics 104.

[52] *Ibid*.

[53] See for instance: C Harlow, *Accountability of the European Union* (Oxford University Press 2002).

[54] See for the German Bundestag of 15 March 2017 18/11568 *Drucksache*; German Bundestag of 27 February 2019 19/8028 *Drucksache*; German Bundestag of 27 March 2020 19/19340 *Drucksache*.

[55] For example: European Court of Auditors, 'Special report 24/2019: Asylum, relocation and return of migrants: Time to step up action to address disparities between objectives and results' (2019); European Court of Auditors, 'Special report No 27/2018: The Facility for refugees in Turkey: helpful support, but improvement needed to deliver more value for money' www.eca.europa.eu.

the nature of this Statement.[56] Also Greek national courts have not ruled on the matter. While a lower Greek court in Lesbos found that Turkey is an unsafe third country, the Greek Council of State ruled in 2017 that the return of Syrian refugee was in line with EU law and the judges decided against submitting a request to the ECJ for a preliminary ruling.[57] Here, the discussion could be enriched by the research and findings involving the shared responsibility for wrongful acts under international law.[58] Overall, EU liability in the current format and under its current strict procedural conditions, does not provide a suitable tool to remedy breaches of fundamental human rights in the externalisation process.[59]

In addition, the EP has avoided challenging these informal instruments in court for political reasons. Finally, as Paula García Andrade highlights in her *Article* to this *Special Section*, the ECJ evaded ruling on the substance which is in stark contrast to the more active role taken in the assessment of legal migration from partner countries.[60] In a politically sensitive field with many different players involved, the ECJ applies the well-known reservations, may they be specified as a restriction to manifest errors of assessment or a misuse of power, or lack of competence and falling outside the scope of EU law.[61] This chimes in with the general trend to carve out the Court's jurisdiction in the Common Foreign and Security Policy (CFSP), stressing that the rule of law and effective judicial protection are worth pointing out.[62] While García Andrade argues for a more accentuated role of the external relations' structural principles to fulfil gap-filling tasks, scrutiny mechanisms to address shifting borders include also the European Court of Human Rights[63] and national courts. The contribution by Galina Cornelisse and Madalina Moraru in this *Special Section* emphasizes in the case of the European Return Directive that the "vertical, horizontal and transnational judicial interaction between domestic courts, ECJ and the ECtHR' can take away hard edges and place limits to states attempts to shift their borders".[64] Overall, it becomes clear that only the careful recalibration and coordination of

[56] ECtHR *JR and Others v Greece* App n. 22696/16 [25 January 2018].

[57] Greece Council of State of 22 September 2017 decision n. 2347/2017.

[58] A Nollkaemper and others, 'Guiding Principles on Shared Responsibility in International Law' (2020) EJIL 15.

[59] See further: C Ziebritzki, 'Refugee Camps at EU External Borders, the Question of the Union's Responsibility, and the Potential of EU Public Liability Law' (05 February 2020) Verfassungsblog verfassungsblog.de.

[60] See in this *Special Section*, P García Andrade, 'The External Dimension of the EU Immigration and Asylum Policies before the Court of Justice' (2022) European Papers www.europeanpapers.eu 109.

[61] Case C-162/96, *Racke v Hauptzollamt Mainz* ECLI:EU:C:1998:293. And see further case law examples in P García Andrade's, 'The External Dimension of the EU Immigration and Asylum Policies before the ECJ' cit.

[62] Case C-134/19 P *Bank Refah Kargaran v Council* ECLI:EU:C:2020:793 paras 35-36.

[63] ECtHR *O.S.A and others v. Greece* App n. 39065/16 [21 March 2019]; ECtHR *J.R. and others* App n. 22696/16 [25 January 2018]; ECtHR *Ilias and Ahmed v Hungary* App n. 47287/15 [14 March 2017].

[64] See in this *Special Section* G Cornelisse and M Moraru, 'Judicial Interactions on the European Return Directive: Shifting Borders and the Constitutionalisation of Irregular Migration Governance' (2022) European Papers www.europeanpapers.eu 127.

accountability mechanisms can address and frame evolving and inventive tools to shift borders and their management.

III. EU's external borders: of administrative integration and physical and legal infrastructures of deflection

The (immediately) preceding section focused on the hybridity and informalisation which is increasingly employed in the EU's cooperation with third countries on migration. In this section, the focus shifts on the legal and policy developments at the EU's territorial external borders, as "the last points of encounter" of EU's shifting borders.[65] We critically analyse their "liquidity", as Davitti puts it,[66] referring here to the physical and legal infrastructures of mobility regulation (and often deflection) that are currently employed at the EU's external territorial borders. Moreover, this section highlights the emergence of increasing horizontal (across national levels) and vertical (between the EU and national level) administrative integration as a prevailing mode of policy implementation at the EU's borders and reflects on the implications, including both challenges and opportunities, of this development. Finally, we scrutinise the Commission's proposals as part of a New Pact on Migration and Asylum in what concerns the envisaged processes at the borders and the streamlining of external border control, asylum, and return in a seamless process.

III.1. Hotspots as incubators of liminality and of an emerging European integrated administration

The "hotspot approach to migration management"[67] is part of the EU level responses to the 2015–16 spike in arrivals of third country nationals and stateless persons at the EU's external borders, many of them with international protection needs, for example, fleeing persecution or generalized violence. It essentially concerns interagency collaboration, where deployed national experts under the coordination of a specific agency – the European Asylum Support Office (EASO), Frontex, Europol, and Eurojust – operationally assist national administrations in "hotspots" for migrant arrivals. It comprises a variety of administrative tasks, including registration and identification of migrants, and channelling of migrants into further procedures, for example, return or assessment of an international protection claim.[68] This approach, first rolled out in Italy and Greece, was novel:

[65] A Shachar, *The Shifting Border* cit. 5.

[66] D Davitti, 'Biopolitical Borders and the State of Exception in the European Migration "Crisis"' cit. 1176

[67] For its first conceptualisation see Commission Communication COM(2015) 490 final of 25 September 2015 on managing the refugee crisis: immediate operational, budgetary and legal measures under the European agenda on migration, Annex II.

[68] See K Luyten and A Orav, 'Hotspots at EU External Borders: State of Play' (2020) European Parliament www.europarl.europa.eu.

although the respective agency regulations foresaw deployments, the element of inter-agency collaboration in what in essence would be a single operational framework, had never been so clearly articulated. Although five years have passed since the roll out of this approach, the regulatory framework of EU hotspots continues to be characterised by informality and complexity and the pertinent legal framework still consists of a fragmented patchwork of EU and national (soft law) and legislation.[69]

Critical migration studies have engaged with the realities associated with the functioning of the hotspots. Papoutsi *et al.* conceptualise hotspots as an incubator of "liminal EU territory", understood as "a sorting space that filters through the 'deserving few' and detains or removes the 'undeserving' and the 'rightless'".[70] Drawing from Foucault's "political technology" concept,[71] Tazzioli analyses hotspots as a "a generalised strategy of containment through mobility",[72] where migration movements are not only obstructed in their autonomy by generating immobility but also "through administrative, political and legal measures that use (forced) mobility as a technique of government".[73] One could conceptualise the functioning of relevant legal processes implemented in the hotspots, such as the EU's Dublin Regulation for responsibility allocation,[74] the emergency relocation decisions (establishing intra-EU transfers of asylum seekers for the benefit of Italy and Greece as a temporary exception to the Dublin system),[75] and returns to Turkey under safe country provisions,[76] as such strategies of "containment through mobility" since they completely fail to take into account the agency of migrants. Finally, Davitti, drawing

[69] K Ziebritzki, 'The Integrated EU Hotspot Administration and the Question of the EU's Liability' in M Kotzur, D Moya, U S Sözen and A Romano (eds), *The External Dimension of EU Migration and Asylum Policies* (Nomos 2020) 253, 261-264.

[70] A Papoutsi and others, 'The EC Hotspot Approach in Greece: Creating Liminal EU Territory' (2019) JEMS 2200, 2201.

[71] M Foucault, 'The Political Technology of Individuals' in J D Faubion (ed.), *Power: Essential Works of Foucault 1954–1984* (The New Press 2000) 403.

[72] M Tazzioli, 'Containment through Mobility: Migrants' Spatial Disobediences and the Reshaping of Control Through the Hotspot System' (2019) JEMS 2764, 2765.

[73] *Ibid*.

[74] Regulation (EU) 604/2013 of the Council and the European Parliament of 26 June 2013 on establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in One of the Member States by a Third-Country National or a Stateless Person (Recast) (Dublin III Regulation).

[75] Council Decision (EU) 2015/1523 of 14 September 2015 Establishing Provisional Measures in the Area of International Protection for the Benefit of Italy and of Greece (1st Emergency Relocation Decision); Decision 2015/1601/EU of the Council of 22 September 2015 on establishing Provisional Measures in the Area of International Protection for the Benefit of Italy and Greece (2nd Emergency Relocation Decision) and for analysis of the content and functioning of the schemes see 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, 1459–67.

[76] 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 (Procedures Directive), art. 38.

on Agamben's writings on "willed exception",[77] understands the application of safe country concepts in hotspots as a clear manifestation of a "willed biopolitical technique of government" which aims at deflection while being couched in humanitarian terms.[78]

From a doctrinal legal perspective, the current implementation of the EU hotspot approach has led to fundamental rights violations, including the risk of *refoulement* due to return to a non-safe country,[79] disproportionate restrictions to the freedom of movement of asylum seekers,[80] and violations of the principle of human dignity and of the prohibition of inhuman or degrading treatment.[81] From a combined interdisciplinary perspective of EU administrative law and administrative governance, the functioning of the hotspots points to an increasingly integrated administration,[82] with EU agencies engaging in joint implementation with national authorities.[83] For example, based on Greek national law, EASO experts conduct interviews and issue non-binding opinions on the admissibility of claims and at the merits stage.[84] While the final decision formally remains with the Greek Asylum Service, EASO evidently has a significant, if not decisive, impact on the outcome of applications, rendering this in essence a *de facto* mixed or composite administrative proceeding.[85] The exercise of executive powers and discretion by EU agency (deployed) staff has direct impact on the fundamental rights of migrants and asylum seekers.

[77] G Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford University Press 1998).

[78] D Davitti, 'Biopolitical Borders and the State of Exception in the European Migration "Crisis"' cit. 1188-1192.

[79] M Gkliati, 'The EU-Turkey Deal and the Safe Third Country Concept Before Greek Asylum Appeals Committees' (2017) Movements, Journal for Critical Migration and Border Regime Studies 213; and E Tsourdi, 'Regional Refugee Regimes – Europe' in C Costello, M Foster and J McAdam (eds), *Oxford Handbook of International Refugee Law* (Oxford University Pres, 2021) 352, 365-367.

[80] M Mouzourakis, 'All but Last Resort: The Last Reform of Detention of Asylum Seekers in Greece' (18 November 2019) EU Immigration and Asylum Law and Policy eumigrationlawblog.eu.

[81] E Tsourdi, 'COVID-19, Asylum in the EU, and the Great Expectations of Solidarity' (2020) IJRL 374.

[82] E Tsourdi, 'The Emerging Architecture of EU Asylum Policy: Insights into the Administrative Governance of the Common European Asylum System' in F Bignami (ed.), *EU Law in Populist Times: Crises and Prospects* (Cambridge University Press 2020) 191.

[83] For a conceptual framework on joint processing, see E Tsourdi, 'Holding the European Asylum Support Office Accountable for its Role in Asylum Decision-Making: Mission Impossible?' (2020) GLJ 506, 513–516. For an understanding on Frontex's role in joint implementation see E Tsourdi, 'Beyond the Migration Crisis: The Evolving Role of EU Agencies in the Administrative Governance of the Asylum and External Border Control Policies' in J Pollak and P Slominski (eds), *The Role of EU Agencies in the Eurozone and Migration Crisis: Impact and Future Challenges* (Palgrave Macmillan 2021) 171, 180-181.

[84] See Law 4346/2019 of 1 November 2019 published on the Official Gazette of the Greek Government, Series A, Issue 169, 4827 ff., arts 76(1) (re: admissibility) 76(2) (re: merits) and 90 (re: border procedures).

[85] On mixed or composite administrative proceedings in EU law more broadly see characteristically: G Della Cananea, 'The European Union's Mixed Administrative Proceedings' (2014) Law&ContempProbs 197; MP Chiti, 'Forms of European Administrative Action' (2014) Law&ContempProbs 37 (2014); H Hofmann, 'Composite Decision-Making Procedures in EU Administrative Law' in H Hoffmann and A Tuŕk (eds), *Legal Challenges in EU Administrative Law: Towards an Integrated Administration* (Edward Elgar 2009) 136.

These developments stir the challenges of effective monitoring, explored in this *Special Section* by the *Article* of Sarah Tas,[86] and of accountability[87] for fundamental rights violations. Regarding the latter, one line of literature has explored the limitations and possibilities of judicial accountability, including the mobilisation of less traditional avenues such as EU public liability by Fink.[88] Other authors have focused on less explored accountability avenues such as Tsourdi's critical analysis of extra-judicial accountability, and namely the EU Ombudsman's treatment of individual complaints relating to EASO involvement in asylum processing at hotspots,[89] or in this *Special Section* the analysis of Loschi and Slominski of Frontex's Consultative Forum as a novel mechanism of social accountability.[90] However, administrative integration should not be considered as inherently negative due to the failings of the current application of the hotspots approach. It also presents significant opportunities, such as the potential to harmonise practices "bottom-up",[91] and to enhance intra-EU solidarity through EU agencies and their resources. However, in order for it to evolve beyond the *status quo*, administrative cooperation should be appropriately framed, including through binding legislation, appropriately resourced, including through significant resources from the EU level, and released from the underlying impetus of externalisation.

III.2. Beyond hotspots: securitisation and deflection of "risky" migrants

The operationalisation of the hotspot approach to migration management is not the sole development at the EU's external borders. Member States have adopted a number of national level responses, some at the fringes of legality, such as the increased use of criminal law to pre-empt and manage migration, some beyond, such as illegal pushbacks at the borders. These developments are inscribed in Member States' increasing espousal

[86] See in this *Special Section* S Tas, 'Fundamental Rights Violations in the Hotspots: Who Is Watching Over Them?' (2022) European Papers www.europeanpapers.eu 215.

[87] We are referring here to a broad interdisciplinary understanding of the concept of accountability, thus not equating it to legal responsibility. See, *e.g.*, M Bovens, T Schillemans and R E Goodin, 'Public Accountability' cit. 1, 9, building on the previous works of Bovens and notably on M Bovens, 'New Forms of Accountability and EU-Governance' (2007) Comparative European Politics 104.

[88] M Fink, *Frontex and Human Rights: Responsibility in "Multi-Actor Situations" under the ECHR and EU Public Liability Law* (Oxford University Press 2018).

[89] E Tsourdi, 'Holding the European Asylum Support Office Accountable for its Role in Asylum Decision-Making: Mission Impossible?' cit. 526-530.

[90] See in this *Special Section*, C Loschi and P Slominski, 'Frontex's Consultative Forum and Fundamental Rights Protection: Enhancing Accountability Through Dialogue' (2022) European Papers www.europeanpapers.eu 195.

[91] On the evolution of practical cooperation in the EU asylum policy see E Tsourdi and C Costello, 'The Evolution of EU Law on Refugees and Asylum' in P Craig and G de Búrca (eds), *The Evolution of EU Law: Third Edition* (Oxford University Press 2021) 793, 813-814.

of a security-oriented approach to migration, whereby refugees and migrants are perceived as a security threat to state sovereignty.[92] Similar trends of securitisation at territorial borders can be observed in further states of the Global North, such as the US and Australia, whereby states try to control global mobility.[93] In a "culture of control", as Garland has eloquently put it, there is growing societal motivation for the identification, segregation and incapacitation of certain classes of people perceived as "the dangerous other",[94] with migrants and refugees falling within this realm of "risky" individuals. Jesse analysed how "othering" is a discursive group process wherein the in-group has the power to ascribe negative attributes to an out-group.[95] Central to the construction of "otherness" is the "'asymmetry in power relations" wherein the dominant group devalues the particularity of others (their otherness) while imposing corresponding discriminatory measures.[96] Cultural and ethnic identity increasingly define othering,[97] and thus underpin the characterisation of migrants and refugees as "the risky other". The illegal and borderline legal unilateral deflection practices at the EU's territorial borders, outlined by following paragraphs, and the securitisation approach that underpins them, bear links with racism, empire, and colonialism.[98]

Criminalisation of migration – or, as commonly referred to, "crimmigration"[99] – broadly encompasses the entire arsenal of coercive measures currently available in the context of immigration enforcement at the national level, whose origins can be traced back to the criminal justice system. This continuum of measures includes deprivation of liberty, preventive policing, and the creation of criminal offences for non-compliance with

[92] For example, see D Bigo, 'Security and Immigration: Toward a Critique of the Governmentality of Unease' (2002) Alternatives 63.

[93] See A Shacknove, 'From Asylum to Containment' (1993) International Journal of Refugee Law 516; B S Chimni, 'The Geopolitics of Refugee Studies: A View from the South' (1998) Journal of Refugee Studies 350, and more recently, D S FitzGerald, *Refuge beyond Reach* cit.; D Ghezelbash, V Moreno-Lax and others, 'Securitization of Search and Rescue at Sea: The Response to Boat Migration in the Mediterranean and Offshore Australia' (2018) ICLQ 315.

[94] D Garland, *Culture of Control* (Chicago University Press 2001).

[95] M Jesse, 'The Immigrant as the "Other"' in M Jesse (ed.), *European Societies, Migration, and the Law: the "Others" amongst "Us"* (Cambridge University Press 2021) 19, 20-22.

[96] J F Staszak, 'Other/otherness' in R Kitchin and N Thrift (eds), *Encyclopedia of Human Geography* (Elsevier 2009) 43, 43.

[97] A Rea, S Bonjour, and D Jacobs, 'Introduction' in S Bonjour, D Jacobs and S Bonjour (eds), *The Others in Europe* (Éditions de l'Université libre de Bruxelles 2009) 9.

[98] See, *e.g.*, N El-Enany, *Bordering Britain: Law, Race, And Empire* (Manchester University Press 2020) and L Mayblin and J Turner, *Migration Studies and Colonialism* (Polity 2020).

[99] This term was coined by Juliet Stumpf. See Juliet Stumpf, 'The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power' (2006) AmULRev 367. For the notion of "populist fuelled crimmigration" see V Passalacqua, 'El Dridi Upside down: A Case of Legal Mobilization for Undocumented Migrants' Rights in Italy' (2016) Tijdschrift voor bestuurswetenschappen en publiekrecht 215.

administrative – immigration – legislation.[100] For example, as Galina Cornelisse and Madalina Moraru explore in this *Special Section*, with the entry into force of the Return Directive,[101] certain Member States turned to protean and complex crimmigration policies based on an ill-conceived understanding of the *legal* and *temporal* borders between domestic criminal law and the Return Directive, including concerning illegal entry.[102] As the authors analyse, the ECJ has greatly curtailed such recourse to national criminal legislation based on the principles of effectiveness and proportionality.[103] In addition, the trend of (over)criminalising migration has more recently extended to the criminalisation and prosecution of human smuggling in a rather sweeping manner, including where no financial gain is pursued and humanitarian assistance to irregular entry is provided by individuals or civil society actors.[104]

Another set of practices includes the erection of physical barriers at external territorial borders and the establishment of transit zones. Hungary is a case at point. Since 2015, the Hungarian government has dismantled refugee protection through a series of legislative amendments. A detailed analysis goes beyond the remit of this *Article*;[105] the measures touched every aspect of the national asylum system. Among other things, the measures introduced a fully informal removal mechanism, first within an eight-kilometre distance of the fence with Serbia, and later throughout the whole territory; criminalised the crossing of the 175-kilometre fence; and established that a "crisis situation" permits the deprivation of liberty of asylum seekers in transit zones throughout the entire refugee status determination procedure.[106]

As Nagy has explained, this signified that during a "crisis situation caused by mass immigration" (which the Hungarian government immediately instated and has repeatedly renewed without objective indicators to justify it), all asylum seekers are obliged to submit themselves to a forced (and escorted) removal from within Hungarian territory to the

[100] Valsamis Mitsilegas, *The Criminalisation of Migration in Europe: Challenges for Human Rights and the Rule of Law* (Springer 2015).

[101] Directive 2008/115/EC of the European Parliament and the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.

[102] See in this *Special Section* G Cornelisse and M Moraru, 'Judicial Interactions on the European Return Directive' cit.

[103] *Ibid*.

[104] For example, S Carrera and others, *Policing Humanitarianism – EU Policies Against Human Smuggling and their Impact on Civil Society* (Hart 2019).

[105] See instead B Nagy, 'From Reluctance to Total Denial: Asylum Policy in Hungary 2015-2018' in V Stoyanova and E Karageorgiou (eds), *The New Asylum and Transit Countries in Europe During and in the Aftermath of the 2015/2016 Crisis* (Brill 2019) 17; K Juhász, 'Assessing Hungary's Stance on Migration and Asylum in Light of the European and Hungarian Migration Strategies' (2017) Politics in Central Europe 35; Hungarian Helsinki Committee, 'Two Years After: What's Left of Refugee Protection in Hungary?' (September 2017) helsinki.hu.

[106] Nagy, 'From Reluctance to Total Denial' cit.

Serbian side of the fence, depriving them of immediate access to the procedure.[107] The official narrative is that removed persons could then walk along the fence to reach the Hungarian transit zone and wait for admission, with no water, sanitation or shelter provided.[108] Admissions to the transit zone were extremely limited, benefiting just one person per day in January 2018.[109] Within the transit zone, asylum seekers were deprived of a number of procedural rights and reception conditions, and of their liberty.[110]

These amendments led to systemic violations of asylum seekers' fundamental rights. This became apparent through a host of references for preliminary rulings by Hungarian courts. The *FMS* judgment allowed the ECJ to scrutinise conditions within the transit zones, and to find multiple violations of the substantive asylum and return *acquis* on detention standards (*i.e*. arbitrary deprivation of liberty), alongside related procedural standards (*i.e*. no possibility of judicial review of detention).[111] It was an infringement action initiated by the Commission that allowed the ECJ to holistically examine the dismantling of the national asylum and return systems.[112] The Court found that the "automatic removals" of asylum seekers from Hungarian territory, the drastic limitation of the number of applicants allowed to enter the transit zones, and the system of detention in transit zones, breached a number of the EU's asylum and return *acquis* provisions and the fundamental rights under the Charter (notably arts 6, 18 and 47). Despite the Court's rulings, pushbacks at the Hungarian-Serbian border consisting of illegal *refoulement* persist. The involvement of Frontex in these settings creates intricate legal issues of responsibility for fundamental rights violations in a multi-actor setting that Mariana Gkliati explores in this *Special Section*.[113]

A final example of unilateral deflection actions at national level takes place at the EU's external sea borders. Namely, the absence of an EU-coordinated response to disembarkation of asylum seekers and migrants arriving by sea has seen Member States such as Italy and Malta unilaterally declaring a "closed port" policy combined with non-disembarkation practices. This has led to intense human suffering with boats remaining adrift at

[107] *Ibid*. 38. Only three exceptional categories of individuals were granted access to a regular procedure: those in detention, those who regularly stayed in Hungary and those under 14 years of age; see Hungarian Asylum Act, art. 80(j).

[108] Nagy, 'From Reluctance to Total Denial' cit. 38.

[109] United Nations High Commissioner for Refugees, *Hungary: UNHCR dismayed over further border restrictions and draft law targeting NGOs working with asylum-seekers and refugees* www.unhcr.org.

[110] Joined cases C-924/19 and C-925-19 *FMS and Others v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság* ECLI:EU:C:2020:367.

[111] *Ibid*.

[112] Case C-808/18 *Commission v Hungary* ECLI:EU:C:2020:1029.

[113] See in this *Special Section*, M Gkliati, 'The Next Phase of the European Border and Coast Guard: Responsibility for Returns and Push-backs in Hungary and Greece' (2022) European Papers www.europeanpapers.eu 171.

sea for lengthy periods.[114] When disembarkation and relocation takes place, it is organised in an *ad hoc* manner, "ship-by-ship". Solidarity *à-la-carte* has been found to downgrade the consistency of the EU asylum *acquis*, failing to adequately protect individuals' fundamental rights.[115]

III.3. Screening, border asylum procedures and streamlined returns: what's "new" in the New Pact on Migration and Asylum?

The New Pact on Migration and Asylum,[116] the latest policy framework and the series of legislative proposals that accompany it[117] endorse "a comprehensive approach, bringing together policy in the areas of migration, asylum, integration and border management", seeking to establish "seamless migration processes and stronger governance".[118] At the borders, this translates in practice to subjecting all non-EU citizens who do not fulfil entry requirements, first, to a *screening procedure* where identification (identity, health and security check), and referral to either an asylum procedure or a return procedure will take place, or will end in refusal of entry.[119] Rather than constituting a novelty, this procedure mainly consolidates the processes which already take place under different instruments (*e.g.* Schengen Border Code, asylum *acquis*).[120]

Those channelled to an asylum procedure may be subjected to either a *normal* asylum procedure or possibly a *border procedure* (such referral to a border procedure is mandatory in cases of misleading the authorities; constituting a danger to national security and public order; or holding a nationality with an EU-wide "recognition rate" of 20 per cent or lower).[121] This border procedure, applicable for a maximum of 12 weeks, is in essence an accelerated asylum determination procedure, and can also be coupled with

[114] One such highly mediatised case was that of the Aquarius ship. See M Fink and K Gombeer, 'The Aquarius Incident: Navigating the Turbulent Waters of International Law' (14 June 2018) EJIL Talk www.ejiltalk.org.

[115] S Carrera and R Cortinovis, 'Search and Rescue, Disembarkation and Relocation Arrangements in the Mediterranean: Sailing Away from Responsibility?' (CEPS Paper 10-2019).

[116] Communication COM(2020) 609 final from the Commission of 23 September 2020 on a New Pact on Migration and Asylum.

[117] The most relevant to our analysis are the: Commission Proposal for a Regulation COM(2020) 612 final introducing a screening of third country nationals at the external borders; Amended Commission Proposal for a Regulation COM(2020) 611 final establishing a common procedure for international protection in the Union; Commission Proposal for a Regulation COM(2020) 610 final on asylum and migration management; and, finally, Commission Proposal for a Regulation COM(2020) 613 final addressing situations of crisis and force majeure in the field of migration and asylum.

[118] Communication COM(2020) 609 final cit.

[119] Communication COM(2020) 612 final recital 40 Screening Regulation Proposal cit.

[120] See analysis in D Thym, 'European Realpolitik' cit.

[121] COM(2020) 611 final art. 41(3) read together with art. 40(1) Amended Commission Proposal for a Procedures Regulation cit.

the deprivation of liberty of asylum seekers.[122] The border procedure is not unknown to national asylum systems. However, it is currently not obligatory, neither is it regulated in such detail by EU law. Rather, the possibility exists under EU law for Member States to introduce such a procedure through national law. If the application is rejected at the end of the border procedure, the now failed asylum seeker is subjected to a novel *return border procedure*.[123] Therein lies the "seamless link" between asylum and return at the borders that aims to "quickly assess abusive asylum requests or asylum requests made at the external border by applicants coming from third countries with a low recognition rate in order to swiftly return those without a right to stay in the Union".[124]

The UNHCR had voiced the need for swift identification at the external borders, differentiation between categories of persons making up mixed flows, and referral to an appropriate procedure, as early as 2007 (and updated ten years later) through its so-called 10-Point Plan.[125] In addition, Member States' international and EU law human rights obligations concerning asylum seekers, victims of trafficking in human beings, children, and victims of torture, entail, to varying degrees, positive obligations of identification. Hence, the establishment of a structured screening stage is not inherently negative.

What is problematic is the deflection logic which imbues the operationalisation of the screening procedure. First, protection needs are reduced to international protection needs and referral to an asylum procedure, whereas they should include broader forms of vulnerability, *e.g*. survivors of torture or victims of human trafficking and referral to appropriate care structures. Next, it has been observed, that while emphasis is placed on ill-founded asylum claims and the weeding out of "abusers", no efforts are made for the prioritisation of manifestly well-founded claims.[126] The "means aspect" (*e.g*. facilities, personnel) for effectively running such a process is not appropriately accounted for, risking a repetition of the solidarity deficit conundrum and widely defective conditions currently facing applicants at hotspot areas, such as in the islands of Eastern Aegean in Greece.[127] Processing at border areas, for those subjected to an accelerated border procedure, risks undermining their procedural rights due to circumstances and logistic constraints (*e.g*.

[122] COM(2020) 611 final art. 41(11) read together with art. 40(f) Amended Commission Proposal for a Procedures Regulation cit., and analysis in G Cornelisse, 'The Pact and Detention: An Empty Promise of "certainty, clarity and decent conditions"' (6 January 2021) EU Immigration and Asylum Law and Policy eumigrationlawblog.eu.

[123] COM(2020) 611 final art. 41(a) Amended Proposal for a Procedures Regulation cit.

[124] COM(2020) 611 final Explanatory Memorandum Amended Proposal for a Procedures Regulation cit. 4.

[125] United Nations High Commissioner for Refugees, *The 10-Point Plan in Action* www.unhcr.org.

[126] An argument raised in L Jakulevičienė, 'Re-decoration of Existing Practices? Proposed Screening Procedures at the EU External Borders' (27 October 2020) EU Immigration and Asylum Law and Policy eumigrationlawblog.eu.

[127] E Tsourdi, 'COVID-19, Asylum in the EU, and the Great Expectations of Solidarity' cit.

access to information, access to counsel) while facing tight deadlines.[128] In addition, in all three stages of border procedures (*i.e.* screening, asylum and return) the instruments blur the lines between deprivation of liberty and restrictions to the freedom of movement, and could lead to the propagation of widespread *de facto* detention.[129] The Pact instruments on the border return procedure, however, contain guarantees for a fairer procedure compared to the European Commission's 2018 proposal to recast the Return Directive, for example in what concerns the justification of decisions and judicial review.[130]

The Pact consolidates and enhances deflection strategies at the EU's external territorial borders. In addition, it adopts an ambivalent approach to administrative integration, not appropriately framing the involvement of EU agencies in these envisaged processes.[131] Neither has financial support for the implementation of these procedures been significantly enhanced. Overall then, the Pact instruments risk further entrenching the EU's external territorial borders as "liminal EU territory",[132] or "anomalous zones",[133] where certain fundamental rights and procedural guarantees could be *de facto* suspended.

IV. Overview of contributions

This collective study brings together legal and social sciences scholars to reflect on themes that have the potential to both challenge or further reinvigorate the EU's shifting borders. The first *Article* in this *Special Section*, that of Paula García Andrade, assesses the role of courts in the EU: whether contributing to a reinvention of the EU's shifting border or to an expansion of human rights responsibilities beyond borders as a counterbalance to the "spatial and operational aggrandizement of regulatory power'".[134] García Andrade dives into a scoping exercise to analyse whether a rationale in the case law can be detected in

[128] See analysis in J Vedsted-Hansen, 'Border Procedure: Efficient Examination or Restricted Access to Protection?' (18 December 2020) EU Immigration and Asylum Law and Policy eumigrationlawblog.eu.

[129] See analysis in Cornelisse, 'The Pact and Detention' cit.

[130] As elaborated by M Moraru, 'The New Design of the EU's Return System under the Pact on Asylum and Migration' (14 January 2021) EU Immigration and Asylum Law and Policy eumigrationlawblog.eu juxtaposing COM(2020) 611 final art. 41(a) Amended Proposal for a Procedures Regulation cit. with the provisions of COM(2018) 634 final chapter V Commission Proposal for a Directive on common standards and procedures in Member States for returning illegally staying third-country nationals.

[131] See analysis in E Tsourdi, 'The New Pact and EU Agencies: A Tale of Two Tracks of Administrative Integration and Unsatisfactory Embedding' in D Thym and Odysseus Academic Network (eds), *Reforming the Common European Asylum System. Opportunities, Pitfalls, and Downsides of the Commission Proposals for a New 'Pact' on Migration and Asylum* (Nomos 2022) 113.

[132] See analysis in A Papoutsi and others, 'The EC Hotspot Approach in Greece' cit. and above subsection III.3.

[133] G Campesi, 'The EU Pact on Migration and Asylum and the Dangerous Multiplication of "anomalous zones" for Migration Management' (27 November 2020) Asile Forum on the New Pact on Migration and Asylum www.asileproject.eu, referring to the writings of Neuman on Guantanamo Bay; see G L Neuman, 'Anomalous Zones' (1996) Stanford Law Review 1197.

[134] A Shachar, 'The Shifting Border' cit. 19.

the external dimension of the EU immigration and asylum policies. She explains that a limited number of cases reach the court in this field, either because no infringement procedures against the Member States have been initiated, or due to the limited standing of individuals in the annulment procedure. Other factors are the CJEU's limited jurisdiction in the Common Foreign and Security Policy and the debated legal accountability of Frontex or EU Member States operations in third countries. Where the Court did assess this field, García Andrade detects judicial passivism which undermines the legitimacy of externalisation instruments. This, however, could be explained by the Court's unease with the deficiencies of the constitutional framework of the external dimension. The author further argues that such uncertainties could be overcome by the Court employing the structural principles of EU external relations law to fill gaps and address the shortcomings.

In the second *Article* of this *Special Section*, Galina Cornelisse and Madalina Moraru grapple with the multilevel application of migration law, in particular by courts. They argue that the role of law in migration management is more complex than merely enabling the state to regulate mobility and transform its borders. Migration legislation, in fact, holds a promise of opening more space for legal claims for migrant justice, especially if it is applied by judges across different legal orders. Cornelisse and Moraru substantiate this claim through a critical and thorough study of judicial interactions by European and domestic courts on the Return Directive, and, notably, the areas of merging of criminal justice and immigration policing; detention as immigration enforcement; and the legal and social exclusion of irregular migrants. They conclude that EU legislation on return has set into motion a process of incremental constitutionalisation of irregular migration in Europe in two ways. Firstly, by extending judicial review over a legal field which has traditionally been considered an exceptional branch of law under the purview of executive control, and, secondly, by enabling irregularly staying migrants to have their *interests* translated into *rights* that can be litigated and enforced.

The third *Article*, that of Caterina Molinari, examines the impact of constitutional principles in this field, where agreements and arrangements can create and reinforce borders, preventing individuals from accessing not only physical territories, but also legal systems endowing them with rights and safeguards. More specifically, the *Article* of Caterina Molinari delves into two structural principles, namely subsidiarity and institutional balance, and how far these principles frame the shared competences exercised in this field. She explains, firstly, that the role of the subsidiarity principle in EU external relations law has been underdeveloped but should be strengthened and could have an added value to limit Union's action in the readmission policy. She argues that the application by the Court of the principle of institutional balance can fill the gap of procedural rules for informal readmission instruments to allow institutions – and especially the European Parliament – to fully exercise their prerogatives without impinging upon each other's functions. She then evaluates the instruments employed in the readmission policy and concludes that certain types of *ad hoc* readmission deals will require a stricter application of

procedures, namely employing similar procedures as for international agreements they intend to replace.

The next two *Articles* centre around the physical infrastructures of the shifting border by examining the European Border and Coast Guard Agency's potential responsibility for human rights violations (Mariana Gkliati), as well as the impact of this agency's Consultative Forum on Fundamental Rights in increasing its fundamental rights accountability (Chiara Loschi and Peter Slominski).

Focusing on the role of Frontex in surveillance and return operations in Greece and Hungary, Mariana Gkliati traces the potential implications for the responsibility of the agency for human rights violations. In her thorough study, she scrutinises both the indirect responsibility of the agency through assisting the host state in the commission of a violation and into its direct responsibility due to exercising a degree of effective control over seconded agents. Gkliati's study illustrates a shift from complicity, as the main form of responsibility for Frontex, to direct responsibility, brought about by the agency's expansion of powers, means, and competences. These developments bring to sharp relief the necessity of a robust system of judicial and administrative accountability.

Chiara Loschi and Peter Slominski engage in a theoretical assessment of the Consultative Forum's interaction with the various fora in charge of holding Frontex accountable. In so doing, they combine Bovens' concept of accountability[135] with the notion of dialogues[136] to argue that the status of the Consultative Forum and its possibility to engage with key stakeholders on a regular basis provide an opportunity to strengthen dialogues with and between Frontex's accountability fora. Even though the authors reach the conclusion that these accountability dialogues have had a modest impact so far, they highlight their normative potential to enhance the agency's accountability and thus challenge EU's shifting borders.

To complement the role of agency action in the shifting border context and the arising accountability challenges, Sarah Tas studies hotspots as means to push the border "deep into the interior" of the EU. Tas observes the limited nature of judicial and administrative control over EU agencies and national authorities in the hotspots. She thus focuses on an under-researched area, notably monitoring for fundamental rights violations, as a means to fill this gap. Her detailed study includes five European monitoring mechanisms, being the European Commission, the European Parliament, the European Ombudsman, the Fundamental Rights Agency, and the agencies' internal monitoring mechanisms. After thorough scrutiny of the powers, means, and operationalisation of the monitoring mandate of each of these mechanisms, Tas concludes that, in their current state of development, they are insufficient to monitor the complex environment of the hotspots.

[135] M Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework' (2007) ELJ 447.

[136] J Bohman, *Public Deliberation. Pluralism, Complexity, and Democracy* (MIT Press 1996); NC Roberts, 'Keeping Public Officials Accountable through Dialogue: Resolving the accountability Paradox' (2002) Public Administration Review 658; M Gkliati and H Rosenfeldt, 'Accountability of the European Border and Coast Guard Agency: Recent Developments, Legal Standards and Existing Mechanisms' (RLI Working Papers 30/2016).

ARTICLES

THE EU'S SHIFTING BORDERS RECONSIDERED: EXTERNALISATION, CONSTITUTIONALISATION, AND ADMINISTRATIVE INTEGRATION

edited by Evangelia (Lilian) Tsourdi, Andrea Ott *and* Zvezda Vankova

THE EXTERNAL DIMENSION OF THE EU IMMIGRATION AND ASYLUM POLICIES BEFORE THE COURT OF JUSTICE

PAULA GARCÍA ANDRADE*

ABSTRACT: This *Article* analyses the case-law of the European Court of Justice (ECJ) relating to the external dimension of the EU immigration and asylum policies. Its aim is to search for the rationale behind the figures and types of actions brought before the Court in this field, as well as to infer from this case-law the inputs provided by Luxembourg to the design, development and implementation of EU external action on immigration and asylum. The role played by the ECJ in this external dimension will therefore be assessed, by verifying whether it can be ascribed to its usual role within the internal dimension of EU immigration and asylum policies or is rather closer to its case-law on EU external relations in general.

KEYWORDS: ECJ case law – external dimension – EU immigration and asylum policies – EU external relations law – EU-Turkey Statement – development cooperation.

I. INTRODUCTION

It is widely accepted that the case-law of the European Court of Justice (ECJ) has significantly contributed to the conformation of both EU external relations law and the EU area

* Associate Professor of European Union Law, Universidad Pontificia Comillas, pgandrade@comillas.edu.

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of freedom, security and justice (AFSJ).[1] However, the pronouncements of the Court regarding the external dimension of EU immigration and asylum policies, as a conjunction of these two sectors of EU law, seem to present a more limited impact. In this particular field, a reduced number of cases have reached the ECJ, which has been confronted in recent years with a variety of issues related, for instance, to the adequate decision-making procedures applicable to the externalisation of sea border controls;[2] the delimitation between readmission and development policies in EU external action;[3] the issuance of humanitarian visas by Member States,[4] or the use of international soft law tools for migration cooperation purposes.[5] To these scattered and diverse cases, we may add the much more solid and abundant jurisprudence of the Court regarding the interpretation of the migration-related provisions contained in association agreements and their impact on the status of third-country nationals' rights.[6]

The acquisition of complete jurisdiction over the AFSJ via the last reform of the Treaties, the rather recent proliferation of legal developments in this external dimension and some of their particularities might be among the reasons explaining the modest number of proceedings before the Court. From a substantive perspective, the content of some of these judgments might be disconcerting, as it seems to diverge from the traditional position of the ECJ within the AFSJ as an EU institution that tends to favor European integration and ensure human rights protection. At the same time however, these judgments

[1] See, among others, on EU external relations, M Cremona and A Thies (eds), *The European Court of Justice and External Relations Law. Constitutional Challenges* (Hart Publishing 2014); M Cremona (ed.), *Structural Principles of EU External Relations Law* (Hart Publishing 2018); and regarding the AFSJ in general, K Lenaerts 'The Contribution of the European Court of Justice to the Area of Freedom, Security and Justice' (2010) ICLQ 255; V Hatzopoulos, 'With or Without you... Judging Politically in the Field of Area of Freedom, Security and Justice' (2008) ELR 44; H Labayle, 'Architecte ou Spectatrice? La Cour de Justice de l'Union dans l'Espace de Liberté, Sécurité et Justice' (2006) RTDEur 1.

[2] Case C-355/10 *European Parliament v Council* ECLI:EU:C:2012:516.

[3] Case C-377/12 *Commission v Council (PCA with the Philippines)* ECLI:EU:C:2014:1903.

[4] Case C-638/16 *X and X v État belge* ECLI:EU:C:2017:173.

[5] Case T-192/16 *NF v European Council* ECLI:EU:T:2017:128; case T-193/16 *NG v European Council* ECLI:EU:T:2017:129; and case T-257/16 *NM v European Council* ECLI:EU:T:2017:130.

[6] Although their aim is to govern the privileged relationship of the Union and its Member States with a particular country "in all the fields covered by the Treaties" (case C-12/86 *Demirel* ECLI:EU:C:1987:400), association agreements can be considered, in my view, an instrument *lato sensu* of the external dimension of EU migration policy. As they usually contain clauses related to access to employment, residence and social security of nationals from the associated country, readmission clauses, as well as additional provisions regarding commitments on broader migration dialogues and cooperation, we can affirm the EU is conducting a part of its external action on migration through these global agreements. See, among others, S Peers, 'EU Migration Law and Association Agreements' in B Martenczuk and S Van Thiel (eds), *Justice, Liberty, Security: New Challenges for EU External Relations* (Vubpress 2008) 53–87; K Eisele, *The External Dimension of the EU's Migration Policy. Different Legal Positions of Third-Country Nationals in the EU: A Comparative Perspective* (Brill/Nijhoff 2014); P García Andrade, *La acción exterior de la Unión Europea en materia migratoria: un problema de reparto de competencias* (Tirant lo Blanch 2015).

may also be a sign of the Court's reluctance to pronounce itself on political choices, keeping rather in line with its EU external relations case-law.

This *Article* will therefore attempt to analyse and categorise the judgments of the ECJ relating to the developments of the external dimension of the EU immigration and asylum policies, comprising, for this purpose, both external instruments of cooperation with third countries and internal instruments having an externalisation purpose. Through this exercise, I will firstly aim at searching for the rationale behind the figures and types of actions brought before the Court in this field (section II). I will secondly attempt to extract from the content of ECJ case-law the inputs provided by Luxembourg to the design, development, and implementation of the external dimension of EU immigration and asylum policies and thus to its constitutional framing (section III). Bearing in mind its mission of ensuring that, in the interpretation and application of the Treaties, the law is observed,[7] the role the ECJ plays in this external dimension will be assessed. This will be done by verifying whether it can be ascribed to its usual role within the internal dimension of these policies or is rather closer to its case-law on EU external relations in general (section IV).

II. Quantitative analysis and scope of judicial competence in the external dimension of EU immigration and asylum policies

After undertaking an empirical survey of ECJ case-law, the first observation to make is that only a very limited number of cases have reached the Court as regards to issues pertaining to the external dimension of EU immigration and asylum policies. Out of the 84 judgments delivered in the period 2018-2020 in relation to immigration and asylum policies, none of them concerned the EU external action or its instruments of externalisation,[8] with the sole exception of the appeal on the EU-Turkey Statement rejected by the Court of Justice.[9] Cases regarding migration-related provisions of association agreements are however not included in this calculation. Out of 13 cases on association agreements decided in the period 2018-2020, more than 50 per cent of them dealt with migration-related issues, such as family reunification and social security of migrant workers, and all the seven cases addressed the interpretation and implementation of the Association Agreement with Turkey.[10]

If we examine the types of legal actions with which the ECJ was confronted in these cases, most of them concerned annulment actions introduced under art. 263 TFEU,

[7] Art. 19 TEU.

[8] From the total number of pronouncements delivered by the ECJ on immigration and asylum law since the 90s (around 190 approximately), only eight concern its external dimension *stricto sensu*.

[9] Joined cases C-208/17 P to C-210/17 P *NF and others v European Council* ECLI:EU:C:2018:705.

[10] See, *e.g.*, case C-70/18 *A, B, P* ECLI:EU:C:2019:823; case C-677/17 *Çoban* ECLI:EU:C:2019:408; case C-123/17 *Yön* ECLI:EU:C:2018:632.

against decisions to conclude international agreements on behalf of the EU[11] or arrangements,[12] decisions on the EU position to be defended within the organs set up by an international agreement,[13] or internal acts with externalisation effects.[14] As far as legal standing is concerned, applications were filed mainly by EU institutions, and also by Member States and private parties, albeit to a lesser extent.

A few judgments respond to preliminary references, usually when the cases relate to EU secondary legislation with extraterritorial or externalisation effects.[15] Preliminary rulings are of course the main legal proceeding through which the ECJ has had the opportunity to develop its much more solid jurisprudence regarding the interpretation of association agreements and their impact on the status of migrants' rights.[16] The fact that preliminary references on the migration provisions of association agreements are numerous in contrast to the limited number of preliminary questions regarding the specific instruments of the external dimension of EU migration policy might be explained by the scope of the Court's judicial competences on the AFSJ.

Initial procedural limitations were imposed on the ECJ's jurisdiction under former Title IV of the EC Treaty, as preliminary references on interpretation and validity could only be raised, according to former art. 68 EC Treaty, by courts or tribunals against whose decisions no judicial remedy was allowed, thus discarding references by lower instance courts.[17] Moreover, the request for urgent preliminary ruling procedures, created for the AFSJ in 2008,[18] was also restricted, quite paradoxically, to last instance courts.[19] The Lisbon Treaty

[11] E.g. *Commission v Council (PCA with the Philippines)* cit.

[12] On the EU-Turkey Statement, *NF v European Council* cit.; *NG v European Council* cit.; and *NM v European Council* cit.

[13] Case C-81/13 *United Kingdom v Council* ECLI:EU:C:2014:2449.

[14] On Council Decision 2010/252/EU supplementing the Schengen Borders Code as regards the surveillance of the sea external borders, *European Parliament v Council* cit.; on a Commission Decision approving a project on the security of borders of Philippines, case C-403/05 *European Parliament v Council (Philippines Border Management Project)* ECLI:EU:C:2007:624; on a Commission Decision confirming the refusal to grant access to documents regarding the Statement with Turkey of 18 March 2016, case T-852/16 *Access info Europe v Commission* ECLI:EU:T:2018:71.

[15] *E.g.* on Regulation 810/2009 establishing the Visa Code, *X and X* cit.; case C-403/16 *El Hassani* ECLI:EU:C:2017:960.

[16] S Peers, 'EU Migration Law and Association Agreements' cit. and K Eisele, *The External Dimension of the EU's Migration Policy* cit.

[17] Limitations on former Title VI TEU on police and judicial cooperation on criminal matters are not addressed in this paper.

[18] Decision 2008/79/EC of the Council of 20 December 2007 amending the Protocol on the Statute of the Court of Justice. From the first one decided in July 2008 (case C-195/08 PPU *Rinau* ECLI:EU:C:2008:406), 64 urgent procedures have been resolved by the ECJ up to now; only 14 of them related to borders, asylum and immigration.

[19] K Lenaerts, 'The Contribution of the European Court of Justice to the Area of Freedom, Security and Justice' cit. 264; H Labayle and P De Bruycker, 'Impact de la jurisprudence de la CEJ et de la CEDH en matière d'asile et d'immigration' (2012) Étude Parlement Européen 72-74.

suppressed these limitations: as of 1 December 2009, "normalized" jurisdiction of the Court on the AFSJ, and more particularly on immigration and asylum policies, has applied. In addition, the AFSJ has also benefitted from other general improvements on judicial protection brought about by the Lisbon reform.[20]

Quite surprisingly, not a single infringement procedure against a Member State has reached the Court of Justice as far as this external dimension is concerned. Since 2004, out of 30 (closed) cases initiated within the immigration and asylum policies of the AFSJ under art. 258 TFEU, none of them relates to their external dimension.[21] The only exception would lie in the infringement procedure brought against the Netherlands on the charges required for obtaining or renewing residence permits by Turkish nationals, considered by the Court as an infringement of the Ankara Agreement, its Additional Protocol and Decision 1/80 of its Association Council.[22] It should be recalled that Member States must comply with the provisions of any international agreement concluded by the Union, as they, albeit not parties to these agreements under international law unless concluded in the mixed form, fulfil an obligation under EU law to respect and implement those agreements.[23] In addition to abiding by the commitments contained in international agreements concluded by the Union, Member States must respect the EU rules on the distribution of external competences. This includes, for instance, the obligation to refrain from negotiating a bilateral agreement at the national level when the Commission has received a mandate to negotiate an agreement with the same substantive scope at the supranational level.[24] Some infringements of the so-called "mandate theory" and the principle of sincere cooperation in negotiating readmission can be identified.[25] However, as far as this external dimension is concerned, we

[20] See V Hatzopoulos, 'Casual but Smart: The Court's New Clothes in the Area of Freedom Security and Justice (AFSJ) after the Lisbon Treaty' (College of Europe Research Papers in Law 2-2008). We refer to the extension of the legal standing of private persons in the annulment action, by allowing to bring this procedure against regulatory acts which are of direct concern to them and do not entail implementing measures (art. 263(4) TFEU); the extension of the passive legitimation to acts from the European Council and EU Agencies (art. 263(1) TFEU); or the recognition of the right to an effective remedy in art. 47 of the EU Charter on Fundamental Rights.

[21] We must however relativise this data, as the unwillingness of the Commission to start infringement procedures appears to be a general feature of EU external relations as a whole. According to information provided in Curia, only 36 infringement procedures have reached the ECJ on external relations issues from the start of the integration process.

[22] Case C-92/07 *Commission v Netherlands* ECLI:EU:C:2010:228.

[23] Art. 216(2) TFEU. See P Eeckhout, *EU External Relations Law* (Oxford University Press 2011) 301.

[24] For an examination on how Member States have respected the rules on distribution of external competences on the different dimensions of migration, see P García Andrade, *La acción exterior de la Unión Europea en materia migratoria* cit.

[25] After the Commission received from the Council a mandate to negotiate an EURA with Russia in September 2000, Austria (2005), Greece (2004) and Italy (2006) signed bilateral readmission agreements or police cooperation agreements linked to readmission with the same country. Bilateral readmission agreements were put into force with Albania by Germany (2003) and the United Kingdom (2005), while the Commission had received its negotiating mandate in November 2002, the EURA having been signed in April

can only give account of the Commission's attempt to initiate an infringement procedure against Germany for negotiating an "Authorised Destination Status" (ADS) agreement with China at the bilateral level, in violation of the exclusive external competence of the EU on short-term visas.[26]

Together, of course, with the restricted legal standing of individuals under the annulment procedure in general EU law, other reasons also account for the limited number of cases that reach the Court concerning the external dimension of EU migration policy. For example, additional limitations apply to the judicial competence of the ECJ, especially as far as the operational aspects of this external dimension are concerned. At this point, we may think of the Court's capacity to monitor the conformity with human rights of Common Security and Defence Policy (CSDP) missions with a migration purpose, instruments that, because of their evident extraterritorial scope, might be included into the EU external action on migration *lato sensu*.[27] *A priori*, the Court lacks, according to art. 24 TEU and art. 275 TFEU, jurisdiction with respect to Treaty provisions on the Common Foregin and Security Policy (CFSP) and acts adopted pursuant thereto. The exception allowing the Court to review the legality of restrictive measures adopted by the Council against natural or legal persons is not applicable, while the ground of judicial competence aimed at monitoring respect of the mutual non-affectation clause of art. 40 TEU would not allow for the protection of individual rights.[28] However, it is true that art. 40 TEU provides precisely for the legal foundation to verify whether these missions, which, in my opinion, pursue AFSJ-migration objectives, are adequately founded on the TEU legal bases of the CSDP or whether we are instead faced with a problem of horizontal delimitation of competences.[29] In my view, the limited jurisdiction of the ECJ over this intergovernmental policy constitutes indeed an additional reason why these missions should rather be founded on the TFEU legal basis on migration. As such, had the operations been undertaken by the European Border and Coast Guard Agency (EBCG or Frontex Agency), they would have been subject to the review of legality of the ECJ under art. 263 TFEU as "acts of bodies,

2005. See P García Andrade, 'The Duty of Cooperation in the External Dimension of the EU Migration Policy' in S Carrera and others (eds), *EU External Migration Policies in an Era of Global Mobilities: Intersecting Policy Universes* (Brill/Nijhoff 2019) 299.

[26] B Van Vooren, *EU External Relations Law and the European Neighbourhood Policy: A Paradigm for Coherence* (Routledge 2012) 92.

[27] See, as examples, Council Decision 2013/233/CFSP on the European Union Integrated Border Management Assistance Mission in Libya (EUBAM Libya); or Council Decision 2015/778/CFSP on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED).

[28] S Johansen, 'Human Rights Accountability of CSDP Missions on Migration' (8 October 2020) EU Immigration and Asylum Law and Policy eumigrationlawblog.eu.

[29] See P Koutrakos, 'The Nexus between CFSP/CSDP and the Area of Freedom, Security and Justice' in S Blockmans and P Koutrakos (eds), *Research Handbook on the EU's Common Foreign and Security Policy* (Elgar 2018) 296; P García Andrade, 'EU External Competences in the Field of Migration: How to Act Externally When Thinking Internally' (2018) CMLRev 157, 182-185.

offices or agencies of the Union intended to produce legal effects vis-à-vis third parties". Obtaining judicial redress against the Agency's actions, including its extraterritorial operations, is legally possible,[30] and EU substantive safeguards can be considered to apply also extraterritorially.[31] Nevertheless, when border cooperation takes places in the territory of third countries, the distribution of powers, functions and responsibilities in the operations between not only Frontex and Member States' staff but also with third countries' agents appears even much more difficult to clarify.[32] In general terms, procedural difficulties related to the legal standing of individual applicants[33] or the production of legal effects of Frontex's acts vis-à-vis third parties, as well as transparency limitations also complicate the filing of legal actions by individuals against Frontex actions or omissions.[34] This therefore hinders the judicial supervision of the increasingly significant operational aspects of the external dimension of EU migration policy.

Finally, it is also important to note that the proliferation of developments of EU external action in the fields of migration and asylum has occurred quite recently. Although the political importance of the external dimension of immigration and asylum policies can be traced back to the early 90s, the first agreement specifically addressing migration – thus excluding association agreements with migration-related clauses - was only concluded in

[30] See art. 98 of the Regulation 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard (EBCG Regulation) in connection to art. 263(5) TFEU.

[31] Art. 71(3) EBCG Regulation: "The Agency and Member States shall comply with Union law, including norms and standards which form part of the Union acquis, *including where cooperation with third countries takes place on the territory of those third countries*", emphasis added.

[32] See J Santos Vara, *La dimensión exterior de las políticas de inmigración de la Unión Europea en tiempos de crisis* (Tirant lo Blanch 2020) 115-134; J Rijpma, 'The Proposal for a European Border and Coast Guard: Evolution or Revolution in External Border Management?' (2016) Study for the LIBE Committee European Parliament 23-24; M Fink, 'Frontex: Human Rights Responsibility and Access to Justice' (30 April 2020) EU Immigration and Asylum Law and Policy eumigrationlawblog.eu. Note also that status agreements concluded by the EU with third countries simply state that "[e]ach Party shall use an existing mechanism to deal with allegations of a breach of fundamental rights committed by its staff in the exercise of their official functions in the course of an action performed under this Agreement" (Status Agreement between the European Union and the Republic of Serbia on actions carried out by the European Border and Coast Guard Agency in the Republic of Serbia). The members of a team, both from the Agency and Member States' staff, enjoy immunity from the jurisdiction of the third country but this shall not exempt them from the jurisdictions of the respective home Member States.

[33] In May 2021, the first action for failure to act against Frontex was brought before the ECJ by several human rights organisations on behalf of two asylum seekers because of the Agency's failure to respect its human rights obligations during push-back activities in the Aegean Sea and its failure to suspend or terminate those operations (case T-282/21 *SS and ST v Frontex* pending). It is to be seen whether the Court accepts the applicants' legal standing for this action.

[34] See S Tas, 'Frontex Actions: Out of Control? The Complexity of Composite Decision-Making Procedures' (TARN Working Paper 3-2020) 6-7. Also D Fernández Rojo, 'The Introduction of an Individual Complaint Mechanism Within Frontex: Two Steps Forward, One Step Back' (2016) Tijdschrift voor Bestuurswetenschappen en Publiekrecht 225; S Carrera, L Den Hertog and J Parkin, 'The Peculiar Nature of EU Home Affairs Agencies in Migration Control: Beyond Accountability Versus Autonomy?' (2013) EJML.

2004.[35] Moreover, EU external action in the field of migration has substantially expanded and consolidated for more than a decade, through the conclusion of readmission agreements, visa facilitation and visa waiver agreements, the adoption of mobility partnerships, common agendas on migration and mobility and an important number of other *ad hoc* informal instruments of cooperation. However, in contrast, EU developments aimed at fostering cooperation with third countries on asylum matters remain scarce,[36] and are currently limited to reinforcing the protection capacities of third countries through "regional protection and development programmes" and to efforts on resettlement. This evolution in time has not however affected the ECtHR in the same way, as the difference in numbers and scope between its case-law and that of the ECJ in the field of migration and asylum is extremely noticeable to the detriment of the latter.[37]

III. Substantive inputs from the Court of Justice's case-law on the external dimension of EU immigration and asylum policies

Having assessed the ECJ case-law from a procedural perspective, focusing on quantitative aspects and on the scope of the judicial competence of the Court, this section will attempt to analyze the content of the Court's decisions in order to extract the inputs provided by Luxembourg to the design, development and implementation of the external dimension of EU immigration and asylum policies and thus to its constitutional framing.

Several threads can be identified in the ECJ case-law related to this external dimension. Perhaps one of the most prominent is the line of cases in which the ECJ has refused to adjudicate on the substance by declaring a lack of competence. Through the well-known orders delivered in *NF*, *NG* and *NM v European Council* (the EU-Turkey Statement cases),[38] the General Court (GC) declared the inadmissibility of the annulment actions filed by several asylum-seekers on the ground that the act in question, the EU-Turkey Statement of 18 March 2016,[39] was to be attributed to the Member States and not to the EU. It was therefore not a reviewable act under art. 263 TFEU. These orders and that of

[35] Agreement between the European Community and the Government of the Hong Kong Special Administrative Region of the People's Republic of China on the readmission of persons residing without authorisation [2004]. With the exception of the EU-Turkey Statement, no legal action related to an instrument exclusively devoted to migration cooperation between the EU and a third country (*e.g.* readmission agreements, visas agreements...) has been brought before the Court.

[36] See, for an overview of external developments on migration and asylum, P García Andrade and I Martín, *EU Cooperation with Third Countries in the Field of Migration* (2015) Study for the LIBE Committee European Parliament.

[37] See H Labayle and P De Bruycker, 'Impact de la Jurisprudence de la CEJ et de la CEDH en matière d'asile et d'immigration' cit. 6.

[38] *NF v European Council*, *NG v European Council* and *NM v European Council* cit.

[39] EU-Turkey Statement of 18 March 2016, in European Council Press Release 144/16 of 18 March 2016.

the Court of Justice, which declared the appeal manifestly unfounded on formal reasons,[40] prevented the ECJ from ruling on the nature of this cooperation instrument, from verifying its compliance with the rule of law and institutional balance in conducting the EU's external action, as well as from monitoring the compatibility of the Statement with EU asylum and human rights law. Equally, in *X and X*, the Court replied to the preliminary reference from the Belgian *Conseil du Contentieux des Étrangers* that an application for a visa, with limited territorial validity, on humanitarian grounds submitted to the diplomatic mission of a Member State, did not fall within the scope of EU law – in this case the EU Visa Code – but solely within that of national law.[41] In doing so, the Court avoided an assessment of whether human rights obligations imposed a requirement on Member States to issue this kind of visa.

Both cases are considered, by Goldner Lang, examples of "judicial passivism", as the Court consciously chose not to decide on the substantial issues at stake by declaring a lack of jurisdiction.[42] By declaring its lack of competence, these cases may also reflect a different image of the ECJ when compared to its traditional role of ensuring the protection of individual rights which it has played in other fields of EU law.[43] Spijkerboer argues that had the Court addressed the compatibility of the EU-Turkey Statement with international and European asylum and refugee law, the Court would have been faced with two unattractive alternatives: either declaring unconformity with human rights, thus an "explosive political situation" for the Court, or interpreting refugee law standards in a narrow manner, which would be harmful for refugee protection and would undermine the Court's expansive interpretative approach, even leading to an erosion of other fields of law.[44] Nevertheless, in

[40] *NF and others v European Council* cit.

[41] *X and X v État belge* cit. paras 43-45.

[42] I Goldner Lang, 'Towards "Judicial Passivism" in EU Migration and Asylum Law?' in T Cárpeta and others (eds), *The Changing European Union: A Critical View on the Role of Law and Courts* (Hart Publishing forthcoming). In Spijkerboer's view, these judgments even reflect a bifurcation of law, through which the externalization of migration law is kept outside the scope of EU law: T Spijkerboer, 'Bifurcation of People, Bifurcation of Law: Externalization of Migration Policy before the EU Court of Justice' (2017) Journal of Refugee Studies 216, 220.

[43] For the ECJ's contribution to the protection of fundamental rights in the AFSJ, see K Lenaerts, 'The Contribution of the European Court of Justice to the Area of Freedom, Security and Justice' cit. For a view on the inadequate protection provided by the ECJ in the concrete fields of immigration and asylum in comparison to the contribution by the ECtHR, see H Labayle and P De Bruycker, 'Impact de la Jurisprudence de la CEJ et de la CEDH en Matière d'asile et d'immigration' cit. Nonetheless, on the international significance of its case-law regarding the interpretation of the Geneva Convention on the Status of Refugees, see E Drywood, 'Who's In and Who's Out? The Court's Emerging Case Law on The Definition of a Refugee' (2014) CMLRev 1093.

[44] T Spijkerboer, 'Bifurcation of People, Bifurcation of Law' cit. 224.

refusing to adjudicate on substantive grounds,[45] the Court decreases the legitimacy of externalisation instruments, as legitimacy also comes with judicial supervision and human rights law.[46]

The refusal of the Court to decide on the substance of the case in *X and X*, by excluding humanitarian visa applications from the scope of EU law, also led, as a consequence, to the non-applicability of the EU Charter of Fundamental Rights.[47] However, it could be argued, as Goldner Lang does, that the Court cannot be accused of refraining from discussing the object and purpose of the claimants' applications.[48] Leboeuf also considers that, although the Court has not dealt with human rights concerns in *X and X*, it has neither dismissed them.[49] It is true that a few months later, in *El Hassani*, a preliminary ruling on the right to bring an appeal against the decision of the consulate authorities of a Member State refusing a short-term visa,[50] the Court reaffirmed that the Charter is applicable when Member States apply, even with a broad discretion and in an extraterritorial setting, the provisions of the Visa Code.[51]

Another line of case-law shows the Court's favorable attitude towards the use of development cooperation instruments for control-oriented objectives of the external dimension of the EU immigration policy, exacerbating, in my view, what constitutes a problem of horizontal division of competences. In the *Philippines Border Management Project* case and the *Partnership and Cooperation Agreement with the Philippines* case, the Court of Justice indeed interpreted the objectives of development cooperation policy so broadly as to integrate security and migration concerns therein, in opposition to the explicit aims of primary law for this EU external policy. Firstly, in the *Philippines Border Management Project* case, the Court accepted, in line with the European Consensus on Development, that security-related projects in third countries – as the one on border security management approved by the

[45] Another option for the Court would have been to declare the annulment action inadmissible for lack of legal standing of the applicants, by relying on the *Plaumann* doctrine: it would have been very difficult indeed to argue on the direct and individual affectation of the applicants by the Statement. However, a possible follow-up would have been a preliminary reference under art. 267 TFEU by a Greek judge: see T Spijkerboer, 'Bifurcation of People, Bifurcation of Law' cit. 225. Consequently, refusing admissibility based on the nature of the act was the surest way to impede also a preliminary ruling request and thus ensure the Court's non-pronouncement on the substance of the case (I am grateful to Andrea Ott for pointing to this idea: see her analysis in A Ott, 'EU-Turkey Cooperation in Migration Matters: A Game Changer in a Multilayered Relationship?' (2017) CLEER Papers 29).

[46] T Spijkerboer, 'Bifurcation of People, Bifurcation of Law' cit. 233.

[47] *X and X* cit. para. 45.

[48] I Goldner Lang, 'Towards "Judicial Passivism" in EU Migration and Asylum Law?' cit.

[49] L Lebouef, 'La Cour de Justice face aux dimensions externes de la politique commune de l'asile et de l'immigration. Un défaut de constitutionnalisation?' (2019) RTDEur 55, 63.

[50] *El Hassani* cit.

[51] *Ibid*. para. 33. See L Lebouef, 'La Cour de Justice face aux dimensions externes de la politique commune de l'asile et de l'immigration' cit. 63.

Commission decision at stake – directly contribute to their development,[52] in contrast to the view of AG Kokott, for whom an indirect link to development was deemed insufficient in that case.[53] Later, in the *PCA Philippines* case, the Court handled again a broad notion of development, encapsulating the two traditional paradigms of the migration-development synergies ("more development to less migration", as well as "better managed migration for more development").[54] However, these paradigms do not include the use of development assistance for strengthening capacities of migration control, and even less for the implementation of readmission or border management cooperation commitments. Acting in such a manner would result in a distortion of the objectives assigned to the legal basis of the development cooperation policy in the Treaties.[55] An issue of uncertainty regarding the objectives of EU external policies can certainly be observed in art. 21 TEU, since this provision does not lead to a clear correspondence between objectives and policies.[56] However, it could be argued that development cooperation is precisely an exception in this regard, as the legal basis of this policy clearly states that eradication of poverty constitutes its primary aim.[57]

Both the *EU-Turkey Statement* cases and the *PCA with the Philippines* case might also share a worrisome feature of this ECJ case-law, as these two pronouncements imply a certain departure – or its misapplication in practice – from consolidated jurisprudence of the ECJ. On the one hand, the argumentation followed in the orders of the GC in the *EU-Turkey Statement* cases would run counter to the reasoning underpinning the *ERTA* judgement, by which the Court required to first determine who was competent to conclude the ERTA agreement, and thus the legal effects of the measure in question, in order to then decide on the admissibility of the annulment action.[58] The fact that Member States' proceedings dealt with the negotiations of the ERTA agreement, which fell into an EC exclusive competence,[59] implied that those proceedings had legal effects on the relations between the

[52] *Parliament v Commission (Philippines Border Management Project)* cit. para. 57: "there can be no sustainable development and eradication of poverty without peace and security".

[53] Case C-403/05 *Parliament v Commission* (*Philippines Border Management Project*) ECLI:EU:C:2007:290, Opinion of AG Kokott, paras 93 and 98.

[54] *Commission v Council (PCA with the Philippines)* cit. paras 43 and 49.

[55] We have analysed this issue in P García Andrade, 'EU External Competences in the Field of Migration' cit. 178-182. Broberg and Holdgaard show their criticism towards how the Court relies once again on the joint statement on the "European Consensus" for development and the Development Cooperation Instrument Regulation, instead of interpreting EU primary law, more particularly the terms in art. 208 TFEU which confers upon the development cooperation policy the primary objective of eradicating poverty: MP Broberg and R Holdgaard, 'Demarcating the Union's Development Cooperation Policy After Lisbon: Commission v. Council (Philippines PCFA)' (2015) CMLRev 547, 564-566.

[56] M Cremona, 'A Reticent Court? Policy Objectives and the Court of Justice' in M Cremona and A Thies (eds), *The European Court of Justice and External Relations Law* cit. 15-32.

[57] See art. 208(1) and (2) TFEU.

[58] Case C-22/70 *Commission v Council* (*ERTA*) ECLI:EU:C:1971:32 paras 3-5.

[59] *Ibid*. paras 30-32.

Community and its Member States and on the inter-institutional relationships. More particularly, the Court focused on the content of the act and not on the intention of the authors. It highlighted how the ERTA proceedings, when settling the negotiating position aimed at adapting the agreement to Community law, could not have simply been the expression of a voluntary coordination among Member States, but it rather was a course of action binding or having effects on both the Institutions and Member States.[60] Competence analysis was therefore crucial for the annulment action to be admissible,[61] an argumentation from which the GC preferred to deviate as shown by its omission to address the competence question.[62] On the other hand, as regards the *PCA with Philippines* case, the Court upheld its famous *Portugal v Council* case-law on the use of the development cooperation legal basis for agreements covering a wide range of sectoral commitments provided that these are not so substantial that they constitute objectives distinct from those of development cooperation.[63] However, in the concrete case, the Court, after recognizing that the readmission clause of the PCA contained "specific obligations" distinct from development ones in the sense of its previous case-law,[64] indicated that this clause did not prescribe the specific way in which it would be implemented, as a fully-fledged readmission agreement would generally do.[65] Therefore, the Court surprisingly concluded that readmission commitments do not pursue different objectives from those of development cooperation, accepting an overly broad notion of development in contrast to its explicit aims in EU primary law.[66]

It can also be observed that ECJ case-law concerning the external dimension of EU migration and asylum policies appears to respond to a different logic than the one underpinning its jurisprudence on the interpretation and application of migration-related provisions of association agreements concluded by the EU with third countries. In this line of cases, the Court, when interpreting the scope of rights and obligations of nationals from associated countries as regards residence permits, equal treatment clauses on

[60] *Ibid*. paras 52-55.

[61] It is true that, in the EU-Turkey Statement cases, the GC would nevertheless encounter the obstacle of the lack of legal standing of the applicants, but the fact remains that it chose to ground its refusal to adjudicate on a contested argumentation related to the nature of the act.

[62] See also T Spijkerboer, 'Bifurcation of People, Bifurcation of Law' cit. 225, as well as E Cannizzaro, 'Denialism as the Supreme Expression of Realism. A Quick Comment on NF v. European Council' (European Forum Insight of 15 March 2017) European Papers www.europeanpapers.eu 251-257. We have analysed the competence consequences of the refusal to accept the Union's authorship of the EU-Turkey Statement in P García Andrade, 'EU External Competences in the Field of Migration' cit. 194-196.

[63] Case C-268/94 *Portuguese Republic v Council* ECLI:EU:C:1996:461.

[64] *Commission v Council (PCA with the Philippines)* cit. para. 57.

[65] *Ibid*. paras 58-59.

[66] The Court would have been confusing, in my view, the scope of obligations in the agreement and their self-executing character. Only the first element is relevant for this aspect of the doctrine on the correct choice of the legal basis.

working conditions, or social security coordination, has usually ensured, with certain nuances, the protection of individual rights of migrants and their families.[67] This means that paradoxically the ECJ seems to be exercising a more protective role over certain aspects of legal migration, the less developed dimension of EU migration cooperation with partner countries, while leaving more political discretion to EU institutions and Member States in its control-oriented aspects.

IV. What is the Court of Justice's role in this external dimension?

After having highlighted some of the substantive inputs of this case-law, we should inquire into the possible explanations for these inputs, and whether the attitude and position adopted by the ECJ regarding the external dimension of the EU migration and asylum policies is aligned to, or rather differs from, the role played by the Court within the internal dimension of these policies or its role in EU external relations law more generally.

The above analysis allows us to preliminarily conclude that, although it has been an extremely relevant actor both in the EU system of external relations and in the AFSJ in general, the Court nonetheless plays a quite limited or modest role in the junction of these two sectors of EU law as far as the fields of immigration and asylum are concerned. However, it is important to note, as Cremona argues, that in general external action, the Court influences the content of the policy to a lesser extent than it does with regard to internal policies, and is rather more inclined to operate on the institutional architecture and the applicable legal limits to EU external action.[68] This non-interventionist approach to the policy choices made by EU institutions in external relations is even accompanied by a strong deference towards EU political institutions to retain their policy discretion.[69]

On migration matters, this can be observed in the external dimension but could even be a defining feature of the whole policy, since in recent years the ECJ also appears to follow this non-interventionist approach with respect to policy choices in its internal dimension. As Thym notes, it was predicted that the Court would replicate in migration matters the dynamism of internal market law, thereby promoting the rights of migrants and refugees just as it did regarding the legal status of EU citizens.[70] Although the Court has advanced very important developments in the fields of migration and asylum and has framed to a

[67] See K Eisele, *The External Dimension of the EU's Migration Policy* cit.; S Peers, 'EU Migration Law and Association Agreements' cit.; S Peers, *EU Justice and Home Affairs Law. Volume I: EU Immigration and Asylum Law* (Oxford University Press 2016) 417-427.

[68] M Cremona, 'A Reticent Court?' cit. 15 and 25. See also M Cremona, 'Structural Principles and their Role in EU External Relations Law' in M Cremona (ed.), *Structural Principles of EU External Relations Law* (Hart Publishing 2018) 5.

[69] *Ibid.*

[70] D Thym, 'Between "Administrative Mindset" and "Constitutional Imagination": The Role of the Court of Justice in Immigration, Asylum and Border Control Policy' (2019) ELR 139, 140.

certain extent the Member States' margin of discretion when applying EU legislation,[71] Thym argues that the current trend leans towards treading carefully by deferring to the position of EU institutions or by granting discretion to Member States.[72] Indeed, the ECJ might be reluctant to interfere in ongoing political or legislative debates, as well as in fields in which there is uncertainty or disagreement on the political direction of the policy. Spijkerboer appears to agree on this view as regards specifically the external dimension of the policy, in which the ECJ position "is motivated by a wish not to interfere with a crucial policy field"; a justification that could be convincing, in his view, if the policy was succeeding.[73]

This attitude of the Court of non-interference in policy choices could explain its position in the *PCA Philippines* case, relying so closely on the political choices made in secondary legislation and political documents – unfortunately against the Treaties –; and probably in *X and X* too, in which an eventual decision requiring Member States to issue humanitarian visas on the basis of the Visa Code would have amounted to a political decision corresponding to the role of political institutions of the EU and not to the Court.[74]

In other examples of EU external relations case-law since ERTA, the Court has also been "showing itself aware of the political realities of international negotiations",[75] a reason that might justify the refusal to annul a Council decision of conclusion in a given case or explain the preservation of the effects of an annulled decision until the adoption of the replacing measure. The Court usually shows this attitude towards agreements whose content would not vary greatly in case the act of conclusion were annulled, that is, when annulment grounds concern the powers of the institutions and not other substantive violations of the Treaties.[76] Consequently, if the aim of preserving the outcome of international negotiations or ensuring the effectiveness of the instrument might explain the Court's attitude, I do not think however this motive might justify its position in the *EU-Turkey Statement* cases, as the refusal to admit the annulment action precisely avoids an examination of the substantive conformity of the Statement with EU asylum law and human rights obligations.

It is true that, in the external relations sphere, the Court has, instead of influencing policy content, played a much more relevant and "activist" role in defining the scope and nature of EU external competences, in specifying the legal effects of international obligations and more generally the status of international law within the EU legal order, as well as in setting the contours of the institutional balance in conducting external affairs. More

[71] See for case-law developments the analysis in H Labayle and P De Bruycker, 'Impact de la Jurisprudence de la CEJ et de la CEDH en matière d'asile et d'immigration' cit.

[72] D Thym, 'Between "Administrative Mindset" and "Constitutional Imagination"' cit. 140.

[73] T Spijkerboer, 'Bifurcation of People, Bifurcation of Law' cit. 227.

[74] See I Goldner Lang, 'Towards "Judicial Passivism" in EU Migration and Asylum Law?' cit. and T Spijkerboer, 'Bifurcation of People, Bifurcation of Law' cit. 227.

[75] M Cremona, 'A Reticent Court?' cit. 26.

[76] See, for instance, case C-660/13 *Council v Commission* (*Swiss MoU case*) ECLI:EU:C:2016:616 para. 51.

particularly, the ECJ has had a tremendous influence in shaping the definition and peculiarities of EU external competences in most of the policy fields of the EU external action. However, in opposition to judicial cooperation in civil matters as another component of the AFSJ,[77] not a single pronouncement has been issued up to now by the Court as regards EU external competences on migration and asylum, even if the contours of their existence and mostly their nature in the different fields of migration policy are far from being straight-forward.[78]

Its traditional inclination to operate within the institutional architecture of EU external relations law cannot explain the ECJ's position in the *EU-Turkey Statement* cases either, since, as argued above, the ECJ departed here from the sound legal argumentation previously developed in its ERTA judgment, and opted for denying EU intervention instead of clearly setting limits for the European Council to step into the making of external action.[79] The protection of the principle of institutional balance has therefore not been ensured.[80]

It is also important to note, in my view, that a "passive Court" in the sense given by Goldner Lang might just be a reflection of other institutions' passivism. We could firstly think of the European Parliament, which has not shown an intensive willingness to bring certain legal and/or political developments of this external dimension before the ECJ. Its attitude towards the procedure for the adoption of the *EU-Turkey Statement* and the absence of any legal action brought before the Court is certainly in contrast with previous cases. In case C-355/10 *European Parliament v Council*, the Court of Justice decided to annul Council Decision 2010/252 supplementing the Schengen Borders Code as regards the surveillance of sea external borders within operational cooperation coordinated by Fron-

[77] See, e.g., Opinion 1/03 *New Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters* ECLI:EU:C:2006:81; case C-533/08 *TNT Express Nederland BV* ECLI:EU:C:2010:243; or opinion 1/13 *Convention on the civil aspects of international child abduction* ECLI:EU:C:2014:2303.

[78] In the absence of explicit external competences, the ECJ doctrine of implied powers filled the silence of the Treaties, which continue to be of paramount significance in this area after the Lisbon Treaty only recognized an EU explicit external competence on readmission, in art. 79(3) TFEU. The codification in the Treaties of the ECJ doctrine of implied external competences, as well as of ERTA exclusivity have added confusion to an already complex jurisprudence. We have examined the existence and nature of EU external competences on migration in P García Andrade, 'EU External Competences in the Field of Migration' cit. and P García Andrade, *La acción exterior de la Unión Europea en materia migratoria* cit.

[79] Not only the European Council cannot participate in the procedure to conclude international agreements by the EU according to art. 218 TFEU, but this institution is neither allowed to adopt non-legally binding agreements with third countries as art. 16 TEU entrusts to the Council the decision-making power in EU external relations.

[80] Even if the applicants in the EU-Turkey Statement cases lacked legal standing under the *Plaumann* doctrine, the fact that the refusal to admit the annulment action was however based on the nature of the act and therefore impeded future preliminary references shows, in my view, the ECJ's lack of will to protect this principle.

tex, as it had been adopted on the basis of implementing powers instead of as a legislative act.[81] The Court agreed with the European Parliament that rules on sea border surveillance required the adoption of political choices – such as the enforcement powers conferred on border guards and their impact on the fundamental rights of persons – which constitute essential elements of the basic legislation, the Schengen Borders Code (SBC) whose adoption must involve the EU legislature.[82] The European Parliament's concern over the democratic legitimacy of the rules on sea border surveillance clearly differs from its passivism towards the increasing trend to resort to non-legally binding instruments of cooperation whose informal nature – *a priori* – prevents this EU institution from being involved in the development of this external dimension.[83] The European Commission would also be responsible for the limited cases heard by the ECJ on the external dimension of EU migration policy, as it has shown, as argued above, an evident lack of will to bring Member States before the Court under infringement procedures.

A further argument raised by academic scholarship to explain the ECJ's position regarding the EU external action on migration interestingly points to the unease of the Court regarding the deficiencies of the constitutional framework of this external dimension.[84] It is true that EU primary law provisions governing EU external action are still ambiguous, particularly those codifying the ECJ doctrine on implied external competences (arts 216(1) and art. 3(2) TFEU) to which recourse has to be made when it comes to most of the dimensions of migration. A certain degree of uncertainty also characterizes EU external representation, which has given rise to continuous tensions among both EU institutions and Member States in the field of migration.[85] Further clarifications are still needed regarding the legal conceptualization of international soft law instruments, the inter-institutional distribution of powers applicable to their adoption, as well as the judicial scrutiny of these instruments in spite of their lack of binding effects.[86] It can also be argued that the constitutional framework on

[81] Case C-355/10 *European Parliament v Council* ECLI:EU:C:2012:516.

[82] *Ibid*. paras 64-65 and 76-78.

[83] On the necessary involvement of the European Parliament, see T Verellen, 'On Conferral, Institutional Balance and Non-Binding International Agreements: The Swiss MoU Case' (European Forum Insight of 10 October 2016) European Papers www.europeanpapers.eu 1225; and our analysis in P García Andrade, 'The Role of the European Parliament in The Adoption of Non-legally Binding Agreements With Third Countries' in J Santos Vara and S Sánchez Rodríguez-Tabernero (eds), *The Democratisation of EU International Relations through EU Law* (Routledge 2019) 115.

[84] L Leboeuf, 'La Cour de Justice face aux dimensions externes de la politique commune de l'asile et de l'immigration' cit. 61. Leboeuf argues that, in *X and X* the Court did not want to move away from the territorial logic of the system, while in the Statement orders it took an attitude of withdrawal regarding the problem.

[85] M Gatti, 'Too Much Unity in The European Union's External Migration Policy?' (20 July 2018) EU Immigration and Asylum Law and Policy Blog eumigrationlawblog.eu.

[86] See RA Wessel, 'Normative Transformations in EU External Relations: the Phenomenon of "Soft" International Agreements' (2021) West European Politics 77; A Ott, 'Informalization of EU Bilateral Instruments: Categorization, Contestation and Challenges' (2020) YEL; A Ott, 'The "Contamination" of EU Law By Informalization? International Arrangements in EU Migration Law' (29 September 2020) Verfassungsblog

migration and asylum does not provide the same certainty and precision as its internal market counterpart,[87] and that the EU Charter, when ensuring individual rights to third-country nationals, provides a lesser degree of protection than to Union citizens.[88] In my view however, these eventual limitations and current uncertainties of the EU constitutional framework of EU external action on migration are to be overcome by the Court through the recourse to structural principles of EU external relations law.[89] The principles of conferral, sincere cooperation, institutional balance, unity in external representation, solidarity,[90] transparency and the rule of law can certainly help the Court in filling the gaps and limitations mentioned above, as it has traditionally done in EU external relations law in general. Although the Court does not intervene on substantive policy choices of this external dimension, it has a lot to say on its constitutional governance, which would allow the Union to construct a coherent external action on migration and asylum compatible with the values on which the EU is founded and that shall be promoted, upheld, and respected in its relations with the rest of the world.

V. Concluding remarks

From its initial developments in practice in the early 2000s, the external dimension of EU immigration and asylum policies has only modestly reached the ECJ from a quantitative perspective. One of the prominent reasons behind the low number of cases heard by the Court on this external dimension might relate to the limitations to its judicial competences in this area; initially applicable to the preliminary reference procedure and now still perceivable regarding the operational aspects of this external dimension partially implemented through CFSP missions and EBCG Agency's operations, especially complicating the filing of legal actions by individuals. The passivism of other EU institutions in bringing matters before the Court, as demonstrated, for instance, in the timid attitude of the

verfassungsblog.de; as well as J Santos Vara, *La dimensión exterior de las políticas de inmigración de la Unión Europea en tiempos de crisis* cit. 19-46.

[87] A strong contrast between freedom-enhancing prescriptions underlying the internal market and the vague description of diverse objectives on migration, asylum and border controls can be identified: D Thym, 'Between "Administrative Mindset" and "Constitutional Imagination"' cit. 142.

[88] See, among others, F Ippolito, 'Migration and Asylum Cases Before the Court of Justice of the European Union: Putting the EU Charter of Fundamental Rights to Test?' (2015) EJML; S Peers, 'Immigration, Asylum and the European Union Charter of Fundamental Rights' in E Guild and P Minderhoud (eds), *The First Decade of EU Migration and Asylum Law* (Brill/Nijhoff 2012) 437.

[89] For the conceptualization and implications of these principles, see M Cremona (ed.), *Structural Principles in EU External Relations Law* cit.; see also M Cremona and A Thies (eds), *The European Court of Justice and External Relations Law* cit.

[90] Note that this structural principle (art. 3(5) and 21 TEU) has been additionally concretised in art. 80 TFEU as regards the asylum policy. On the external scope of this principle, see V Moreno Lax, 'Solidarity's Reach: Meaning, Dimensions and Implications for EU (External) Asylum Policy' (2017) Maastricht Journal of European and Comparative Law 740.

European Parliament in this role or the unwillingness of the Commission to initiate infringement procedures against non-compliant Member States, as well as the quite recent proliferation in time of legal developments of EU external action in these fields, may also explain their limited impact in the Luxembourg case-law.

In substantive terms, the analysis of the Court's case-law on the external dimension of immigration and asylum policies does not really provide a more comforting assessment. There are cases in which the Court refuses to adjudicate on the substance because of a controversial lack of jurisdiction, or in which a certain departure from its own previous case-law can be identified. The wish not to interfere in sensitive policy options, providing ample political discretion to EU institutions and Member States or blessing a security-oriented approach to migration, even accepting a deviation of EU development policy from its objectives in primary law, are some of the features of ECJ case-law on the external aspects of migration policies. The reflected image will most likely not correspond to the one we usually have of the ECJ, a key supranational institution whose contribution to the conformation and development of the EU integration process and its legal order has been crucial, particularly as far as EU external relations and the AFSJ are concerned.

However, a more nuanced look at these traits of the Court's case-law analyzed above, in comparison to the usual role the ECJ plays within the internal dimension of migration policies, on the one hand, and on EU external relations in general, on the other, might relativize its exceptionality. In particular, the "passivist" attitude of the Court and its hands-off position regarding policy contents and objectives, may inscribe into the reasonable non-interventionist approach on policy choices which is typical of the ECJ case-law on external relations, but also a recent defining feature of its role in migration policy as a whole. At the same time however, the Court has not printed into the external dimension of migration and asylum policies its traditional external relations contribution, focused on framing the EU external action through the definition of competences, or the delimitation of the contours of institutional balance, and through other structural principles of EU external relations law of enormous political significance for a still uncertain constitutional architecture. This is, in my view, what the Court should provide to an external action on migration in which the current trends towards informalization, agencification or re-securitization are entailing serious challenges to those principles and values that must guide the international action of the Union, and which is therefore clearly in need of strong judicial supervision. After the controversial pronouncements the Court has issued regarding this external dimension of the EU migration and asylum policies, the timing seems perfect to make use, in Thym's words, of that "constitutional imagination" that its case-law is currently lacking.[91]

[91] D Thym, 'Between "Administrative Mindset" and "Constitutional Imagination"' cit. 153.

ARTICLES

THE EU'S SHIFTING BORDERS RECONSIDERED: EXTERNALISATION, CONSTITUTIONALISATION, AND ADMINISTRATIVE INTEGRATION

edited by Evangelia (Lilian) Tsourdi, Andrea Ott *and* Zvezda Vankova

JUDICIAL INTERACTIONS ON THE EUROPEAN RETURN DIRECTIVE: SHIFTING BORDERS AND THE CONSTITUTIONALISATION OF IRREGULAR MIGRATION GOVERNANCE

GALINA CORNELISSE* AND MADALINA MORARU**

TABLE OF CONTENTS: I. Introduction. – II. "Immigration courts as border zones": courts and judicial interactions in the field of irregular migration. – III. "Is it a crime to be a foreigner?": courts reconfiguring the borders between criminal law and the return directive. – IV. Detention as a tool to "reconfigure and relocate national borders": judicial interactions turning the liberty of irregular migrants into a human right. – V. "Speaking rights to power": judicial interactions on the legal and social exclusion of irregular immigrants. – VI. Conclusions: Future challenges to judicial interactions.

ABSTRACT: This *Article* examines the dynamics between shifting borders – the border as a legal construct instead of a geographical barrier – and law by analysing the role of courts and judicial interactions in the implementation of the Return Directive in Europe. We argue that legislation that states may have introduced primarily to shift and reinvigorate their borders nevertheless holds a promise of opening

* Associate professor EU Law and Public International Law, VU Amsterdam, g.n.cornelisse@vu.nl.

** Director of the Centre for Migration Studies, Masaryk University, madalina_bianca.moraru@law.muni.cz.

The text between reversed commas featuring in the titles of section II, II, IV and V is quoted from different sources, namely: "Immigration courts as border zones" (section II) is a quotation of AC Kocher, *Notice to Appear: Immigration Courts and the Legal Production of Illegalized Immigrants* (PhD Thesis The Ohio State University 2017) OhioLINK Electronic Theses and Dissertations Center rave.ohiolink.edu. The question "[i]s it a crime to be a foreigner?" (section III) is a quotation from case C-290/14 *Celaj* ECLI:EU:C:2015:285, opinion of AG Szpunar: "Is it a crime to be a foreigner? We do not think so" para.1; it is also the closing sentence of the ECtHR *Saadi v The United Kingdom* [GC] App n. 13229/03 [29 January 2008] joint partly dissenting opinion of judges Rozakis, Tulkens, Kovler, Hajiyev, Spielmann and Hirvelä para. 65. The sentence "reconfigure and relocate national borders" (section IV) is a quotation of A Mountz and others, 'Conceptualizing Detention: Mobility, Containment, Bordering, and Exclusion' (2013) Progress in Human Geography 522. Finally, "[s]peaking rights to power" is a quotation from A Brysk, *Speaking Rights to Power: Constructing Political Will* (Oxford University Press 2013).

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up more, instead of less, space for legal claims for migrant justice, especially if such legislation is applied by judges across different legal orders. We look at the impact of judicial interactions by European and domestic courts on the Return Directive in three areas in which states have attempted to shift their borders for maintaining irregular migration within exclusive domestic competences: the merging of criminal justice and immigration policing; detention as immigration enforcement; and the legal and social exclusion of irregular migrants. We show that in all these fields, judicial interactions have set into motion a process of incremental constitutionalisation of irregular migration in Europe in two ways. First, such interactions have resulted in extended judicial review over a legal field which has traditionally been considered an exceptional branch of law under the purview of executive control. Secondly, they have allowed irregularly staying migrants, as a group largely excluded from the legal and political processes that characterise modern constitutionalism, to have their *interests* translated into *rights* that can be litigated and enforced. By focusing on judicial interactions regarding immigration *enforcement*, this *Article* fills a gap in contemporary research on the role of courts in immigration policy which has so far predominantly analysed adjudication of immigration *status*.

KEYWORDS: Return directive – judicial interaction – borders – national courts– Court of Justice of the European Union – European Court of Human Rights.

I. INTRODUCTION

The reform of the EU's return policy has been one of the EU's main policy responses to the so-called refugee crisis of 2015. As a consequence, irregular immigration has monopolised not only the discussion on the EU's return policy, but also the EU's future strategy for asylum management. The foregrounding of return policies in the migration-asylum continuum is a development which has been strengthened by the New Pact on Migration and Asylum, presented by the European Commission in September 2020:[1] return related provisions are inserted in all the proposals regarding asylum, most pertinently visible in the so-called border return procedure in the amended proposal for an Asylum Procedures Regulation.[2]

The growing interlinkages between asylum and return policies are not only indicative of a more restrictive approach to immigration policies in the political arena, but on a conceptual level, it is argued that they exemplify the idea of *shifting borders*: borders which are not fixed in time and space but consist of legal barriers, often linked to the individual migrant instead of merely to a clearly demarcated and static territory. Legal practices by states in order to pre-empt legal entry or stay for migrants exemplify this idea of shifting borders. Against this conceptual background, Ayalet Shachar has recently written that "the European Union [has established] one of the world's most complex, inter-agency, multitiered visions of the shifting border, comprised of pre-entry controls at countries of

[1] See Communication COM(2020)609 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 23 September 2020 on a New Pact on Migration and Asylum.

[2] Communication COM(2020) 611 final from the Commission of 23 September 2020 on an Amended proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing the Directive 2013/32/EU.

origin and transit all the way through to removal of irregular migrants after they have reached EU territory".[3] According to Shachar, the removal procedure is "facilitated by the shared European Return Directive". Indeed, in a more general sense, she portrays the use of law and legal innovations as complicit in the aggrandizement of regulatory power over mobility and migration which is the rationale behind shifting borders, juxtaposing it with accounts that stress either the disappearance or stasis of borders.

In this *Article*, we draw on the idea of the *shifting border*, whilst simultaneously claiming that in the EU, the role of law in migration management is more complex than merely enabling the state to regulate mobility and transform its borders. In order to do justice to the contemporary dynamics of the relationship between law and shifting borders, it is necessary to acknowledge the multilevel application of the law, in particular by courts. In this *Article*, we focus on the role of courts and judicial interactions in the implementation of the Return Directive,[4] in order to argue that the Return Directive has set into motion a process of incremental constitutionalisation of irregular migration in Europe. Such constitutionalisation has occurred in two related ways. First, the adoption of the Return Directive has extended judicial review over a legal field which has traditionally been considered an exceptional branch of law under the purview of executive control. Second, it has allowed irregularly staying migrants, as a group largely excluded from the legal and political processes that characterise modern constitutionalism, to have their *interests* translated into *rights* that can be litigated and enforced.

We will show how such constitutionalisation has been gradually constructed through judicial interactions, with a particular focus on the large role played therein by domestic judges acting as natural judges for the implementation and application of the Return Directive. Our core claim is that even legislation that states may have introduced to "reinvigorate their borders"[5] holds a promise of opening up more, instead of less, space for legal claims for migrant justice. In order to make this argument, we will first zoom in on existing research on the role of courts in immigration policy (section II). We claim that there is a gap in such research with respect to judicial interactions regarding immigration enforcement, a shortcoming that can be remedied by looking at judicial interactions on the Return Directive in Europe. The next three sections then deal with three exemplary case studies of states' attempts to shift *geographical, temporal, and legal borders* and the accompanying "legal transformation of immigration controls" which we are witnessing today: between criminal justice and immigration policing (section III); immigration enforcement resulting in detention (section IV); and the legal and social exclusion of irregular migrants (section V). For each of these case studies, we will look at the way in which the outcomes of judicial interactions

[3] A Shachar, *The Shifting Border: Legal Cartographies of Migration and Mobility* (Manchester University Press 2020) 55; A Burridge and others, 'Polymorphic Borders' (2017) Territory, Politics, Governance 239.

[4] Directive 2008/115/EC of the European Parliament and the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.

[5] A Shachar, *The Shifting Border* cit. 14.

on the interpretation and application of the Return Directive have restrained arbitrary executive control over immigration and enhanced the protection of individual rights. In our conclusions, we will look at current developments which are illustrative of political and legislative attempts to curb the powers of courts in this area (with governments at times even holding courts responsible for the inefficiency of return policy),[6] arguing that the political negotiations on the EU return policy as formulated in the proposal for a recast of the Return Directive,[7] and more generally in the New Pact, need to be mindful of the outcomes of earlier judicial interactions on the directive across the Member States.

II. "Immigration courts as border zones": courts and judicial interactions in the field of irregular migration

Over the last few decades, an abundant body of scholarship has addressed the role of courts in immigration governance, at times resulting in conflicting outcomes regarding the impact of courts with regard to securing checks and balances, protecting immigrants' fundamental rights and ultimately safeguarding the rule of law in this policy domain. On the one hand, there is research that emphasises the shifts brought about by courts in this policy field by challenging policy choices and expanding immigrants' rights, even culminating in what has been labelled post-national citizenship.[8] At the same time, scholars studying the "judicialization of politics",[9] have argued that the role of courts in immigration governance has been overestimated because relatively few immigrants actually reach courts, and as such the significance of immigration jurisprudence is often amplified given the number of cases that never reach courts.[10]

Also, it has been argued that the expansion of judicial power in immigration cases is an elite-driven process in which politicians control immigrants' access to courts, or even

[6] See European Migration Network (EMN) Synthesis Report, 'The Effectiveness of Return in the EU Member States' (2017) 3.

[7] Communication COM(2018) 634 final from the Commission 12 September 2018 on a Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast).

[8] A Geddes and P Scholten, *The Politics of Migration and Immigration in Europe* (Sage 2016); S Bonjour, 'Speaking of Rights: The Influence of Law and Courts on the Making of Family Migration Policies in Germany: Bonjour Speaking of Rights' (2016) Law & Policy 328; C Joppke and E Marzal, 'Courts, the New Constitutionalism and Immigrant Rights: The Case of the French *Conseil Constitutionnel*' (2004) EurJPolRes 823; V Guiraudon and G Lahav, 'A Reappraisal of the State Sovereignty Debate: The Case of Migration Control' (2000) Comparative Political Studies 163.

[9] T Vallinder, *The Judicialization of Politics. A World-Wide Phenomenon: Introduction* (Sage Publications 1994); R Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press 2009); A Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford University Press 2000); S M Sterett, 'Legal Mobilization and Juridification: Migration as a Central Case' (2016) Law & Policy 273.

[10] B Ní Ghráinne, 'Safe Zones and the Internal Protection Alternative' (2020) ICLQ 335.

manipulate judicial review powers ultimately for their own self-interested purposes.[11] Moreover, the judicial philosophies of some domestic courts have been regarded as conservative and aligned with the central powers of the state in several jurisdictions.[12] An altogether different dynamic has been highlighted as well by scholars who have shown that every cycle of judicial empowerment is followed by a reactionary cycle curbing the newly gained judicial review powers by the executive, which in turn actually re-empowers judiciaries.[13] While the findings are thus far from one-dimensional, the attention on courts in current research fits with novel ways of theorising the border as a phenomenon that is dispersed across space, and where courts can be seen as "border zones where immigration status is contested and determined".[14]

This *Article* builds on existing scholarship on courts in immigration governance by analysing the role of courts and judicial interactions in adjudicating immigration *enforcement,* an aspect of immigration governance that has been neglected by the scholarship on the role of courts in this area, being predominantly focused on immigration status. Our focus on adjudication concerning a particular instrument of enforcement – the Return Directive, designed to facilitate the return of irregular migrants – is instructive because much of the previous research on courts in this field has concentrated on the direct contestation of the boundary between legal/illegal and inclusion/exclusion, as for example in asylum or family migration litigation. As a result, the way in which the judicialization of *enforcement* affects immigration governance has remained relatively undertheorized. While the transnational nature of immigrants' claims for justice generally stands in the way of full constitutional protection of their interests, this is exacerbated with respect to irregular immigrants – persons whose entry and stay is not authorised by the state and therefore considered unlawful.[15] Interestingly, the Return Directive, an instrument that started out as a "Directive of Shame" because it was seen as diluting human rights standards and procedural guarantees,[16] has since become a positive normative example for

[11] R Hirschl, *Towards Juristocracy* cit.

[12] M Sterett, 'Legal Mobilization and Juridification' cit.; I Cohen, *Israeli Judges in a Jewish State and the Decline of Refugee Protection* (PhD Thesis European University Institute 2015) hdl.handle.net; C Demetriou and N Trimikliniotis, 'Cypriot Courts, the Return Directive and Fundamental Rights: Challenges and Failures' in M Moraru, G Cornelisse and P de Bruycker (eds), *Law and Judicial Dialogue on the Return of Irregular Migrants from the European Union* (Hart Publishing 2020).

[13] M Marmo and M Giannacopoulos, 'Cycles of Judicial and Executive Power in Irregular Migration' (2017) Comparative Migration Studies 149.

[14] A C Kocher, 'Notice to Appear' cit.

[15] See V Federico, M Moraru and P Pannia, 'Migrants and the Law. What European Courts Say' (2022 forthcoming) European Journal of Legal Studies 1.

[16] Or "a draconian policy towards migrants", see V Mitsilegas, 'Immigration Detention, Risk and Human Rights in the Law of the European Union. Lessons from the Returns Directive' in N J Guia, R Koulish and V Mitsilegas (eds), *Immigration Detention, Risk and Human Rights: Studies on Immigration and Crime* (Springer 2016) 27.

legal orders around the globe due to its unexpected protective effect for irregular immigrants in practice.[17] The Directive is a typical instrument of enforcement as it does not determine the conditions under which the stay of a third-country national becomes unlawful, but instead merely refers to the criteria for lawful entry and stay in the Schengen Borders Code or national law.[18] As soon as the stay of an irregular migrant is unlawful, they become subject to the system of enforcement (return) established by the Directive. This entails the taking of a return decision, in which the stay is declared to be unlawful and an obligation to return is established.[19] In case that this obligation is not discharged during the period for voluntary departure or if there is a risk of absconding, Member States may use detention and deportation (forcible removal) to effectuate return.[20] In this *Article*, we trace the way in which this legal instrument has set into motion a process of incremental constitutionalisation of irregular migration in Europe, through courts and judicial interactions across intersecting legal orders.[21]

Using the concept of *judicial interactions* in order to analyse changes in the governance of irregular migration in Europe and the implications of such regulation for individual rights and checks and balances is helpful for a number of reasons. The specific characteristics of EU law, such as the decentralised system of implementation relying on national courts (and individuals claiming their rights) for the enforcement of EU law,[22] the obligation of uniform application of EU law, and differences between the judicial roles of the Court of Justice of the European Union (CJEU) and domestic courts, mean that an analysis of the role of courts in implementing and applying the Return Directive needs to be mindful of the wider legal and institutional framework in which that judicial role is carried out. Judicial interaction is a necessity in the EU, due to the decentralized and non-hierarchical nature of EU law which may lead to inconsistent international legal norms if there would be no transnational judicial interaction.[23] More specifically with regard to the way in which the characteristics of EU law could affect the balance of powers in the area of immigration law enforcement, it is significant that the preliminary reference procedure may provide domestic courts with opportunities to circumvent domestic courts' hierarchy, as *every* court in the EU may refer questions to the CJEU.[24]

[17] MJ Flynn, 'Conclusion: The Many Sides to Challenging Immigration Detention' in M J Flynn and M B Flynn (eds), *Challenging Immigration Detention: Academics, Activists and Policy-makers* (Elgar 2017).

[18] Arts 3(1) and (2) of the Directive 2008/115/EC cit.

[19] *Ibid*. art. 6 and case C-38/14 *Zaizoune* ECLI:EU:C:2015:260.

[20] Arts 8 and 15 of the Directive 2008/115/EC cit.

[21] On the overall role of European and domestic courts in the implementation of the Return Directive, see M Moraru, G Cornelisse and P de Bruyckere, *Law and Judicial Dialogue on the Return of Irregular Migrants from the European Union* (Hart Publishing 2020) 1.

[22] JHH Weiler, 'Van Gend en Loos: The Individual as Subject and Object and the Dilemma of European Legitimacy' (2014) ICON 94.

[23] M Koskenniemi and P Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) LJIL 553.

[24] Art. 267 TFEU. See case C-173/09 *Elchinov* EU:C:2010:581 para. 26; and case C-104/10 *Kelly* EU:C:2011:506 para. 61.

Moreover, judges adjudicating the Return Directive act in an area that is increasingly regulated by a multiplicity of legal orders, including the European Convention of Human Rights (ECHR) and global legal norms. Norms emanating from these orders may at times be complementary or mutually reinforcing, or they may be in tension or even in conflict with each other. In a legal landscape that is typified by ever denser transnational regulation, such as EU law, the ECHR and domestic constitutional law, a focus on judicial interactions is especially warranted as immigration adjudication in this legal constellation may subject executive decision-making to forces of accountability that have hitherto been absent from this area of law. Accordingly, if we want to know more about the judicial role in adjudicating irregular migration and its effects on individual rights and executive power, we need to pay close attention to the ways in which judges from different legal orders interact with each other when dealing with complementarity or conflict.[25] In the Sections below, we will show how judicial interactions on the Return Directive between the CJEU and domestic courts (vertical) and between domestic courts from different Member States or between the CJEU and the European Court of Human Rights (ECtHR) (transnational) have resulted in increased protection of the rights of irregular migrants and the introduction of hitherto unseen checks and balances on the executive-driven model of migration governance.

III. "Is it a crime to be a foreigner?": courts reconfiguring the borders between criminal law and the Return Directive

The intermingling of criminal justice and immigration policing has been argued to exemplify current transformations of border control.[26] In this section, we show that courts and judicial interactions have ensured the Return Directive as leading policy on irregular migration by reconfiguring the executive's "shifting borders" approach on the basis of the principles of effectiveness, sincere cooperation and proportionality.

[25] Although "judicial dialogue" has been the leading metaphor used by scholars to refer to the use of foreign jurisprudence by courts, in recent years it has been increasingly criticised as incorrect or inapt for describing the actual practice of national courts' engagement with foreign jurisprudence, whether in the EU or outside. See AT Pérez, 'Judicial Dialogue and Fundamental Rights in the European Union: A Quest for Legitimacy' in G Jacobsohn and M Schor (eds), *Comparative Constitutional Theory* (Edward Elgar 2018) 104-105; DS Law and WC Chang, 'The Limits of Global Judicial Dialogue' (2011) WashLRev 523. Given the narrow scope of "judicial dialogue", this *Article* uses the term "judicial interaction" as the use of judicial reasoning from one court by another court, for the purpose of constructing a better interpretation of a legal norm, without necessarily involving reciprocity or continuity over time.

[26] A Kraler, M Hendow and F Pastore, 'Introduction: Multiplication and Multiplicity – Transformations of Border Control' (2016) Journal of Borderlands Studies 145.

For decades, several Member States have utilised criminal law for irregular migration management.[27] However, since the entry into force of the Return Directive, systemic reforms have been required in some Member States to amend their expulsion procedures.[28] As soon as the stay of an irregular migrant is unlawful, they become subject to the system of enforcement established by the Directive. Member States are obliged to apply the provisions of the Return Directive to *all* third-country nationals illegally staying on their territory, which entails the application of a gliding scale of measures, ranging from the least constraining in the form of voluntary departure to the most coercive such as removal and detention.[29]

This gradual model of immigration enforcement established by the Return Directive stands in stark contrast with the use of criminal law to sanction breaches of immigration law. Nonetheless, the "crimmigration" phenomenon[30] did not immediately disappear with the entry into force of the Return Directive. Especially those Member States with a long history of crimmigration[31] or populist fuelled crimmigration[32] have stalled the implementation of the Return Directive, and turned to protean and complex crimmigration policies based on an ill-conceived understanding of the *legal* and *temporal* borders between domestic criminal law and the Return Directive.[33] As we shall see below, the partial decriminalisation of irregular entry and stay in Europe has been the gradual result of vertical judicial interactions between Italian, French and Dutch courts and the CJEU.

One of the strategies used by Member States to preserve the use of crimmigration was to expand the *legal borders* of criminal law under a derogation allowed by art. 2(2)(b) of the Return Directive. This provision stipulates that third-country nationals who are subject to a return as a criminal law sanction or as a consequence of a criminal law sanction can be exempted from the application of the Directive. This derogation was broadly

[27] In France, the use of crimmigration to manage irregular migration was confirmed by the very Constitutional Court (*e.g.* French Conseil Constitutionnel of 16 July 1996 decision n. 96-377 *DC*; French Conseil Constitutionnel of 5 May 1998 decision n. 98-399 *DC*. More generally, see C Gosme, 'Trapped Between Administrative Detention, Imprisonment, and Freedom-in-Limbo' in M Guia, R Koulish and V Mitsilegas (eds), *Immigration Detention, Risk and Human Rights* cit. 93.

[28] See Communication COM(2014) 199 from the European Commission of 23 March 2014 on EU return policy.

[29] Recitals 10 and 13, arts 3(1) and (2), 6 and 8 of the Directive 2008/115/EC cit.; and *Zaizoune* cit.

[30] For a definition of this term, see I Majcher, '"Crimmigration" in the European Union Through the Lens of Immigration Detention' (Global Detention Project Working Paper 6/2013).

[31] L Imbert, 'Endorsing Immigration Policies in Constitutional Terms: The Case of the French Constitutional Council' in *Migrants and the Law. What European Courts Say on Migrants' Rights* (2022) European Journal of Legal Studies.

[32] V Passalacqua, 'El Dridi Upside Down: A Case of Legal Mobilization for Undocumented Migrants' Rights in Italy' (2016) Tijdschrift voor bestuurswetenschappen en publiekrecht 215.

[33] On Italy, see A di Pascale, 'Can a Justice of the Peace be a Good Detention Judge? The Case of Italy' in M Moraru, G Cornelisse and P de Bruycker (eds), *Law and Judicial Dialogue on the Return of Irregular Migrants from the European Union* cit.

interpreted by several Member States, allowing them to continue using criminal law sanctions in response to irregular migration. However, vertical judicial interactions between Italian and French courts and the CJEU have clarified the legal border between the domestic criminal competences and the scope of the Return Directive.[34]

The CJEU consistently held in a number of cases referred by these courts, such as *El Dridi*, *Achughbabian* and *Sagor*, that, even though criminal competences in this area remain a Member State competence and the Return Directive as such does not prohibit the use of criminal law for sanctioning illegal immigration, the exercise of criminal competences should not deprive the Directive of its effectiveness.[35] The CJEU precluded the use of criminal sanctions such as imprisonment for mere illegal entry of stay on the basis of the principle of effective application of the Return Directive, finding that such a measure does not contribute to the removal of an irregularly staying third-country national. It can therefore not be understood as a "measure" that Member States are required to take in order to enforce the return decision.[36] Home arrest is also precluded, if the national legislation does not provide for the immediate release of the third-country national as soon as the physical transportation (return) becomes possible.[37] A proportionate fine, as a criminal penalty, is acceptable only if it is not used as an alternative to removal and it does not impede return.[38] Judicial interactions thus established the legal limits to "crimmigration" as a derogation from the Return Directive, with the Italian courts' reference to the "principle of sincere cooperation laid down in Article 4(3) TEU and the objective of ensuring the effectiveness of EU law",[39] reverberating in the rulings by the CJEU.

However, in the meantime Member States found a second strategy to enable the continued use of criminal law to manage irregular migration, by shifting the *temporal borders* between criminal law and the measures taken on the basis of the Return Directive. They employed criminal law sanctions (*e.g.* fines or imprisonment) for irregular entry or stay without having passed through all the procedural steps set out by the Directive. For instance, in Italy, criminal detention was adopted, without having resorted to voluntary departure, removal or pre-removal detention under the scope of the Return Directive.[40]

[34] Case C-61/11 PPU *El Dridi* ECLI:EU:C:2011:268; case C-329/11 *Achugbabian* ECLI:EU:C:2011:807; case C-430/11 *Sagor* ECLI:EU:C:2012:777. For an in-depth interpretation of this judgments, see G Cornelisse, 'The Scope of the Return Directive: How Much Space is left for National (Criminal) Procedural Law on Irregular Migration?' in M Moraru, G Cornelisse and P de Bruycker (eds), *Law and Judicial Dialogue on the Return of Irregular Migrants from the European Union* cit. 41.

[35] See in particular *Achughbabian* cit. para. 33.

[36] Art. 8 of the Directive 2008/115/EC cit. See for example *Sagor* cit. para. 44; and *Achughbabian* cit. para. 37.

[37] See *Sagor* cit.

[38] See *Zaizoune* cit. and *Sagor* cit.

[39] *El Dridi* cit. para. 30.

[40] A di Pascale, 'Can a Justice of the Peace be a Good Detention Judge?' cit. 301.

Vertical judicial interaction between Italian and Dutch courts and the CJEU however, reconfigured the temporal borders between criminal law and the Return Directive.[41] The CJEU formulated the general rule that the Return Directive establishes a complete system of return measures which must be applied in a precise and mandatory temporal order starting from the less restrictive measure – voluntary departure – to the most restrictive one – pre-removal detention.[42] In *Celaj*, a case referred by the Tribunal of Florence, the Court of Justice refined this rule by allowing for the imposition of a criminal sanction for illegal stay where the return procedure has been applied and the person concerned re-enters the territory of that Member State in breach of an entry ban.[43] *Ouhrami* gave further impetus to the clarification of the temporal border between criminal law and the measures from the Return Directive, albeit implicitly, as the CJEU ruled that an entry ban starts to produce effects only after a third-country national has left the territory of the EU. This raised questions regarding the conformity with EU law of national laws criminalising irregular stay in cases where an entry ban had been issued, with criminal prosecutions being carried out also with regard to third-country nationals who had not left the territory.[44] The ensuing preliminary reference by the Dutch Supreme Court resulted in transnational interaction between the CJEU and the ECtHR, and can be seen as a first step towards judicial review of the legality of "crimmigration" by the CJEU against human rights principles as developed by the European Court of Human Rights.[45] Indeed, the CJEU ruled that criminal law can be used for sanctioning mere illegal stay – of course after having exhausted the measures in the Return Directive – *only* if that criminal legislation is sufficiently accessible, precise and foreseeable in its application in order to avoid all risks of arbitrariness that would infringe the right to liberty.[46]

During the so-called refugee crisis, several Member States found another ingenious way to resort to "crimmigration" measures, namely by pushing inwards the external borders of the EU. In art. 2(2)(a), the Return Directive provides for the possibility for Member States to not apply the Directive to irregular immigrants apprehended at or near external borders, a derogation which affirms the continuing relevance of tangible, territorial borders. Not surprisingly, the extent to which the Directive should cover third-country nationals who are apprehended at or near Member States' borders was one of the most

[41] Case C-290/14 *Skerdjan Celaj* ECLI:EU:C:2015:640; case C-225/16 *Ouhrami* ECLI:EU:C:2017:590; case C-806/18 *JZ* ECLI:EU:C:2020:724.

[42] See *Celaj* cit. and *El Dridi* cit.

[43] *Celaj* cit.

[44] Dutch Supreme Court of 27 November 2018 ECLI:NL:HR:2018:2192 and Court of Appeal Amsterdam of 24 May 2019 ECLI:NL:GHAMS:2019:1736.

[45] ECtHR *Del Río Prada v Spain* App n. 52750/09 [21 October 2013].

[46] See *JZ* cit. para. 41.

controversial issues during the negotiation of the Directive between the European Parliament and the Council.[47] According to the French government, the temporary reintroduction of internal borders within the Schengen area turned internal borders in external borders, allowing it to impose criminal law sanctions on those migrants crossing these borders without having to first apply the Return Directive. In *Affum* and *Arib*, the CJEU rejected the shifting of external borders inward, at least to the extent that this was done for the purposes of governing irregular migration.[48] It held that the border control exception in the Return Directive relates exclusively to the crossing of a Member State's *external* border, as defined in art. 2(2) of the Schengen Borders Code.[49] Therefore, Member States cannot exclude from the scope of the Directive persons crossing *internal* borders, even when border controls have been reintroduced. The Court then logically ruled that these persons could not be imprisoned on the basis of national criminal law merely on account of irregular entry across an internal border, if the return procedure had not been applied.[50]

Judicial interactions of various types have empowered domestic courts to extend judicial review of crimmigration measures on the basis of their conformity with the Return Directive and the principle of proportionality. In addition to the use of the preliminary reference procedure, domestic courts have resorted to consistent interpretation of domestic laws with EU law as interpreted by the CJEU. For instance, when the CJEU delivered its judgment in the Celaj case, Dutch and Czech Supreme Courts had already decided that criminal sentences for mere irregular entry and stay could only be applied when all the steps of the return procedure had been applied without leading to actual return.[51] Nevertheless, in some jurisdictions, the direct effect of CJEU rulings initially remained limited and the intervention of domestic supreme courts has been necessary to ensure conformity with the Return Directive. Thus, in Italy, the Sagor and Achughbabian rulings did not restrain the use of criminal law sanctions for irregular stay until after the intervention of the Supreme Court (i.e. Court of Cassation).[52] Citing Achughbabian, the Italian Court of Cassation held that home confinement could be an option as long as it does not contravene the Directive's

[47] F Lutz, S Mananashvili and M Moraru, 'Return Directive 2008/115/EC' in K Hailbronner and D Thym (eds), *EU Immigration and Asylum Law* (Nomos 2022) 692.

[48] Case C-47/15 *Affum* ECLI:EU:C:2016:408; case C-444/17 *Arib and Others* ECLI:EU:C:2019:220. Furthermore, the Court held that the exception in art. 2(2)(a) of the Return Directive does not apply to persons that seek to leave. See *Affum* cit. paras 71-72, 78.

[49] Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code).

[50] *Affum* cit. para. 93.

[51] See the Dutch Council of State of 05/2013 judgment n. 11/0307; and Czech Supreme Court of May 2014 judgment 7 Tdo 500/2014 *Nejvyšší soud*.

[52] See A di Pascale, 'Can a Justice of the Peace be a Good Detention Judge?' cit.

objectives and the enforcement of the third-country national's return.[53] Moreover, while the majority of domestic courts have seized on the effet utile of the Return Directive in order to strike down criminal law measures in this area, in other jurisdictions the spill-over effect of judicial interactions has remained more marginal. Thus, in Cyprus, domestic courts continued to endorse criminalisation as a key pillar of domestic migration governance and allowed immigration authorities a "very wide" scope for the use of discretionary powers.[54] Only after the European Commission's express recommendation in 2013, some two years after the first CJEU cases on the matter, did Cyprus cease to use criminal law sanctions such as imprisonment for mere illegal entry or stay.

In reaction to the Member States' shifting of legal, geographical and legal borders in an attempt to maintain irregular migration under the exclusive realm of domestic criminal law, judicial interactions have ensured a directly effective EU right for irregular migrants of not being subject to criminal penalties for mere irregular entry or stay, with exceptions in clearly defined and limited circumstances.

IV. Detention as a tool to "reconfigure and relocate national borders": judicial interactions turning the liberty of irregular migrants into a human right

It has been argued that immigration detention is "a powerful, physical manifestation of exclusionary state practice", which works not only to contain mobility, but also to "reconfigure and relocate national borders".[55] Indeed, as an institution and legal practice, immigration detention shows that borders are widely diffused *within* the State, most acutely visible in the crucial differences between the way in which the liberty of citizens and immigrants is protected. Such differences have come to the fore in the case law of the ECtHR, which has afforded states significant leeway in detaining migrants under art. 5 ECHR, most notably due to the general absence of a necessity requirement when depriving immigrants of their liberty.[56] The acquiescence by a human rights court to *unnecessary* limitations to the human rights of immigrants raises the question of whether these rights can actually be seen as *human* rights. In this section, we set out how judicial interactions between the CJEU and domestic courts on art. 15 of the Return Directive, the provision

[53] Italian Court of Cassation judgment of Corte di Cassazione of 23 April 2013 n. 35587/2013. On the slow process of interpretative convergence that started to develop following the Supreme Court judgment see A di Pascale, 'Can a Justice of the Peace be a Good Detention Judge?' cit.

[54] See for instance, Cyprus Administrative Court of 24 February 2016 n. 5984/2013 *Kiriak Leonov v Republic of Cyprus*. In Greek the word used is "ευρύτατες". See, C Demetriou and N Trimikliniotis, 'Cypriot Courts, the Return Directive and Fundamental Rights' cit.

[55] *Ibid*.

[56] ECtHR *Chahal v UK* App n. 22414/93 [15 November 1996], for an early critique, see G Cornelisse, 'Human Rights for Immigration Detainees in Strasbourg: Limited Sovereignty or a Limited Discourse?' (2004) European Journal of Migration and Law 6 and 93.

regulating the use of detention in return procedures, have resulted in a crucial shift in the legal paradigm that regulates immigration detention in the Member States, traditionally characterized by administrative discretion and deferential judicial review.[57] We will see that such interactions have led to increased protection of the rights of detained irregular immigrants, for example through a stronger insistence on the principle of proportionality and the use of alternative measures, elements that are absent from the case law of the ECtHR. Moreover, judicial interactions between the CJEU and domestic courts on the scope of judicial review under art. 15 of the Return Directive has empowered (and required) courts in the Member States to extend their powers significantly *vis-a-vis* the executive in a manner that the ECtHR has not been able to do.[58]

Although harshly criticised,[59] the Directive's provisions on pre-removal detention aimed to harmonise inconsistent domestic practices, and limit systematic and long detention of irregular migrants.[60] For this purpose, chapter IV of the Return Directive confines the detention powers of the Member States to clear requirements that were previously absent not only from the domestic legal frameworks, but also more widely from the European human rights instruments.[61] Under art. 15 of the Return Directive, Member States are authorised to detain a third-country national who is the subject of return procedures in order to prepare the return and/or carry out the removal process, unless "other sufficient but less coercive measures can be applied effectively in a specific case". Detention can be applied in particular if there is a risk of absconding, or when the third-country national avoids or hampers return or removal.[62] EU law thus requires that detention in the immigration context is a proportionate and necessary measure;[63] conditions that are also reflected in other requirements of art. 15, for example that detention

[57] G Cornelisse and M Moraru, 'Judicial Dialogue on the Return Directive: Catalyst for Changing Migration Governance?' in M Moraru, G Cornelisse and P de Bruycker (eds), *Law and Judicial Dialogue on the Return of Irregular Migrants from the European Union* cit. 17-37.

[58] The ECtHR caselaw on immigration detention is an example of narrow protection of individual liberties and judicial isolationism from the CJEU and domestic courts. Due to reasons of scope we will not address the pertinent case law here. For more see LR Helfer and E Voeten, 'Walking Back Human Rights in Europe?' (2020) EJIL 797.

[59] See V Mitsilegas, *The Criminalisation of Migration in Europe: Challenges for Human Rights and Rule of Law* (Springer 2016); ML Basilien-Gainche, 'Immigration Detention under the Return Directive: The CJEU Shadowed Lights' (2015) European Journal of Migration and Law 17 and 104; See D Acosta, '"The Good, the Bad and the Ugly in EU Migration Law": Is the European Parliament Becoming Bad and Ugly? (The Adoption of Directive 2008/15: The Returns Directive)' (2009) European Journal of Migration and Law 19.

[60] See F Lutz, 'Prologue: The Genesis of the EU's Return Policy' in M Moraru, G Cornelisse and P de Bruycker (eds), *Law and Judicial Dialogue on the Return of Irregular Migrants from the European Union* cit.

[61] Such as the ECHR, and globally, see Australia and US, which have an unlimited immigration detention policy, see MJ Flynn, 'Conclusion: The Many Sides to Challenging Immigration Detention' in MJ Flynn and MB Flynn (eds), *Challenging Immigration Detention: Academics, Activists and Policy-makers* (Elgar 2017).

[62] See also recital n. 13 art.15 of the Directive 2008/115/EC cit.

[63] G Cornelisse, 'Detention and Transnational Law in the Eurepean Union: Constitutional Protection between Complementarity and Inconsistency' in M Flynn (ed.), *Challenging Immigration Detention* cit.

"shall last for as short a period as possible and only maintained as long as removal arrangements are in progress and executed with due diligence". Art. 15 also limits the absolute duration of the detention to a maximum period of six months, which can be extended for a further 12 months only under certain conditions.[64] Moreover, detention can no longer be justified and the third-country national should be released immediately, if there is no reasonable prospect of removal,[65] or if the other conditions in art. 15 are no longer met.

As we saw, in *El Dridi*, the CJEU underlined that the system of enforcement that the Directive establishes is based on a step-by-step approach, in which "Member States must carry out the removal using the least coercive measures possible".[66] The gradualism required by the Return Directive has not only had implications for crimmigration measures as discussed above, but it has also significantly affected the use of administrative detention in return procedures. Thus, in *El Dridi*, the CJEU clarified that detention may only be resorted to if it appears, after an individual assessment, that "the enforcement of the return decision in the form of removal risks being compromised by the conduct of the person concerned".[67] The requirement of an individual assessment and the principle of proportionality was underlined again in preliminary references brought by courts from the Czech Republic and Bulgaria (*i.e*. *Arslan*[68] and *Mahdi*). These judgments diverge significantly from the ECtHR approach, by requiring detention to be imposed only when necessary, and by considering it lawful only when less coercive measures would not suffice. As such, they have had a significant influence on domestic rulings on immigration detention. For example, some four years after the entry into force of the Directive, the Slovenian Administrative Court issued a landmark judgment in which it referred to *Arslan* and *Mahdi*, clearly stating the obligation of the administration to consider alternative measures, thereby giving precedence to the Return Directive over incompatible national provisions. It imposed an obligation upon the police to verify whether alternatives to detention could be carried out. The Court described in detail a checklist on how administrative authorities should proceed in imposing restrictive measures.[69] Belgian courts as well, have declared detention measures unlawful on the basis of art. 15 Return Directive because authorities had not considered alternative measures.[70]

Measures of detention based on art. 15 shall be subject to judicial review if these have been ordered by administrative authorities, either *ex officio* or upon the request of

[64] See art. 15(5) and (6) of the Directive 2008/115/EC cit.

[65] Case C-357/09 PPU *Kadzoev* ECLI:EU:C:2009:741 para. 68.

[66] *El Dridi* cit. para. 37.

[67] *Ibid*. paras 39-41. See also case C-146/14 *Mahdi* ECLI:EU:C:2014:1320 para. 70.

[68] Case C-534/11 *Arslan* ECLI:EU:C:2013:343.

[69] Slovenian Administrative Court judgment of 6 March 2015 n. IU 392/2015.

[70] See S Sarolea, 'Le Rappel du Principe de Subsidiarité. Note sous Bruxelles, Ch. mis. en acc., 1er juillet 2016' (2016) Newsletter EDEM. See Belgian Court of Cassation judgment of 14 October 2016 n. 176363.

the third-country national concerned.[71] If the detention is found to be unlawful, the third-country national has to be released immediately.[72] When it comes to judicial review of detention in the Member States, the different configurations thereof can be compared to a *mille-feuille*, the French patisserie composed of multiple layers of puff pastry. Indeed, the metaphor seems to work when considering the variety of institutional and procedural layers which domestic judicial systems in Europe display, portraying a sharp institutional heterogeneity.[73] The multiple layers of limitations that judges face, risks crumbling the effectiveness and uniformity of the procedural guarantee of judicial review of detention, just as when one bites from a *mille-feuille* patisserie.[74] Judicial interactions between domestic courts and the CJEU on the Return Directive however, have led to an extension of the scope and intensity of judicial review in most Member States, providing courts with the competence to assess elements of the lawfulness of detention which they could not assess before the entry into force of the Directive, such as all aspects of facts and law, proportionality, necessity and the existence of alternative measures.

The landmark case on review powers of national courts in pre-removal detention is *Mahdi*, in which the CJEU provided the reviewing courts with the competence to review *all* relevant elements of the lawfulness of detention on the basis of art. 15 of the Return Directive. In *FMS and Others*, issued some six years later, it reaffirmed the wide scope of the required review, recalling that "the national court must be able to substitute its own decision for that of the administrative authority that ordered the detention and to order either an alternative measure to detention or the release of the person concerned".[75] It also held that in the absence of domestic law providing for judicial review of detention, the principle of primacy of EU law and the right to effective judicial protection, guaranteed by art. 47 of the Charter, provide a basis for review.[76]

After the *Mahdi* ruling, courts in many Member States left behind their limited understanding of their review powers. French courts for example expanded their control to "errors of appreciation" committed by the administration, whereas before they dealt only with manifest errors committed by the administration or even endorsed the reasoning

[71] Art. 15(2) of the Directive 2008/115/EC cit.; *Mahdi* cit.

[72] *Ibid*. See also joined cases C-924/19 PPU and C-925/19 *PPU FMS and Others* ECLI:EU:C:2020:367 para. 292.

[73] A Blisa and D Kosař, 'Scope and Intensity of Judicial Review: which Power for Judges Within the Control of Immigration Detention?' in M Moraru, G Cornelisse and P de Bruycker (eds), *Law and Judicial Dialogue on the Return of Irregular Migrants from the European Union* cit. 191.

[74] This argument is valid with regard to return more generally, seeing that judicial heterogeneity and a particular division of competences between different branches of the judiciary within a single Member State can negatively impact the effective implementation of the Return Directive, even if formally speaking judicial organisation falls within national procedural autonomy. See case C-233/19 *B v CPAS de Liège* ECLI:EU:C:2020:397, opinion of AG Szpunar.

[75] *FMS* cit. para. 293.

[76] *Ibid*. para. 291.

of the administration automatically.[77] On the basis of the *Mahdi* preliminary ruling, the Bulgarian judiciary disapplied the domestic law which provided that judicial renewal of detention following the lapse of the first six months, takes place in a closed hearing without the participation of the third-country national.[78] In the Netherlands, before the entry into force of the Return Directive, courts were extremely deferential in their review of the question whether less coercive measures could have been applied, as this fell within the discretion of the administration.[79] While the entry into force of the Return Directive already changed their approach marginally,[80] the *Mahdi* judgment brought substantial changes: according to the Dutch Council of State, the judiciary is now obliged to carry out a full review of whether the administration has correctly decided not to use alternatives to detention.[81] And the saga still continues; recently the Council of State referred a preliminary question to the CJEU asking for clarification on whether art. 15 requires *ex officio* judicial review of all elements of the detention measure.[82]

In conclusion, the robust guarantee of judicial control of detention in the Return Directive has been bolstered by vertical judicial interactions, and the resulting expansion of the review powers of domestic courts stands in stark contrast with the traditional executive-driven model of irregular migration governance. It has brought about a new role for immigration courts when intervening in administrative decision-making, enabling them to balance effective returns with effective judicial protection and the protection of the rights to personal liberty. That, together with judicial interactions on the applicability of the proportionality principle when the executive decides on detention, has resulted in a crucial shift in the legal paradigm that regulates detention in the immigration context.

V. "Speaking rights to power": judicial interactions on the legal and social exclusion of irregular immigrants

In this section, we show how a triangular interaction between domestic courts, the CJEU, and the ECtHR has filled legislative gaps in the Return Directive, thereby reshaping Member States' borders, here understood as "polysemic entities" that differentiate between

[77] See for instance, Court of Appeal of Nancy judgment of 18 February 2013. For a full list of cases, see M Moraru and G Renaudiere, 'European Synthesis Report on the Judicial Implementation of Chapter IV of the Return Directive Re-Removal Detention' (Working Paper REDIAL Research Report 05/2016).

[78] Supreme Administrative Court of Bulgaria judgment of 6 June 2014 n. 1535/2014. For a commentary see M Moraru and G Renaudiere, 'European Synthesis Report on the Judicial Implementation of Chapter III of the Return Directive Procedural Safeguards' (Working Paper REDIAL Research Report 03/2016).

[79] Dutch Council of State of 16 August 2005 n. 200505443/1 and of 11 January 2008 n. 200708177/1.

[80] Dutch Council of State of 28 April 2011 n. 201100194/1/V3.

[81] Dutch Council of State cof 23 January 2015 n. 201408655/1/V3.

[82] Joined cases C-704/20 and C-39/21 *Staatssecretaris van Justitie en Veiligheid* (pending). See also G Cornelisse, 'Van de Magna Carta tot Mahdi: Reikwijdte en intensiteit van de rechterlijke toetsing van vreemdelingendetentie' (2015) Asiel en Migrantenrecht.

people already present within national territory in terms of their legal and social rights.[83] Through judicial interactions, courts have created space for the recognition of new rights, remedies and principles reflecting the realities of returns and Member States' obligations under international human rights instruments.[84] The judicial interactions that we discuss below show that the legislation which Member States have primarily adopted in order to strengthen their borders as devices of exclusion has opened up more, instead of less, space for the "differential inclusion" of irregular immigrants.[85]

In the political negotiations on the Return Directive, effectiveness of returns was the primary driver for legislation on this matter. As a result, procedural safeguards are not elaborate and individual rights at stake in the removal process are protected in rather general terms. Thus, art. 5 requires Member States to take "due account of the best interests of the child, family life and the state of health of the third-country national concerned' when implementing the Directive, as well as 'to respect the principle of *non-refoulement*". Art. 9 obliges Member States to postpone removal if that would violate the principle of *non-refoulement*. The Directive protects core procedural safeguards as well, such as the duty to state reasons and to provide a translation of a return related measure as well as the right to a remedy.[86] Saliently, in the negotiations on the Return Directive, Member States insisted on a large margin of discretion when it came to procedural safeguards, and without it the Directive would not have passed the Council's approval vote.[87] As a consequence, procedural rights such as the right to be heard and obligatory judicial review of all return related measures were not included in the Directive.[88]

The omission from the Return Directive of the right to be heard is an acrid illustration of the typical status of irregular migrants in the law. Indeed, when Member States are provided with far-reaching and even mandatory powers of exclusion, as is done in the Return Directive, and there is no corresponding obligation to hear those who are affected, the law fails to make space for their interests in the most literal sense possible. However, the exclusion of the right to be heard from the Directive was remedied by judicial interactions between French and Dutch courts and the CJEU.[89] On the basis of the EU general principle

[83] É Balibar, 'What Is a Border?' (2002) Politics and the Other Scene 75.

[84] Such as the EU Charter, ECHR, UN Convention on the Rights of Children.

[85] Differential inclusion denotes "the selective inclusion of migrants within the sphere of rights in the receiving society in contrast to the idea of borders as devices of exclusion or inclusion". See J Könönen, 'Differential Inclusion of Non-citizens in a Universalistic Welfare State' (2018) Citizenship Studies 53-69.

[86] Arts 12 and 13 of the Directive 2008/115/EC cit.

[87] F Lutz, S Mananashvili and M Moraru, 'Return Directive 2008/115/EC' cit.

[88] See, in contrast, arts 14-18 and 46(5) of the 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.

[89] Case C-166/13 *Mukarubega* EU:C:2014:2336; case C-249/13 *Boudjlida* ECLI:EU:C:2014:2431; case C-383/13 PPU *G&R* ECLI:EU:C:2013:533.]

of the right of defence, the CJEU deduced a right to be heard for returnees before the administrative authorities can adopt a decision negatively affecting them.[90] At the same time, the CJEU underlined the objective of effective returns, most notably through the rule that even if the right to be heard had been breached, it would render a return-related decision invalid, "only insofar as the outcome of the procedure would have been different if the right was respected".[91] Domestic courts in Belgium,[92] Greece,[93] Lithuania[94] and the Netherlands[95] have subsequently used the French-originating preliminary rulings to require, as a rule, an administrative hearing in relation to each of the return-related decisions the administration adopts, with significant effects on administrative practice in this regard. For instance, in Belgium, the Aliens Office started sending formal letters, inviting foreign nationals to express their views before withdrawing their right to stay.[96]

A comparable dynamic took place with regard to the ambiguously formulated remedy prescribed by art. 13 of the Directive. Judicial interactions between Belgian labour courts and the CJEU over more than six years have clarified the nature of the appeal that should be available against return related measures, and the suspensive effect thereof, thereby carving out a space between asylum law and irregular migration. In *Abdida*, the CJEU first ruled that the remedy provided must be determined in a manner that is consistent with art. 47 of the Charter, which recognises a right to an effective judicial remedy.[97] Secondly, referring to case law of the ECtHR and art. 47 of the Charter, the CJEU

[90] *Mukarubega* cit. para. 44; *Boudjlida* cit. para. 32-33.

[91] *G&R* cit.; the CJEU thus affords returnees a lower level of protection of the right to be heard compared to other fields, see case C-517/17 *Addis* ECLI:EU:C:2020:579 and case C-417/11 P *Council v Bamba* ECLI:EU:C:2012:718 para. 51. M Moraru and M Clement, 'Judicial Interactions Upholding the Right to be Heard of Asylum Seekers, Returnees and Immigrants: The Symbiotic Protection of the EU Charter and General Principles of EU law' in F Casarosa and M Moraru (eds), *The Practice of Judicial Interaction in the Field of Fundamental Rights - The Added Value of the Charter of Fundamental Rights of the EU* (Edward Elgar 2022) 264.

[92] Belgian Council of Alien Law Litigation (CALL) judgment of 25 June 2014 n. 126.219 and later judgment of 24 February 2015 n. 230.293; CALL judgment of 24 February 2015 n. 230.293; judgment of 15 December 2015 n. 233.257. These cases are summarised in M Moraru and G Renaudiere, 'European Synthesis Report on the Judicial Implementation of Chapter III of the Return Directive Procedural Safeguards' cit.

[93] See, for instance, Thessaloniki Administrative Court judgment of 27 April 2015 n. 717/2015.

[94] Supreme Administrative Court of Lithuania of 7 July 2015 n. eA-2266-858/2015 *SAA v Migration Department under the Ministry of the Interior*. See I Jarukaitis and A Kalinauskaitė, 'The Administrative Judge as a Detention Judge: The Case of Lithuania' in M Moraru, G Cornelisse and P de Bruycker (eds), *Law and Judicial Dialogue on the Return of Irregular Migrants from the European Union* cit. 237-257.

[95] See M Moraru and G Renaudiere, 'European Synthesis Report on the Judicial Implementation of Chapter III of the Return Directive Procedural Safeguards' cit. 11-13.

[96] *Ibid*.

[97] See case C-562/13 *Abdida* ECLI:EU:C:2014:2453 para. 45. In later cases the CJEU further clarified that a domestic court must recognise the suspensive effect of an appeal against a return decision, even if it does not fall within its power according to the domestic procedural law, if the enforcement of that decision may expose that national to a real risk of being subjected to treatment contrary to art. 19(2) of the Charter.

held that the remedy must have automatic suspensive effect in respect of a return decision whose enforcement may expose the third-country national concerned to a risk of refoulement. However, the CJEU went much further than the ECtHR in clarifying the relationship between non-refoulement and "removing a migrant suffering from a serious illness to a country in which appropriate treatment is not available".[98] Indeed, the case law of the ECtHR regarding so-called medical cases had been criticised for protecting against removal only those who are (almost) dying.[99] Relying on the Charter, the CJEU ruled that such removal would violate the principle of *non-refoulement* where there is a serious risk of grave and irreversible deterioration in the state of health of the third-country national concerned.[100] This has resulted in the ECtHR adapting its case law accordingly in the *Paposhvili* case, aligning its approach with that of the CJEU.[101]

These judicial interactions have resonated in the administrative and legislative practices of the Member States. Thus, in reaction to the Belgian preliminary rulings, the Belgian Constitutional Court explicitly requested the legislator to codify the suspensive effect of remedies in legislative provisions. Interestingly, some domestic courts went further than the minimum requirements established by the CJEU. For instance, the Supreme Court of Estonia held that the right to respect for family life could also suspend the return procedure, if removal would entail a disproportionate restriction amounting to an almost absolute denial of the right to family life protected by the ECHR.[102] Another example is provided by the Austrian High Administrative Court, which ruled that art. 47 of the Charter requires legal aid to be provided in the return procedure even if it is not foreseen by secondary European legislation.[103]

The way in which judicial interactions have filled legislative gaps in the Return Directive and therewith turned returnees' interests into justiciable rights, is most conspicuous with regard to the rights of (unaccompanied) children in return procedures. In art. 10 of the Return Directive, the interests of unaccompanied children are acknowledged, albeit somewhat differently depending on whether it concerns the taking of a return decision or their

See case C-402/19 *LM v CPAS de Seraig* ECLI:EU:C:2020:759; *B v CPAS de Liège* cit. See also the ruling in case C-924/20 *FMS and Others* ECLI:EU:C:2020:367.

[98] *Abdida* cit. paras 33 and 48.

[99] JB Farcy, 'Unremovability under the Return Directive: An Empty Protection?' in M Moraru, G Cornelisse and P de Bruycker (eds), *Law and Judicial Dialogue on the Return of Irregular Migrants from the European Union* cit.; and MB Dembour, *When Humans Become Migrants* (Oxford University Press 2015).

[100] See *Abdida* cit. 437. The CJEU also ruled that Member States are obliged to make provision, in so far as possible, for the basic needs of a third-country national suffering from a serious illness where such a person lacks the means to make such provision for himself. Due to reasons of scope we do not address this aspect of "differential inclusion" in the case law of the CJEU.

[101] ECtHR *Paposhvili v Belgium* App n. 41738/10 [13 December 2016].

[102] M Moraru, G Renaudiere and P de Bruycker, 'Electronic Journal on Judicial Interaction and the EU Return Policy, Second Edition: Articles 12 to 14 of the Return Directive 2008/115' (Working Paper REDIAL Research Report 04/2016) 15.

[103] Austrian Administrative High Court (VWGH) judgment of 3 September 2015 n. 2015/21/0032.

actual removal. Thus, before Member States decide to issue a *return decision*, assistance by appropriate bodies other than the authorities enforcing return shall be granted, with due consideration being given to the best interests of the child.[104] As for *removal*, Member States need to be satisfied that the minor will be returned to a member of his or her family, a nominated guardian or adequate reception facilities in the State of return.[105]

This legislative set-up however, causes an obvious protection gap between the taking of a return decision and actual removal. The consequences of such a gap were clearly visible in the Netherlands, where unaccompanied children over the age of fifteen would be issued with return decisions without a prior assessment of whether there was adequate reception in the country of return. As such, their stay was considered unlawful and they were under a legal obligation to return. In many cases, however, these children would not return, and their stay would merely be "tolerated" until they reached eighteen years of age. In *TQ*, a Dutch court asked the CJEU to clarify whether an administrative practice which only investigates the availability of adequate reception *after* a return decision has been taken is in accordance with the Return Directive and with the rights of the child as protected in art. 24 of the Charter.[106]

In *TQ*, the CJEU considered that a Member State must assess the best interests of the child at all stages of the return procedure of an unaccompanied minor. In order to determine what is in the best interests of the child, a "general and thorough assessment" of the situation of the unaccompanied minor must take place, including "the age, gender, special vulnerability, physical and mental health, stay with a foster family, level of education and social environment". It ruled that *before* issuing a return decision in respect of an unaccompanied minor, a Member State must verify that adequate reception facilities are available for the minor in the State of return. If that is not the case, the child cannot be the subject of a return decision. Moreover, if adequate reception facilities are no longer guaranteed at the time of removal, the Member State will not be able to enforce the return decision. According to the Court, the age of the child may play a role, but it is not the only factor in the investigation of whether adequate care is available after return; this should be based on a case-by-case assessment of the situation rather than an automatic assessment based on the sole criterion of age, which it considered national "administrative practice [that] seems arbitrary".[107] Underlining the principle of effectiveness, the Court also held that Member States cannot refrain from enforcing a return decision which has been taken after it has been established that adequate reception is available. It therewith essentially precluded the grey status of "tolerated stay" of unaccompanied minors.

Interestingly, *TQ* brought about changes in Dutch administrative practice, although initially superficial. Explicitly referring to the judgment of the CJEU, the administration

[104] Art. 10(1) of the Directive 2008/115/EC cit.
[105] *Ibid*. art. 10(2).
[106] Case C-441/19 *TQ Staatssecretaris van Justitie en Veiligheid* ECLI:EU:C:2021:9.
[107] *Ibid*. para. 67.

abstained from taking return decisions in cases where they previously would have done so. Nonetheless, even if return decisions were no longer taken in instances where adequate reception was not available, this did not mean that the status of the unaccompanied minor, for example after the rejection of an asylum claim, became lawful. This policy led to fierce litigation in the Netherlands, culminating in a recent judgment by a lower court declaring this practice in obvious violation of EU law. In the eyes of the court, precluding the grey status of tolerated stay as the CJEU had done meant that these children should be accorded lawful stay.[108]

In a later case, the CJEU explicitly engaged with the Convention on the Rights of the Child and the UN Committee on the Rights of the Child.[109] This case had been referred by a Belgian court, which doubted the conformity with EU law of the view by the *Conseil du Contentieux des Étrangers*, that the best interests of the child must be taken into account only if return related decisions expressly refer to that child. According to the CJEU, Member States are "required to take due account of the best interests of the child before adopting a return decision accompanied by an entry ban, even where the person to whom that decision is addressed is not a minor but his or her father".[110] In this way, the CJEU used both the Charter and international human rights law to acknowledge the social realities of return, thereby deconstructing the legal borders that all too often fail to acknowledge the continuum between those that it includes (in this case the child) and excludes (the father).

VI. Conclusion: future challenges to judicial interactions

Immigration enforcement *vis-à-vis* irregular immigrants has traditionally been considered an exceptional branch of law under the purview of executive control with limited possibilities for judicial review, a constellation which was legitimised by the State's sovereign power over its territorial borders. Irregular immigrants are perceived to have trespassed these borders without authorisation and as such, they have been largely excluded from the legal and political processes that characterise modern constitutionalism. We have shown in this *Article* how the Return Directive has provided opportunities for the development of an unprecedented degree of judicial control over immigration enforcement. This has converted the interests of persons who have traditionally been excluded from justice in the territorial state paradigm, into rights that can be litigated and enforced. Not unexpectedly, the paradigm shift that the Return Directive brought about was met with resistance by Member

[108] District Court of The Hague judgment of 15 February 2021 n. NL20.19498 ECLI:NL:RBDHA:2021:1103.

[109] Case C-112/20 *M.A. v État belge* ECLI:EU:C:2021:197. The CJEU referred to General Comment n. 14 (2013) of the Committee on the Rights of the Child on the right of the child to have his or her best interests taken as a primary consideration art. 3(1) CRC/C/GC/14 para. 19.

[110] *M.A.* cit.

States' executives, who subsequently developed ingenious strategies – exploiting the Directive's regulatory vagueness[111] – in order to preserve the *status quo* of immigration enforcement based on crimmigration policies and plenipotentiary powers of the executive.

They have done so in ways that are indicative of shifting borders, namely through using criminal law for immigration enforcement and shifting the substantive border between the Return Directive and criminal law, by pushing the external border inwards, by reconfiguring and relocating borders through the use of detention, and by establishing social borders by excluding irregular migrants from legal and social rights. In due time, however, vertical, horizontal, and transnational judicial interactions between domestic courts, CJEU and at times the ECtHR has forced adaptation of domestic laws to the Directive's underlying principles of primacy of voluntary departure, pre-removal detention as a measure of last resort, individual assessment, and respect of the principle of non-refoulement, the best interests of the child and family life. In this way, courts have clarified the legal vagueness and gaps in the Directive by formulating directly enforceable human rights' obligations and by reforming the executive model of irregular migration governance according to the tripartite state powers model, limiting the space for unchecked exercise of administrative powers. Regardless of the immense procedural diversity existent in return adjudication in the Member States, judicial interactions have thus served to create a common language and legal principles on returnees' rights throughout Europe, placing clear and transparent limits to the way in which states attempt to shift their borders for the purposes of exclusion. At this point it is important to emphasise that some jurisdictions have been conspicuously absent from the judicial interactions which we described in this article, in spite of a protracted compliance deficit. Research shows that institutional and informal practices at the domestic level, in addition to judicial management reasons, influence the occurrence or absence of vertical judicial interactions and ultimately the effective application of the Return Directive in a Member State.[112]

In any case, after a long-fought role of courts in ensuring checks and balances to the executive driven model of irregular migration governance in the Member States, the newly acquired forms of judicial review that we described in this article are under threat by the sense of crisis that pervades policy-making in this area. Thus, both the 2015 refugee crisis and the Covid-19 crisis have thrown back irregular migration management into a state of executive aggrandizement, where courts and judicial review are seen as endangering policy effectiveness.[113] In a reactionary game of mirrors, the Commission, in the

[111] See M Moraru, 'Judicial Dialogue in Action: Making Sense of the Risk of Absconding in the Return Proceedings' in M Moraru, G Cornelisse and P de Bruycker (eds), *Law and Judicial Dialogue on the Return of Irregular Migrants from the European Union* cit. 125-149.

[112] M Moraru, G Cornelisse and P de Bruycker (eds), *Law and Judicial Dialogue on the Return of Irregular Migrants from the European Union* cit.

[113] J Petrov, 'The COVID-19 Emergency in the Age of Executive Aggrandizement: What Role for Legislative and Judicial Checks?' (2020) The Theory and Practice of Legislation 71-92.

2020 Pact on Asylum and Migration and its proposal for the recast of the Return Directive, proposes limitations to the scope of judicial review powers by introducing a new border management procedure.[114] The proposed return border procedure will limit not only the substantive, but also the temporal and territorial scope of judicial review. Thus, only courts close to the border centres will be competent to adjudicate in the border procedure; there is limited time to bring and adjudicate appeals and a smaller number of appeals is allowed. The return border procedure, which is linked to the other pre-entry procedures that occupy a central place in the Pact, provides yet another instance of the shifting border, in that an increased number of immigrants present on European soil will be seen as never having crossed the external borders of the EU.[115] Yet another illustration of shifting borders is the Pact's introduction of border checks deep *within* the Member States' territory by obliging Member States to screen "third-country nationals found within their territory where there is no indication that they have crossed an external border to enter the territory of the Member States in an authorised manner."[116] It is worth highlighting that this provision would essentially bring under the scope of EU law powers of enforcement that were previously purely national.[117] Also here then, it remains to be seen whether the Europeanisation of instruments that are proposed in order to reinvigorate the borders of exclusion could eventually open up space for addressing – before and by courts and by means of judicial interactions – the fundamental rights concerns raised by Member States attempts to draw lines around the mutable and constantly changing geometry of the community.

[114] See in particular art. 40 of the Proposal for a Regulation of the European Parliament and the Council on establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, COM(2020) 611 final; and art. 22 of the Proposal for a Directive of the European Parliament and the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast), 2018/0329(COD). For a detailed analysis of the border management procedure, see M Moraru, 'The Future Architecture of the EU's Return System Following the Pact on Asylum and Migration: Added Value and Shortcomings' in D Thym and Odysseus Academic Network (eds), *Reforming the Common European Asylum System. Opportunities, Pitfalls, and Downsides of the Commission Proposals for a New 'Pact' on Migration and Asylum* (Nomos 2022) 187-208 and G Cornelisse, 'Border Control and the Right to Liberty in the Pact: A False Promise of "Certainty, Clarity and Decent Conditions"?' in D Thym and Odysseus Academic Network (eds), *Reforming the Common European Asylum System* cit. 61-81.

[115] G Cornelisse and M Reneman, 'Border Procedures in the Commission's New Pact on Migration and Asylum: A Case of Politics Outplaying Rationality?' (2021) ELJ 181.

[116] Art. 5 of the Proposal for a Regulation of the European Parliament and of the Council introducing a screening of third country nationals at the external borders and amending Regulations (EC) n. 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817, COM(2020) 612 final.

[117] In *Achughbabian*, the CJEU established that that the conditions for the *initial* arrest of irregular migrants "remain governed by national law". See *Achughbabian* cit. para. 30.

ARTICLES

THE EU'S SHIFTING BORDERS RECONSIDERED: EXTERNALISATION, CONSTITUTIONALISATION, AND ADMINISTRATIVE INTEGRATION

edited by Evangelia (Lilian) Tsourdi, Andrea Ott *and* Zvezda Vankova

THE EU READMISSION POLICY TO THE TEST OF SUBSIDIARITY AND INSTITUTIONAL BALANCE: FRAMING THE EXERCISE OF A PECULIAR SHARED COMPETENCE

CATERINA MOLINARI*

ABSTRACT: Migration governance entails the enactment of a bordering process, drawing lines of inclusion and exclusion, through legal instruments, policy tools and funding decisions. The level of experimentalism through which this process is increasingly carried out by the EU demands constant reflection on its overall limits and constraints, on the part of those working on it from a constitutional perspective. The present *Article* aims at contributing to that reflection effort by analysing the EU's readmission policy from the standpoint of two principles governing its exercise as a shared competence: subsidiarity and institutional balance. Both principles require EU institutions to engage with the constitutional logic which underlies Treaty choices. On the one hand, subsidiarity reminds the institutions of the need to consider the input and output legitimacy of their intervention in areas of non-exclusive competences. On the other hand, institutional balance contributes to such a legitimacy, by maintaining institutional action and interaction within pre-defined boundaries. In the strongly politicised arena of the common readmission policy, characterised by a high degree of experimentalism, the flexible anchoring in the Treaty framework provided by these two principles would constitute a sound foundation for legitimate EU level action, including through soft law. So far, this potential has been underexploited.

* Doctoral Fellow, Research Foundation–Flanders (FWO)/KU Leuven Institute for European Law, caterina.molinari@kuleuven.be.

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I. INTRODUCTION

Migration governance entails the enactment of a bordering process that draws lines of inclusion and exclusion[1] through legal instruments, policy tools and funding decisions. As it is enacted by public institutions, the bordering process conducted with the tools of the Union's migration policy is constrained by the fundamental principles of the legal order to which these institutions belong, namely the EU. These considerations hold true also for the common readmission policy, conducted since the entry into force of the Amsterdam Treaty[2] through forms of cooperation with third countries directed at pushing the legal and political borders of the Union outwards, creating borders beyond its borders.[3]

Over the years, the common readmission policy has gained political salience and has been pursued through a diversified strategy, involving different actors, various levels of interaction with the readmission policies of the different Member States, and a wealth of tools, ranging from traditional international treaties to soft arrangements of different nature and normative force.[4]

Considering that the border drawing function of the EU readmission policy has an immediate impact on fundamental rights of individuals – *i.e.* core domains protected and regulated through hard procedural and substantive law –, the level of experimentalism characterising its evolution demands constant reflection on its overall limits and constraints. The present *Article* aims at contributing to that reflection effort by analysing the EU's readmission policy from the standpoint of two principles governing its exercise as a shared competence: subsidiarity and institutional balance. The objective is verifying to what extent these principles have been capable of steering institutional conduct in the field so far, but also reflecting on how they could do so in the future, taking into account the main axes of development of this policy field. The choice of these two benchmarks is first and foremost dictated by practical considerations. It would have been impossible to assess the field against all "structural principles"[5] relevant to the Union's external action in the space of an

[1] D Newman, 'On Borders and Power: A Theoretical Framework' (2003) Journal of Borderlands Studies 13, 15; I Horga and M Brie, 'Europe between Exclusive Borders and Inclusive Frontiers' (2010) Studia Europaea 63.

[2] Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts [1997].

[3] On the concept of externalisation see, inter alia, T Spijkerboer, 'Bifurcation of People, Bifurcation of Law: Externalization of Migration Policy before the EU Court of Justice' (2018) Journal of Refugee Studies 216.

[4] *Inter alia*, M Panizzon, 'The Global Migration Compact and the Limits of "Package Deals" for Migration Law and Policy' in E Guild and others, 'What is a Compact? Migrants' Rights and State Responsibilities Regarding the Design of the UN Global Compact for Safe, Orderly and Regular Migration' (RWI Working Paper 1-2017) 17, 21; C Molinari, 'The EU and Its Perilous Journey Through the Migration Crisis: Informalisation of the EU Return Policy and Rule of Law Concerns' (2019) ELR 824, 825.

[5] M Cremona (ed.), *Structural Principles in EU External Relations Law* (Hart 2018).

article. Hence, the decision was made to focus on the exercise of the readmission competence, rather than on its nature, and on the framing of EU-level action, as opposed to action by the Member States. The issues left out of this *Article* (in particular, the question of the exclusivity or non-exclusivity of the Union's readmission competence in different instances, as well as the implications of the principle of sincere cooperation for the parallel pursuit of EU and national readmission policies) are dealt with elsewhere by the present author.[6] While limiting the scope of the present analysis, the focus on subsidiarity and institutional balance allows it to encompass both the vertical and horizontal aspects of competence distribution in the EU legal order, providing an overview of the interplay between those national and supranational actors which shape this policy domain.

II. Subsidiarity

II.1. Subsidiarity and the exercise of the Union's external competences

According to the principle of subsidiarity, enshrined in art. 5(3) TEU, "in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level". The principle is meant to determine the appropriate level of action in areas where both EU and Member States are competent to act.[7] Thus, it governs the exercise of EU competences, as preallocated along the "vertical axis".[8] Much as conferral, subsidiarity is relevant every time the Union decides to "act", internally or externally, through hard or soft law.[9] Nonetheless, its scope is limited to areas of non-exclusive Union competence. In these fields, it sets conditions upon which the Union's *exercise* of its competence should depend.

In its essence, subsidiarity operates by entailing a presumption in favour of Member States' action:[10] proximity of government to the citizens is assumed to make decisions more

[6] C Molinari, 'Sincere Cooperation between EU and Member States in the Field of Readmission: The More the Merrier?' (2021) CYELS forthcoming.

[7] D Cass, 'The Word That Saves Maastricht: The Principle of Subsidiarity and the Division of Powers Within the European Community' (1992) CMLRev 1107, 1134.

[8] The expressions "vertical and horizontal axis" are used by G De Baere, *Constitutional Principles of EU External Relation* (Oxford University Press 2008) 229 to describe the two plans along which competences are divided in the EU: between Member States and supranational level (vertical) and between different actors at the supranational level (horizontal).

[9] *Inter alia*, I Bosse-Platière and M Cremona, 'Facultative Mixity in the Light of the Principle of Subsidiarity' in M Chamon and I Govaere (eds), *EU External Relations Post-Lisbon: The Law and Practice of Facultative Mixity* (Brill Nijhoff 2020) 48; M Klamert, 'Article 5 TEU: Commentary' in M Kellerbauer, M Klamert and J Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford University Press 2019) 70.

[10] J Öberg, 'Subsidiarity as a Limit to the Exercise of EU Competences' (2017) Yearbook of European Law 391, 404.

participatory[11] and *efficient*[12] in addressing collective needs. Specific justifications are needed to rebut this presumption and support action at the supranational level.[13] Hence, subsidiarity translates into an obligation to give reasons.[14] The required justification encompasses both a negative and a positive component, and it entails both qualitative and quantitative considerations.[15] The negative component of the subsidiarity test corresponds to a requirement of *necessity of supranational action*. The latter is only allowed when the national level would be ineffective, *i.e.* incapable of sufficiently reaching the envisaged objectives. The positive component of the subsidiarity test further requires verifying whether EU-level action would bear any *added value*, either in terms of scale of the proposed action or in terms of its effects. Conducting the comparative efficiency determination required to identify added value is no easy task. Crucially, this determination depends on the identified objectives of Union's action,[16] as well as on the embraced conception of subsidiarity.[17]

Codified in the EU Treaties in a restructuring attempt that values proximity of government as a way to facilitate and support the Union's deliberative processes,[18] subsidiarity values participation in decision making as a vehicle for more efficient outcomes.[19] Albeit limited in scope to draft legislative acts, the attribution of the *ex ante* subsidiarity control to national parliaments further shows that democratic legitimacy considerations are not extraneous to the subsidiarity equation, but rather part and parcel of the subsidiarity test.[20]

Justifying the EU's external action from a subsidiarity perspective seems *prima facie* easy. First, external action is always deployed on the international scale. Secondly, EU level intervention on the international sphere has the effect of increasing the negotiating weight behind EU citizens' interests in most instances. Thirdly, since the Lisbon reform of the EU Treaties, art. 218 TFEU attributes to the European Parliament (EP) a prominent

[11] *Ibid*.; D Cass, 'The Word That Saves Maastricht' cit. 1134.

[12] P Craig, 'Subsidiarity: A Political and Legal Analysis' (2012) JComMarSt 72, 84; K Lenaerts, 'The Principle of Subsidiarity and the Environment in the European Union: Keeping the Balance of Federalism' (1993) FordhamIntlLJ 846, 877.

[13] R Schütze, *European Constitutional Law* (Cambridge University Press 2016) 260.

[14] K Lenaerts, 'The Principle of Subsidiarity and the Environment in the European Union' cit. 894.

[15] This is made explicit in art. 5 of Protocol n. 2 on the Application of the Principles of Subsidiarity and Proportionality [2008]. See also M Klamert, 'Article 5 TEU: Commentary' cit. 72.

[16] P Craig, 'Subsidiarity: A Political and Legal Analysis' cit. 73–75.

[17] It should be added that when both the negative and positive component of the subsidiarity test are fulfilled, EU action is permitted, but the supranational institutions remain free not to act. In this respect, see for example case T–310/18 *EPSU and Goudriaan v Commission* ECLI:EU:T:2019:757 paras 135-139.

[18] G De Búrca, 'Reappraising Subsidiarity's Significance After Amsterdam' (Jean Monnet Working Papers 7-1999) 11-12; P Craig, 'Subsidiarity: A Political and Legal Analysis' cit. 73.

[19] NW Barber, 'The Limited Modesty of Subsidiarity' (2015) ELJ 308, 315 ff; C Eckes, *EU Powers Under External Pressure: How the EU's External Actions Alter its Internal Structures* (Oxford University Press 2019) 84. See also P Craig, 'Subsidiarity: A Political and Legal Analysis' cit. 73 on subsidiarity as a means to preserve pluralism.

[20] C Eckes, *EU Powers Under External Pressure* cit. 84. See also NW Barber, 'The Limited Modesty of Subsidiarity' cit. 318.

role in the negotiation and conclusion of international agreements, ensuring a high level of democratic participation in international decision-making. The Commission has recognised such a role and has committed to keeping the EP fully and timely informed on all the phases of the negotiating process, thereby allowing it to provide input.[21] At the national level, the extent to which parliamentary assemblies can obtain information on international negotiations and have their concerns taken into account vary from a Member State to the other. In addition, the link between parliamentary majority and government giving expression to that majority is likely to render scrutiny of executive action on the international stage less effective than it is at the level of the Union.[22]

These considerations notwithstanding, the practice of justifying the Union's external action explicitly as to its compliance with subsidiarity has remained exceptional.[23] While internal legislative proposals systematically include a subsidiarity justification in the relevant explanatory memorandum,[24] the same cannot be said of the decisions to negotiate and sign international agreements. There are several possible reasons for such a lack of justification.

A first reason is linked to the circumstance that the subsidiarity test and the reasoning behind the affirmation that an implied external competence exists partially overlap in certain instances: the finding of an *implied* external competence based on art. 216(1) TFEU can depend on the determination that EU external action is necessary for the achievement of an EU objective. This determination encompasses a finding that EU action bears added value in the given situation. Thus, a separate reasoning on the subsidiarity compliance of the exercise of implied competence might be redundant.[25] Nonetheless, this consideration is irrelevant for *explicit* external competences of a non-exclusive nature, such as readmission. These exist regardless of their necessity in any specific instance, but can only be *exercised* when their activation would respond to the subsidiarity logic. Considering the independent function that subsidiarity plays in determining their exercise by the Union, the lack of subsidiarity justification for explicit non-exclusive external competences – such as readmission – remains problematic.

A second argument used to explain the paucity of subsidiarity justifications for external action is related to mixity. Facultative mixity entails EU's and Member States' joint

[21] Framework Agreement on relations between the European Parliament and the European Commission [2010], points 23 and 24.

[22] D Thym, 'Parliamentary Involvement in European International Relations' in M Cremona and B De Witte (eds), *EU Foreign Relations Law*: *Constitutional Fundamentals* (Hart 2008) 201, 210 ff; P Bajtay, 'Democratic and Efficient Foreign Policy? Parliamentary Diplomacy and Oversight in the 21st Century and the Post-Lisbon Role of the European Parliament in Shaping and Controlling EU Foreign Policy' (EUI Working Papers 11-2015) 5.

[23] C Eckes, *EU Powers Under External Pressure* cit. 94; G De Baere, 'Subsidiarity as a Structural Principle Governing the Use of EU External Competences' in M Cremona (ed.), *Structural Principles* cit. 93, 113 ff.

[24] In compliance with a specific obligation resulting from art. 5 of Protocol n. 2.

[25] I Bosse-Platière and M Cremona, 'Facultative Mixity in the Light of the Principle of Subsidiarity' cit. 64; G De Baere, 'Subsidiarity as a Structural Principle' cit. 101 ff.

action in areas of non-exclusive external competence. This type of mixity is called "facultative" precisely because the Union possesses a shared competence in the area(s) covered by the agreement and would, as a consequence, be able to conclude it on its own.[26] In this scenario, the choice to nonetheless involve the Member States tends to obscure the question of subsidiarity precisely because, through mixity, the Member States are allowed to maintain their international presence and visibility. This renders the need for an explicit justification concerning the added value of the EU's external intervention less politically – albeit not legally – compelling. However, even this second argument tells us nothing on the lack of justification for EU action in fields such as that of readmission. In fact, international cooperation on readmission is almost invariably conducted by the Union alone, rather than through mixed agreements.

In conclusion, and in particular for explicit and non-exclusive external competences, the lack of subsidiarity justification stands in contrast with the logic of subsidiarity, namely informing the Union's federal model and influencing institutional discourse and practice[27] by requiring constant and explicit reflection on the most appropriate level of action. Admittedly, the obligation to provide a subsidiarity justification might prove difficult to enforce judicially, in light of the traditional reluctance of the Court of Justice of the European Union (Court) to scrutinise compliance with this "procedural aspect" of the subsidiarity principle.[28] Such a reluctance has been attributed to the difficulty to disentangle the legal and political content of subsidiarity and to identify, as a consequence, the appropriate scope for judicial review. Albeit consistently reaffirming its competence to scrutinise subsidiarity compliance, the Court has long limited itself to a deferential assessment of the substantive aspects of the principle, namely compliance with the positive and negative criteria enshrined in art. 5(3) TEU. This approach is encapsulated in the frequent finding that "the EU legislature could legitimately take the view [that the relevant objectives] could be best achieved at EU level".[29] As noticed by Craig, at least pre-Lisbon, not only the Court, but also the parties rarely relied on subsidiarity to challenge EU action.[30] Be that as it may, since the entry into force of the Lisbon Treaty, the standard of judicial review of subsidiarity compliance seems to have evolved, by virtue of the enhanced procedural safeguards that Protocol n. 2 to the EU Treaties has attached to the principle in relation to draft legislative acts. The Protocol requires draft legislation to be accompanied by "a detailed statement making it possible to appraise compliance with the principle[..]

[26] As reaffirmed in case C-600/14 *Germany v Council* ECLI:EU:C:2017:935 (hereinafter *OTIF I)* paras 67-68.

[27] G De Búrca, 'Reappraising Subsidiarity's Significance After Amsterdam' cit. 8.

[28] J Öberg, 'Subsidiarity as a Limit to the Exercise of EU Competences' cit. 405 ff.

[29] Case C-151/17 *Swedish Match* ECLI:EU:C:2018:938 para. 69. See also, among others, case C-547/14 *Philip Morris Brands and Others* ECLI:EU:C:2016:325 para. 222; case C-508/13 *Estonia v Parliament and Council* ECLI:EU:C:2015:403 para. 48; and case C-58/08 *Vodafone and Others* ECLI:EU:C:2010:321 paras 77-78.

[30] P Craig, 'Subsidiarity: A Political and Legal Analysis', cit. 80.

of subsidiarity"[31] and explicitly recognises the Court's jurisdiction to scrutinise subsidiarity breaches.[32] In light of this shift in the Treaty framework, several Court's judgment have affirmed that "the EU judicature [...] must verify both compliance with the substantive conditions set out in Article 5(3) TEU and compliance with the procedural safeguards provided for by [...] protocol [n. 2]".[33]This finding has often been accompanied by a (timid) enquiry into the statement of reasons and impact assessment accompanying the relevant piece of legislation.[34] It is submitted that judicial review concerning the existence and adequacy of subsidiarity justification should apply also to non-legislative acts. The Court has itself recognised that a solid subsidiarity justification is necessary to "enabl[e it] [...] to exercise its power of review".[35] This consideration holds true for international agreements as much as for internal legislation. In the future, it is hoped that the Court will feel entitled to annul any EU measure, including non-legislative acts, in case of a totally lacking or clearly insufficient subsidiarity justification.[36]

II.2. The Union's readmission policy to the test of subsidiarity

The Union's readmission competence is an explicit external competence of a shared nature. Thus, compliance with subsidiarity of EU action in the field must be determined on a case-by-case basis, when the competence is exercised. The reflection and justification requirements needed for such a determination are often circumvented: readmission agreements and arrangements proliferate at the two levels of EU governance regardless their comparative efficiency. The avoidance of the subsidiarity question is not only evident in institutional practice in the field of readmission, but also in the relevant doctrine.[37] The latter has often correctly acknowledged the lack of added value of the Union's intervention in the area of readmission. Nonetheless, it has used this observation to justify parallel bilateral action at the national level, rather than to question the subsidiarity-compliance of Union's action.[38] In other words, adopting a top-down approach, the doctrine has often asked whether the Union's competence in the field of readmission could be construed as exclusive, relying on the lack of sufficient added value in the negotiation

[31] Art. 5 Protocol n. 2.

[32] Art. 8 Protocol n. 2.

[33] *Philip Morris Brands and Others* cit. para. 217; case C-477/14 *Pillbox 38* ECLI:EU:C:2016:324 para. 146; case C-358/14 *Poland v Parliament and Council* ECLI:EU:C:2016:323 para. 113.

[34] *Philip Morris Brands and Others* cit. paras 226-227 and *Poland v Parliament and Council* cit. paras 123-124.

[35] *Poland v Parliament and Council* cit. para. 124.

[36] P Craig, 'Subsidiarity: A Political and Legal Analysis' cit. 78.

[37] The question of subsidiarity in external action remains quite unexplored more broadly (see I Bosse-Platière and M Cremona, 'Facultative Mixity in the Light of the Principle of Subsidiarity' cit. 48).

[38] M Panizzon, 'Readmission Agreements of EU Member States: A Case for EU Subsidiarity or Dualism?' (2012) Refugee Survey Quarterly 101, 132; N Coleman, *European Readmission Policy: Third Country Interests and Refugee Right* (Martinus Nijhoff 2009) 207.

with third countries to conclude in the negative. Conversely, it has rarely looked at the issue from the bottom-up perspective imposed by subsidiarity, questioning the extent to which this shared EU competence can legitimately be exercised when EU intervention bears no added value. In light of this gap, the present section will attempt to spell out the – often implicit – justification underlying Union's action in the field of readmission to assess its explanatory potential.

The first question to be asked in the context of a subsidiarity assessment of the Union's readmission policy concerns the nature of the relevant objectives, against which both the effectiveness of national action and the added value of EU-level intervention must be evaluated. As convincingly argued by Coleman, the Union was granted shared competence on readmission by virtue of its potential negotiating strength,[39] with a view to increase the chance of obtaining cooperation from difficult negotiating partners at bilateral level. Readmission agreements were aimed at facilitating the implementation of return orders. At the same time, they were conceived as conducive to the attainment of broader migration policy objectives, such as the creation of a "buffer zone"[40] of neighbouring states capable and willing to prevent transit of irregular migrants towards the EU. This means that the common readmission policy was intended to strengthen the Union's borders and help externalising migration governance without seeking to harmonise national readmission policies. National and supranational action on readmission were meant to concur in achieving the same objective: obtaining third countries' cooperation on readmission and migration control more broadly.[41]

With this in mind, a first observation to be made is that, in most cases, Member States have proven capable of achieving this objective on their own. Over the years, they have developed a broad and ever-expanding network of bilateral readmission agreements.[42] In this respect, and from a subsidiarity perspective, the Union's intervention was, from the beginning, intended to focus on those cases where bilateral negotiations were proving particularly difficult to conduct. This perspective was confirmed by the Council itself in the early phases of the development of the Union's readmission strategy.[43] According to Coleman "[t]he communitarisation of readmission agreements was masterminded in order to gain a more dominant negotiating position especially *vis-à-vis* [...] problematic countries" such as Russia, China and Morocco.[44] As a consequence, the first prong of the subsidiarity test seems to be satisfied with respect to this type of third countries only.

[39] N Coleman, *European Readmission Policy* cit. 56.

[40] G Papagianni, 'Forging an External EU Migration Policy: From Externalisation of Border Management to a Comprehensive Policy?' (2013) European Journal of Migration and Law 283, 284.

[41] N Coleman, *European Readmission Policy* cit. 55.

[42] See data stored in the online inventory kept by JP Cassarino, *An Expanding Readmission System* www.jeanpierrecassarino.com.

[43] Council Proposal of 14 June 2002 for a comprehensive plan to combat illegal immigration and trafficking of human beings in the European Union, para. 76.

[44] N Coleman, *European Readmission Policy* cit. 56.

In addition, even when Member States are incapable of achieving the objectives of the readmission policy with respect to specific third countries, the Union is still required to demonstrate the added value of its intervention, before being allowed to exercise its readmission competence. Added value is to be declined as *i*) higher comparative efficiency in obtaining third countries' cooperation, by reason of the Union's purportedly more significant negotiating weight; and *ii*) enhancement of the participatory rationale of subsidiarity. As to the first element, EU institutions were forced to admit early on that the supranational level lacked the right set of incentives to obtain third countries' cooperation on readmission.[45] For those countries interested in a *quid pro quo* involving labour migration, the Union's intervention bore no advantage, as only "Member States [can] determine volume of admission of third-country nationals coming from third countries to their territory in order to seek work".[46] Notwithstanding the attempts to increase the Union's negotiating toolbox through the linking of readmission and visa facilitation negotiations,[47] as well as through positive[48] and negative conditionality applied to the Union's development funds,[49] the conclusion of EU readmission agreements has remained a challenge, so much so that the institutions have increasingly focussed on flexible cooperation on readmission based on non-binding instruments, rather than international treaties.[50] As a consequence of this tendency towards informalisation, the Union's readmission policy has threaded further away from the participatory logic of subsidiarity. In fact, after the Lisbon reform of the EU Treaties and the prominent role granted to the EP in the negotiation of international treaties,[51] EU institutions could have justified their intervention in the field of readmission invoking the arguably sounder democratic legitimacy of EU external action, when compared to international cooperation conducted at the national level. Nonetheless, the participatory rationale

[45] According to the Commission "As readmission agreements work mainly in the interest of the Community, third-countries are naturally very reluctant to accept such agreements. Their successful conclusion, therefore, depends very much on the positive incentives ("leverage") at the Commission's disposal. In that context it is important to note that, in the field of JHA, there is little that can be offered in return. In particular visa concessions or the lifting of visa requirements can be a realistic option in exceptional cases only (e.g. Hong Kong, Macao); in most cases it is not" (Communication COM(2002) 564 final of 14 October 2002 from the Commission to the Council and the European Parliament on a Community Return Policy on Illegal Residents).

[46] Art. 79(5) TFEU. See A Roig and T Huddleston, 'EC Readmission Agreements: A Re-Evaluation of the Political Impasse' (2007) European Journal of Migration and Law 363, 376.

[47] Communication COM(2006) 735 final of 30 January 2006 from the Commission to the Council and. the European Parliament on The Global Approach to Migration One Year on: Towards a Comprehensive European Migration Policy.

[48] Communication COM(2002) 703 final of 3 December 2002 from the Commission to the Council and the European Parliament on Integrating Migration Issues in the European Union's Relations with Third Countries.

[49] Communication COM(2016) 385 final of 7 June 2016 from the Commission on Establishing a New Partnership Framework with Third Countries under the European Agenda on Migration.

[50] *Ibid*.

[51] R Corbett, 'The Evolving Roles of the European Parliament and of National Parliaments' in A Biondi, P Eeckhout and S Ripley (eds), *EU Law After Lisbon* (Oxford University Press 2012) 249–250.

embedded in the subsidiarity logic offers no support to the informal tools increasingly used by the Union to obtain cooperation on readmission.

From a subsidiarity standpoint, the above seems to suggest that Union action in the field of readmission should be limited: Member States are often capable of achieving the objective of concluding readmission deals on their own. Moreover, EU added value in the absence of competence on labour migration remains doubtful in most cases. The negotiating weight of the Union has been unable to substantially facilitate negotiations with most of those third countries which had shown resistance in the context of bilateral cooperation: Morocco and China, for example, never accepted to conclude readmission agreements with the EU.[52] Finally, considerations linked to the participatory nature of decision-making might provide an argument in favour of Union's action through readmission agreements. Nonetheless, the democratic advantage of having the deals scrutinized by the EP throughout the relevant negotiating process cannot be invoked to justify the increasing number of informal arrangements concluded without following the procedure envisaged in art. 218 TFEU.

In light of the above, and instead of relying blindly on the multiplication of the calls to step up the Union's common readmission policy through differentiated tools and actors,[53] a more explicit and thorough reflection on the added value of supranational action in this area would be politically and legally desirable. It would contribute to bringing the practice of the EU readmission policy more in line with the constitutional architecture envisaged in the Treaties and reverse the current bias towards EU action at any cost, accompanied by the persistent need for parallel national action. An explicit subsidiarity justification would also increase the transparency of the Union's decision-making process, much as it does for internal legislative acts, allowing for more meaningful judicial and democratic scrutiny on external action.

III. Institutional balance

III.1. Institutional balance in the area of readmission according to the Treaties

The previous section has questioned the compliance of the EU readmission policy with subsidiarity, which steers the exercise of competences along the vertical axis. This section

[52] Notwithstanding the circumstance that the relevant negotiating mandate had been issued in the very early day of the common readmission policy: September 2000 for Morocco and November 2002 for China (Readmission Agreements MEMO/05/351 from the Commission of 5 October 2005).

[53] As reiterated most recently in Communication COM(2020) 609 final of 23 September 2020 from the Commission on a New Pact on Migration and Asylum.

will be dedicated to a principle[54] governing the exercise of the Union's readmission competence along the horizontal axis: institutional balance.

Institutional balance is reflected, at the level of EU primary law, in art. 13(2) TEU,[55] according to which "each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them". In its essence, it requires each institution to perform the core functions attributed to it by the Treaties without encroaching on the prerogatives of other institutions. Thereby, it ensures that the allocation of powers to different governing bodies be respected in its rationale and prevents it from being subverted by institutional practice.[56] The principle finds its origin in the case-law of the Court[57] that has been willing to engage with it on several occasions[58] and even, exceptionally, to use it as a ground to annul specific measures.[59] The relevant case-law reiterates that "[t]he Treaties set up a system for distributing powers among the different Community institutions, assigning to each institution its own role in the institutional structure of the Community and the accomplishment of the tasks entrusted to the Community. Observance of the institutional balance means that each of the institutions must exercise its powers with due regard for the powers of the other institutions".[60]

The role that each institution has to perform in the Union's constitutional architecture is defined primarily with reference to the general institutional provisions contained in arts 14 to 19 TEU.[61] These articles allow the Court to extrapolate the intention of the

[54] Institutional balance has been qualified as a "principle" by the Court on several occasions (see, for example, case C-660/13 *Council v Commission* ECLI:EU:C:2016:616 (hereinafter *Swiss MoU*) para. 32; case C-409/13 *Council v Commission* ECLI:EU:C:2015:217 (hereinafter *MFA*) para. 64; case C-73/14 *Council v Commission* ECLI:EU:C:2015:663 (hereinafter *ITLOS*) para. 61).

[55] M Chamon, 'The Institutional Balance, an Ill-Fated Principle of EU Law?' (2015) EPL 371, 375; C Hillion, 'Conferral, Cooperation and Balance in the Institutional Framework of EU External Action' in M Cremona (ed.), *Structural Principles* cit. 117, 118; C Eckes, *EU Powers Under External Pressure* cit. 149.

[56] See O Moskalenko, 'The Institutional Balance: A Janus-Faced Concept of EU Constitutional Law', (2016) Politeja 125, 125.

[57] The Court has referred to the "balance of powers [characterising] the institutional structure of the Community" as early as in case 9/56 *Meroni v High Authority* ECLI:EU:C:1958:7 para. 152.

[58] *MFA* cit. paras 63-95; case C-70/88 *Parliament v Council* ECLI:EU:C:1990:217 (hereinafter *Chernobyl*) paras 20-27; case C-133/06 *Parliament v Council* ECLI:EU:C:2008:257 para. 57; case C-425/13 *Commission v Council* ECLI:EU:C:2015:483 (hereinafter *ETS*) para. 57; *ITLOS* cit. para. 61; case C-233/02 *France v Commission* ECLI:EU:C:2004:173 para. 40.

[59] *Swiss MoU* cit. paras 46-48.

[60] *Chernobyl* cit. paras 21-22. See also *MFA* cit. para. 64; and *ITLOS* cit. para. 61.

[61] C Eckes, *EU Powers Under External Pressure* cit. 127.

Treaties drafters as to the core aspects of the horizontal allocation of powers, to be respected, both internally and externally,[62] in all policy areas, including when EU institutions act as "borrowed" actors, outside the framework of the EU Treaties.[63] According to the general institutional provisions, the EP "shall exercise functions of political control and consultation as laid down in the Treaties";[64] the European Council "shall define the general political directions and priorities"[65] of the Union; and the Council "shall carry out policy-making and coordinating functions as laid down in the Treaties".[66] As to the Commission, it is the bearer of numerous functions, including "tak[ing] appropriate initiatives" to "promote the general interest of the Union" and "ensur[ing] the Union's external representation". Finally, observance of the law "in the interpretation and application of the Treaties" is the task of the Court, which is therefore both subject to the principle of institutional balance and in charge of ensuring its respect by the other institutions.[67]

These overarching provisions must be read together with the procedural indications contained in the legal basis of the policy field at stake.[68] In fact, legal bases are associated with specific procedural arrangements detailing the balance between, for example, democratic accountability, flexibility and speed of action.[69] These arrangements are particularly important to determine the respective weight of the EP's democratic control function, on the one hand, and the Council's policy-making role, on the other, as both these functions have to be performed "as laid down in the Treaties".[70]

With respect to the field of readmission, the procedural arrangements that indicate the desired institutional balance are enshrined in art. 79 TFEU, belonging to Title V on the Area of Freedom Security and Justice (AFSJ), and art. 218 TFEU, dealing with the Union's external action. Art. 79(3) TFEU constitutes the explicit legal basis for external action in a field internally covered by art. 79(2)(c), namely irregular migration. The decision-making procedure envisaged in art. 79 gives us indications on the specific weight that each institution should

[62] The Court's reasoning on institutional balance invariably departs from these general institutional provisions, when dealing with both internal (e.g., *MFA* cit. 68-74) and external EU action (e.g. *Swiss MoU* cit.; *ITLOS* cit. paras 68-77).

[63] Case C-370/12 *Pringle* ECLI:EU:C:2012:756 paras 162-163.

[64] Art. 14(1) TEU.

[65] *Ibid*. art. 15(1).

[66] *Ibid*. art. 16(1).

[67] Discussing the role of the Court for the EU's legal order more generally is beyond the scope of the present *Article*. The inclusion of the Court in this reconstruction of the Treaty allocation of powers is, nonetheless, needed in order to respect the Treaty structure, which does list the Court among other institutions and attributes to it a specific role. In addition, it is useful in order to remind the reader of the uneasy and twofold role of the court – subject and guardian - in the context of the Union's institutional balance.

[68] LAJ Senden, 'Soft Law and Its Implications for Institutional Balance in the EC' (2005) Utrecht Law Review 79, 85 ff.

[69] See C Hillion, 'Conferral, Cooperation and Balance' cit. 130 on the complexities of the relation between the general institutional provisions, on the one hand, and more specific procedural arrangements.

[70] Arts 14(1) and 16(1) TEU.

bear in this policy area. When looking at external action, these indications must be complemented by those coming from art. 218(6)(a)(v) TFEU, which details the procedure to be followed in order to conclude international agreements. A combined reading of arts 79 and 218 TFEU tells us that both the adoption of internal legislation and the conclusion of formal international agreements in the area of irregular migration require a conspicuous involvement of the EP. The latter is co-legislator with the same weight as the Council, internally, and must consent to the conclusion of international treaties, externally. In other words, in all the procedures explicitly detailed in the EU Treaties in the area of irregular migration, the EP is attributed the broadest possible function among the different configurations foreseen in EU primary law. In my view, this must be taken to reflect the institutional balance characterising the field more broadly.[71] Thus, I would argue that, even when no specific procedure is detailed in EU primary law for the conclusion of certain types of instruments, the institutional balance envisaged in the Treaties for both internal and external action in the area of irregular migration requires the EP's political control and consultation prerogatives to be interpreted broadly.

With respect to the conclusion of formal readmission agreements, this consideration remains in the background, as the way in which each institution is to perform its role is detailed in the specific procedural arrangements enshrined in art. 218 TFEU.

Conversely, they become essential with respect to soft deals whose conclusion is procedurally unregulated in EU primary law. In conjunction with the principle of inter-institutional sincere cooperation, institutional balance allows the Court to fill this gap and identify procedural rules of conduct unwritten in the Treaties, but needed to allow institutions to fully exercise their prerogatives without impinging upon each other's functions.[72]

Admittedly, in the absence of inter-institutional agreements[73] or other forms of guidance,[74] fleshing out the manner in which institutional balance is to translate procedurally in the context of the negotiation of soft deals is difficult. It will be for the Court to identify

[71] In relation to the Common Foreign and Security Policy (hereinafter CFSP), Hillion talks about the existence of a field-specific institutional balance, "encapsulated in related legal bases" and "interpreted [by the Court] in consideration of the general provisions of Title III TEU" (C Hillion, 'Conferral, Cooperation and Balance' cit. 129). I identify a similar relation between specific procedural arrangements, broader institutional balance in the AFSJ and respect for the essential role of each institution based on the general institutional provisions. The possibility to extrapolate an overarching institutional balance for the policy field at stake, which takes into account – but is not limited to – specific procedural arrangements, also constitutes the logical assumption underlying the idea of using institutional balance as a "gap-filling principle" (*inter alia*, M Chamon, 'The Institutional Balance, an Ill-Fated Principle of EU Law?', cit. 385).

[72] A Ott, 'Informalization of EU Bilateral Instruments: Categorization, Contestation, and Challenges' (2020) Yearbook of European Law 569, 590 and C Hillion, 'Conferral, Cooperation and Balance' cit. 136.

[73] Of the kind that EP, Council and Commission are explicitly authorised to conclude in order to determine procedures for their cooperation "in compliance with the Treaties" under art. 295 TFEU.

[74] O Stefan, 'COVID-19 Soft Law: Voluminous, Effective, Legitimate? A Research Agenda' European Papers (European Forum Insight of 3 June 2020) www.europeanpapers.eu 663, 669.

the detailed practical consequences of the applicability of institutional balance to soft external deals on a case-by-case basis.[75] In doing so, the Court will not be able to apply art. 218 TFEU directly. However, it will likely take this Treaty article into account as a reflection of institutional balance in the field of external relations,[76]as it has already done in the *Swiss MoU* case. There, the Court explicitly departed from the general institutional provision concerning the Council and Commission, namely arts 16 and 17 TEU, to conclude that "the Commission cannot be regarded as having the right [...] to sign a non-binding agreement resulting from negotiations conducted with a third country".[77] However, it – implicitly but unmistakably – based itself on art 218(2) TFEU in order to determine the procedural consequence of this premise.[78] In fact, the judgment *de facto* recognised that it is for the Council to "authorise the opening of negotiations, adopt negotiating directives [and] authorise the signing of [the non-binding] agreement[...]",[79] exactly as would be the case in the context of the negotiation of a binding international treaty. According to the Court,

> "[t]he decision concerning the signing of an agreement with a third country [...] – *irrespective of whether or not that agreement is binding* – requires an assessment to be made [...] of the Union's interests in the context of its relations with the third country concerned, and the divergent interests arising in those relations to be reconciled. Therefore, [...] [it] is one of the measures by which the Union's policy is made and its external action planned for the purpose of the second sentence of Article 16(1) and the third subparagraph of Article 16(6) TEU".[80]

In other words, the non-binding nature of an international agreement does not allow the Commission to bypass the Council's policy-making function. It is reasonable to deduce from this that non-binding agreements must be respectful of institutional balance more broadly, including the EP's political control and consultation prerogatives.[81] In practice, the level of procedural symmetry between art. 218 TFEU and the negotiation of non-binding deals will depend on the nature of such deals in any given case. In the *Swiss MoU* judgment, the Court did not develop an explicit reasoning on the existence of different kinds of non-binding EU measures, with different levels of normative force. Nonetheless,

[75] As stated by Hillion, "The Court [...] enjoys a degree of discretion in articulating the interface between Title III TEU and specific TEU and TFEU- based procedures, and in turn in refining the functioning of the EU institutional system" (C Hillion, 'Conferral, Cooperation and Balance' cit. 130).

[76] See T Verellen, 'On Conferral, Institutional Balance and Non-Binding International Agreements: The Swiss MoU Case' European Papers (European Forum Insight of 10 October 2016) www.europeanpapers.eu 1225, 1233 on the need "for a parliamentary consent-requirement on the basis of Art. 14 TEU that runs parallel with Art. 218, para. 6, TFEU".

[77] *Swiss MoU* cit. para. 38.

[78] P Koutrakos, 'Institutional Balance and Sincere Cooperation in Treaty-Making under EU Law' (2019) ICLQ 1, 12.

[79] Art. 218(2) TFEU.

[80] *Swiss MoU* cit. paras 39-40 (emphasis added).

[81] T Verellen, 'On Conferral, Institutional Balance and Non-Binding International Agreements' cit. 1233.

the literature has underlined that different types of (internal and external) soft law exist and that the distinction between soft and hard law is not a dichotomy, but rather a matter of degree.[82] Non-binding and binding measures can be placed on a "continuum"[83] that ranges from purely political declarations, to commitments with a certain normative strength, to enforceable legal acts adopted in conformity with pre-defined procedures. The closer the content and potential effects of soft law measures are to those of their hard law alternatives, the more justified it is to require from the institutions the granting of a level of transparency, democratic and judicial accountability comparable to that provided for in the Treaties for hard law. The opposite would expose the EU's Treaty system to elusive conduct on the part of its institutions.[84] The Court has indirectly endorsed this reasoning when adjudicating on the validity of soft law measures. In *FBF*, it reaffirmed that the non-binding nature of a certain measure does not exempt the adopting authority from the obligation to remain within the boundaries of its conferred powers.[85] In *Belgium v Commission*, it accepted that even recommendations might exceptionally be able to produce legal effects, if the issuing institution intended to adopt binding commitments or produce clear consequences on the legal sphere of third parties.[86] Finally, in *France v Commission*, it annulled non-binding internal instructions of the Commission, as they *de facto* resulted in the self-attribution of a new power by the Commission.[87]

In conclusion, the institutional balance that the Treaties delineate for the field of readmission – and that is *reflected* in arts 79 and 218 TFEU – points to a high level of democratic scrutiny.[88] Thus, a significant role of the EP should be guaranteed even with respect to the negotiation of non-binding commitments, which are not directly procedurally regulated in the Treaties. This is the case at least when such deals *de facto* replace binding measures.[89] The opposite would open the gate for institutional elusion of the Treaty framework through soft law labelling. The next sub-section will go over the array of instruments used to pursue the Union's readmission policy to verify whether informal EU deals in the area of readmission are negotiated and concluded in conformity with these standards.

[82] KW Abbott and D Snidal, 'Hard and Soft Law in International Governance' (2000) International Organization 421, 422.

[83] F Terpan, 'Soft Law in the European Union: The Changing Nature of EU Law' (2015) 21 ELJ 68, 70.

[84] C Molinari, 'EU Readmission Deals and Constitutional Allocation of Powers: Parallel Paths That Need to Cross?' (29 September 2020) Verfassungsblog verfassungsblog.de.

[85] Case C-911/19 *FBF* ECLI:EU:C:2021:599 paras 67-68

[86] Case C-16/16 P *Belgium v Commission* ECLI:EU:C:2018:79 para. 29.

[87] Case C-366/88 *France v Commission* ECLI:EU:C:1990:348 paras 23-25.

[88] The Court has already grounded a broad interpretation of the EP's rights of information in the CFSP context on the circumstance that "participation by the Parliament in the legislative process is the reflection, at Union level, of a fundamental democratic principle that the people should participate in the exercise of power through the intermediary of a representative assembly" (case C-263/14 *Parliament v Council (Tanzania)* ECLI:EU:C:2016:435 and case C-658/11 *Parliament v Council (Mauritius)* ECLI:EU:C:2014:2025).

[89] On the need to distinguish between various types of soft law when assessing the role that each institution is required to play, see A Ott, 'Informalization of EU Bilateral Instruments' cit. 591.

III.2. The Union's readmission policy to the test of institutional balance

From the perspective of institutional balance, formal readmission agreements are the least problematic of the different tools used to pursue readmission objectives. As they are negotiated following the detailed procedure described in art. 218(6)(a)(v) TFEU, their procedural design necessarily respects institutional balance. Any deviation from the procedural requirements set out for their conclusion can easily be brought to the attention of the Court and sanctioned. However, the importance of readmission agreements in the overall economy of the EU's readmission policy has been steadily declining over time. The difficulties linked to their negotiation, as well as the perceived urgency resulting from the migration crisis erupted in 2015,[90] have led the Union to focus on the speed and flexibility of international cooperation on readmission, rather than on the type of tools chosen to formalise it.[91] The decline in the use of formal readmission agreements has been accompanied by a parallel multiplication of informal tools of cooperation.[92]

A first example of this trend towards informalisation is constituted by Mobility Partnerships. These are non-binding statements which cover all four pillars of the Union's agenda on migration,[93] although their focus lies in the fight against illegal migration and cooperation on readmission.[94] They have been presented by the Commission as the standard tools to encase migration cooperation with third countries since 2007,[95] and include not only areas belonging to the Union's competence, but also fields, such as legal migration and integration, for which the bulk of the competences still lies with the Member States.[96] Thus, they are concluded by the EU together with a number of Member States, at the issue of negotiations conducted by the Commission for both the national and supranational level. Before negotiations are opened, the Commission performs an

[90] On the crisis narrative and its effects on the patterns of institutional action in the area of migration see S Carrera, J Santos Vara and T Strik, 'The External Dimensions of EU Migration and Asylum Policies in Times of Crises' in S Carrera, J Santos Vara and T Strik (eds), *Constitutionalising the external dimensions of EU migration policies in times of crisis: legality, rule of law and fundamental rights reconsidered* (Edward Elgar 2019) 1.

[91] In Communication COM(2016) 385 final cit., the Commission affirms that "coordinated and coherent EU and Member State coordination on readmission where *the paramount priority is to achieve fast and operational returns, and not necessarily formal readmission agreements*" (emphasis added).

[92] C Molinari, 'The EU and Its Perilous Journey through the Migration Crisis' cit. 831.

[93] The four pillars are the fight against irregular migration; border control; the common asylum system; and legal migration (Communication COM(2015) 240 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee. and. the Committee of the Regions of 13 May 2015 on a European Agenda on Migration).

[94] N Reslow, 'Deciding on EU External Migration Policy: The Member States and the Mobility Partnerships' (2012) Journal of European Integration 223, 232.

[95] Communication COM(2007) 248 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee. and. the Committee of the Regions of 16 May 2007 on circular migration and mobility partnership between the European Union and third countries.

[96] On the relation between need to bring to the table the incentives related to legal migration and EU added value in the field of readmission see section II.2 above.

active role in identifying potential partners and assessing their interests and priorities through exploratory talks, while coordinating with interested Member States.[97] Ultimately, it is for the Council to give its approval to the final choice of partner countries and to mandate the Commission to start negotiations.[98] The Commission is also required to report back on the status and, eventually, conclusion of the negotiations.[99] In terms of nature, Mobility Partnerships are not akin to formal readmission treaties, not only because of their broader scope, which includes legal migration, integration and development issues, but also because of their wording. The parties to such instruments undertake to "negotiate a readmission agreement"[100] and they endeavour, for example, to "pursue cooperation [...] on simplifying the procedures for entry and legal stays"[101] or "[t]o enhance information exchange, administrative capacity and operational and technical cooperation with regard to border management".[102] In the *crescendo* that goes from pure political declarations to hard law, Mobility Partnerships remain on the soft side of commitments, paving the way for hard law rather than substituting it. Thus, it could be argued that political control on their content be less pressing than it is for legally binding commitments. In other words, the extent to which the exclusion of the EP from the relevant negotiating procedure is questionable, as well as the determination of its desired level of involvement in the conclusion of this type of instruments, remain debatable.[103]

The legally problematic nature of a complete sidestepping of the EP is much clearer with respect to *ad hoc* informal readmission deals such as the EU-Afghanistan Joint Way Forward on migration issues[104] and its successor, the Joint Declaration on Migration Cooperation between Afghanistan and the EU,[105] as well as the EU-Bangladesh standard operating procedures[106] and the admission procedures concluded with Ethiopia.[107] As discussed above, to avoid elusive conduct on the part of EU institutions, soft deals whose content and effects are analogous to those of binding international agreements should be adopted based on procedures capable of ensuring that each institution, including the EP, can exercise its Treaty-

[97] N Reslow, 'Deciding on EU External Migration Policy' cit. 229.

[98] Communication COM(2007) 248 final cit.

[99] N Reslow, 'Deciding on EU External Migration Policy', cit. 230.

[100] Joint Declaration Establishing a Mobility Partnership between the Hashemite Kingdom of Jordan and the European Union and Its Participating Member States of 9 October 2014, point 9.

[101] *Ibid*. point 2.

[102] *Ibid*. point 13.

[103] On the distinction between different types of soft law with respect to the need for EP involvement see A Ott, 'Informalization of EU Bilateral Instruments' cit. 591.

[104] Joint Way Forward between Afghanistan and the EU on Migration Issues of 4 October 2016.

[105] Joint Declaration between Afghanistan and the EU on Migration Cooperation of 26 April 2021.

[106] Decision C(2017) 6137 of the Commission of 8 September 2017 on the signature of the EU-Bangladesh Standard Operating Procedures for the Identification and Return of Persons without an Authorisation to Stay.

[107] Admission Procedures for the Return of Ethiopians from European Union Member States, in Item Note to Permanent Representatives Committee No. 15762/17 of General Secretariat of the Council of 18 December 2017.

based prerogatives. If this is the case, the gap between the role of the EP according to art. 218 TFEU and its function in the negotiation of these soft deals should be very narrow, as the content of these soft law instruments reproduces that of formal readmission agreements,[108] so much that the choice to explicitly qualify them as non-binding does not appear motivated by their content, but purely by political considerations. Nonetheless, these deals were all negotiated by the Commission under the political supervision of the Council, with no political control and consultation role left to play for the EP.[109] In other words, the EP was totally side-lined, in clear disregard of institutional balance.

The Commission's explicit support for the use of informal readmission tools[110] was expressed in the immediate aftermath of the conclusion of the EU-Turkey Statement,[111] hailed as an example to follow for its flexible nature and immediate results.[112] Unsurprisingly, the Statement had itself been adopted in clear violation of institutional balance, at least if considered as an EU's (as opposed to a Member States') deal.[113] Its conclusion by the European Council, after a negotiation conducted by the European Council's President,[114] inflates the role of this institution to the detriment not only of the EP, but also of the Council and the Commission. The institutional balance envisaged in the Treaties attributes a general power of external representation of the Union to the Commission[115] and

[108] As described in C Molinari, 'EU Institutions in Denial: Non-Agreements, Non-Signatories, and (Non-)Effective Judicial Protection in the EU Return Policy' (Maastricht Faculty of Law Working Paper 2-2019) 15.

[109] See Draft Joint Way Forward on migration issues between Afghanistan and the EU, in Item Note to Permanent Representatives Committee No. 12191/16 of the General Secretariat of the Council of 22 September 2016; Decision C(2017) 6137 cit.; Admission Procedures for the Return of Ethiopians (2017) cit. See also European Parliament Resolution P8_TA(2017)0499 of 14 December 2017 on the Situation in Afghanistan (2017/2932/(RSP)).

[110] Communication COM(2016) 385 final cit. 7. See also S Poli, 'The Integration of Migration Concerns into EU External Policies: Instruments, Techniques and Legal Problems' (2020) European Papers www.europeanpapers.eu 71, 75-76.

[111] EU-Turkey Statement of 18 March 2016, in European Council Press Release 144/16 of 18 March 2016.

[112] Communication COM(2016) 385 final cit.

[113] In this sense, M Gatti and A Ott, 'The EU-Turkey Statement: Legal Nature and Compatibility with EU Institutional Law' in S Carrera, J Santos Vara and T Strik (eds), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis* cit. 177; E Cannizzaro, 'Denialism as the Supreme Expression of Realism – A Quick Comment on *NF v. European Council*' European Papers (European Forum Insight of 15 March 2017) www.europeanpapers.eu 251 ff; S Carrera, L Den Hertogh and M Stefan, 'It Wasn't Me! The Luxembourg Court Orders on the EU-Turkey Refugee Deal' (CEPS Policy Insights 15/2017). This interpretation is in contradiction with the findings of the General Court in case T-192/16 *NF v European Council* ECLI:EU:T:2017:128, according to which the Statement was concluded by the Member States collectively, rather than by the European Council.

[114] As announced in Communication COM(2016) 166 final from the Commission to the European Parliament, the European Council and the Council of 16 March 2016 on the Next Operational Steps in EU-Turkey Cooperation in the Field of Migration.

[115] Except for the CFSP "and other cases provided for in the Treaties", art. 17 TEU. See A Ott, 'Informalization of EU Bilateral Instruments' cit. 578.

policy-making functions – including in the area of external relations – to the Council,[116] as made clear in the Court's case-law.[117] The European Council's task to provide high level guidance cannot impinge upon these Council's and Commission's prerogatives.[118]

The above examples show that the institutions often act as if institutional balance placed no normative constraints upon their action through soft tools. Nevertheless, this interpretation is at odds with the text of the Treaties and the case-law of the Court, which has already annulled a soft deal by virtue of its disregard of institutional balance (and, in particular, of the prerogatives of the Council under art. 16 TEU) in the context of the *Swiss MoU* case.

It is worth noting that ample recourse to soft law has the potential of marginalising not only the EP, but also the Court itself. According to art. 263 TFEU, in the context of direct actions, the Court can only review "acts of bodies, offices or agencies of the Union intended to produce legal effects *vis-à-vis* third parties". Admittedly, the Court has been willing to recognise that even non-binding deals produce legal effects in the context of inter-institutional disputes brought by privileged applicants, as the exclusion of judicial review from entire areas of EU law would upset institutional balance by completely dispossessing the Court of its control function.[119] Nonetheless, to ensure full judicial accountability of EU action, the Court should go further, and recognise that soft law can go as far as affecting individual rights, often of a fundamental character, especially when its content is virtually undistinguishable from hard law. In scrutinising the content of soft law, including soft international deals that aim at producing effects analogous to hard law, the Court would safeguard its own role (*i.e.* "ensur[ing] that in the interpretation and application of the Treaties the law is observed")[120] within the institutional balance envisaged by the Treaties. Moreover, it would disincentives strategic behaviour, aimed at eluding the procedural rules envisaged in the Treaties, on the part of the other institutions.

IV. Conclusion

The present *Article* has looked at the EU readmission policy through the lens of two constitutional principles governing the exercise of EU competences: subsidiarity and institutional balance.

[116] Art. 16(1) TEU.

[117] *Swiss MoU* cit. paras 33-34, but also *ITLOS* cit. paras 62-77.

[118] For a different perspective on this issue, see M Gatti and A Ott, 'The EU-Turkey Statement' cit. 194. It should be noticed that the fact that both Council and European Council are composed of Member States' representatives – at ministerial level, for the Council, and at the level of heads of Member States and Governments, for the European Council – does not make the two institutions interchangeable, especially in light of the different voting rules.

[119] M Chamon, 'The Institutional Balance, an Ill-Fated Principle of EU Law?' cit. 276.

[120] Art. 19(1) TEU.

As flexible principles[121] which do not predetermine an outcome, but rather indicate the rationale that should guide the deployment of competences in the EU's constitutional architecture, subsidiarity and institutional balance share a common trait: they both require constant reflection on the constitutional logic which underlies Treaty choices.

On the one hand, subsidiarity reminds the institutions of the need to consider the input and output legitimacy of their intervention in areas of non-exclusive competences. On the other hand, institutional balance contributes to such a legitimacy, by maintaining institutional action and interaction within pre-defined boundaries.

In the strongly politicised arena of the common readmission policy, characterised by a high degree of experimentalism, the flexible anchoring in the Treaty framework provided by these two principles would constitute a sound foundation for legitimate EU level action in a field where agreements and arrangements can create and reinforce borders, preventing individuals from accessing not only physical territories, but also legal systems endowing them with rights and safeguards.

As shown above, the full potential of subsidiarity and institutional balance as steering tools has not been deployed so far in the area of readmission. EU institutions have multiplied the calls for more decisive EU intervention without asking the questions which would be imposed by the relevant constitutional framework: does EU intervention ensure a more efficient representation of the interests of EU citizens, when compared to national level action? What should the level of judicial[122] and democratic accountability[123] of the EU readmission policy be, in light of the principle of institutional balance?

It is submitted that the avoidance of these questions in response to the political salience of irregular migration results in a less legitimate and ultimately less efficient border drawing process, contributing to weakening the foundations of the EU legal system.

[121] *Inter alia*, W Van de Donk, 'Subsidiarity as an Experience and Inspiration: The Case for Regionomics in North Brabant' (2019) European View 45, 47; GA Bermann, 'Taking Subsidiarity Seriously: Federalism in the European Community and the United States' (1994) ColumLRev 331, 341; S Platon, 'The Principle of Institutional Balance: Rise, Eclipse and Revival of a General Principle of EU Constitutional Law' in K Ziegler, P Neuvonen and V Moreno-Lax (eds), *Research Handbook on General Principles of EU Law* (Edward Elgar Press forthcoming).

[122] Case C-16/16 P *Belgium v Commission* ECLI:EU:C:2017:959, opinion of AG Bobek, paras 4 and 81-86, case C-911/19 *FBF* ECLI:EU:C:2021:294, opinion of AG Bobek, paras 84-93.

[123] T Verellen, 'On Conferral, Institutional Balance and Non-Binding International Agreements' cit. 1233; RA Wessel, '"Soft" International Agreements in EU External Relations' (draft paper presented at the *ECPR SGEU Conference, Panel Hard and Soft Law in the European Union*, Paris 13-15 June 2018) ecpr.eu 19.

ARTICLES

THE EU'S SHIFTING BORDERS RECONSIDERED: EXTERNALISATION, CONSTITUTIONALISATION, AND ADMINISTRATIVE INTEGRATION
edited by Evangelia (Lilian) Tsourdi, Andrea Ott *and* Zvezda Vankova

THE NEXT PHASE OF THE EUROPEAN BORDER AND COAST GUARD: RESPONSIBILITY FOR RETURNS AND PUSH-BACKS IN HUNGARY AND GREECE

MARIANA GKLIATI*

TABLE OF CONTENTS: I. Introduction. – II. Agencies and agencification. – III. Engagement in Greece in light of push backs and suspension of asylum law. – IV. Involvement at the Hungarian-Serbian border. – V. Expanding competences. – V.1. Standing corps of 10.000 border guards. – V.2. Returns. – VI. Responsibility implications. – VI.1. Liability in EU law and the EBCG Regulation. – VI.2. Indirect responsibility. – VI.3. Direct responsibility before 2019. – VI.4. Direct responsibility after 2019. – VII. Frontex responsibility for operations in Hungary and Greece. – VII.1. Surveillance operations at land and sea borders. – VII.2. Return operations. – VIII. Conclusion.

ABSTRACT: This *Article* deals with the potential responsibility of Frontex, the European Border and Coast Guard Agency, for human rights violations, through the case studies of the Greek-Turkish and the Hungarian-Serbian border, where systematic human rights violations have been well-reported. Such violations are studied in the context of the activity of Frontex in border surveillance and return operations in Hungary since 2016, and the Rapid Border Intervention launched in Greece in 2020. This *Article* looks, in particular, into the indirect responsibility of the agency through assisting the host state in the commission of a violation, and into its direct responsibility due to exercising a degree of effective control over seconded agents. What is more, it notes the shift after the 2019 amendment of the EBCG Regulation from complicity, as the main form of responsibility for Frontex, to direct responsibility. This shift is brought by the expansion of the powers and competences of the agency, especially with respect to the standing corps of 10.000 border guards, including the agency's own statutory staff, increased use of own large assets (aircrafts, vessels), and an increased role in return operations. The author further reflects upon the role of EU agencies in a model of "mixed government", in ensur-

* Assistant Professor of International and European Law, Radboud University, mariana.gkliati@ru.nl.
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ing the balance between supranationalisation and intergovernmentalism, and amongst the interests of EU citizens, Member States, and European integration. The conclusion is drawn that, no such balance can be struck before human rights, amongst the core EU values, are properly upheld, and before suitable accountability safeguards are set.

KEYWORDS: border – human rights – migration – Frontex – refugee – *refoulement*.

I. INTRODUCTION

Securing borders, intensifying returns, and enhancing the powers of the European Union (EU) agencies, characterise the current and future course of EU migration management. Frontex, the European Border and Coast Guard Agency (EBCG), is the leading actor in the enforcement of EU border policies across the common Schengen borders and beyond. With its new Regulation of 2019,[1] Frontex moves to its next phase and comes closer than ever to the original vision of the Commission for a fully-fledged European Border Police Corps. Interim, the agency is for the first time under heavy scrutiny from multiple angles, including the European Parliament and the European Anti-Fraud Office for its alleged involvement in human rights violations.[2]

This chapter critically discusses the human rights sensitivities of the agency's work, focusing on the case studies of Hungary and Greece. The human rights footprint of the agency in the two countries has been a cause for serious concern. This *Article* deals in particular with the role of Frontex in surveillance and return operations in Greece and Hungary and the potential implications for the responsibility of the agency for human rights violations. This discussion is seen in the light of the new operational and organizational competences afforded to the agency by the 2019 amendment of its Regulation, in particular the establishment of a standing corps of 10.000 border guards and a major enhancement in return competences.

The agency's responsibility is dealt with through the applicable principles of responsibility under international law, which in the legal pluralist environment within the EU operates, can prove to be a useful source of inspiration and a valuable guide in the case of Frontex for scholars and courts. Such cross-fertilisation amongst different co-existing legal orders is vital for the protection of human rights and the rule of law.

[1] Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) 1052/2013 and (EU) 2016/1624.

[2] For an overview of all the relevant investigations, refer to I Aversa and M Gkliati, 'Frontex Investigations: What Changes in the EU Border Agency's Accountability?' (30 March 2021) Statewatch Frontex Observatory www.statewatch.org.

II. Agencies and agencification

Frontex is embedded in the more widespread phenomenon of agencification within EU law. Agencies constitute part and parcel of the EU institutional structure[3] and their creation is considered as one of the most important institutional developments.[4] They represent the development of delegation of powers at the EU level starting from the delegation of rulemaking from the Council to the Commission already in the Treaty of Rome.[5] In the early 1960s, the making of secondary rules was entrusted to management and regulatory committees giving birth to what has been named "comitology" a regime which allowed for a more intergovernmental approach. The Lisbon Treaty reformed the delegation regime, as the non-inclusion of the committees in art. 290 TFEU suggests that they would cease to exist. In several cases, new agencies took the place of Comitology committees.[6] All in all, their character and role has been taken over by EU agencies.

Agencies play an increasingly important role in EU administration,[7] while their number, powers, staff and budget continue to grow, especially since the 1990s.[8] At the time of writing there are 41 EU agencies.[9]

Their *raison d'être* has been studied extensively in the EU agency literature. According to Majone, the creation of agencies fits comfortably in the model of "mixed government", a *sui generis* constitutional model that is "characterised by the presence in the legislature of the territorial rulers and of the "estates" representing the main social and political interests in the polity".[10] In the context of the EU, this model aims at the bal-

[3] More generally on EU agencies see P Craig, *EU Administrative Law* (Oxford University Press 2012) 140 ff.; M Scholten, *The Political Accountability of EU and US Independent Regulatory Agencies* (Brill Nijhoff 2014); M Chamon, *EU Agencies: Legal and Political Limits to the Transformation of the EU Administration* (Oxford University Press 2016).

[4] M Chamon, *EU Agencies* cit. 47.

[5] Art. 155 TEU.

[6] P Craig, *EU Administrative Law* cit. 126 ff.

[7] See the overview provided at www.europa.eu.

[8] For a picture of the quantitative dimension of agencification see M Chamon, *EU Agencies* cit.

[9] European Court of Auditors, Annual Report 2018/C-434/01 Notices from European Union Institutions, Bodies, Offices and Agencies 5.

[10] G Majone, 'Delegation of Regulatory Powers in a Mixed Polity' (2002) ELJ 320. The term is broader than the related terms of "shared administration" and "joint implementation" also used in the literature, which can be seen as forms of mixed government. "Shared administration" is used in the EU context to describe a desideratum, of a sophisticated system of controls that allows for the exercise of shared tasks. Such a system would connect various types of controls (political, judicial, etc.) belonging to different jurisdictions (EU, national). M Scholten, 'Shared Tasks, but Separated Controls: Building the System of Control for Shared Administration in an EU Multi-Jurisdictional Setting' (2019) European Journal of Risk Regulation. "Joint Implementation" is mainly used in the context of environmental governance reflecting a system of intergovernmental collaboration where goals can be achieved by agents or funding of one country in another country. A Michaelowa, 'Joint Implementation – the Baseline Issue: Economic and Political Aspects' (1998) Global Environmental Change.

ance between supranationalism and intergovernmentalism, as represented by the core principles of institutional balance, institutional autonomy and loyal cooperation among European institutions and Member States. In particular, agencies fulfil the purpose of balancing institutional autonomy and institutional cooperation in a way that all interests, those of the European people, the states, and that of European integration would be balanced.[11] Majone sees them as essential for the professionalisation of governance in advanced economies, while they would strengthen the legitimacy of the Union.[12]

Other writers have opened the discussion on whether the creation of agencies has indeed proven an added value for the management of EU policies,[13] often from a sharply critical perspective. According to Shapiro, the creation of agencies was a way to circumvent the limitations to further political integration, with essentially supranational bodies, over which the Member States would still maintain a level of control. Shapiro also emphasizes the power of apparently objective "technical truths" that trump politics.[14] These thoughts are particularly relevant to Frontex when considering the difficulties in establishing the responsibility of the agency for wrongdoings *vis-à-vis* the member state.

The process of agencification has not left the Area of Freedom Security and Justice (AFSJ) untouched. On the contrary, the AFSJ agencies, European Asylum Support Office (EASO), Europol and Frontex, are empowered with diverse activities that keep expanding both via the legislative route and through dynamic development.[15] In fact their powers are beyond regulatory and have become operational, while the agencies enjoy a considerable level of autonomy that is often not balanced against an adequate level of protection,[16] attendance to the rule of law,[17] and accountability safeguards.[18] The EU

[11] G Majone, 'Delegation of Regulatory Powers in a Mixed Polity' cit. 321 ff.

[12] G Majone, *Regulating Europe* (Routledge 1996).

[13] A Schout, 'Agencies and Inspection Powers: The Case of EASA as New or More of the Same?' in E Vos (ed.), *European Risk Governance: Its Science, its Inclusiveness and its Effectiveness* (Mannheim University Press 2008); A Schout, 'Framework for Assessing the Added Value of an EU Agency' (2011) Journal of Public Policy 363 ff.

[14] M Shapiro, 'The Problems of Independent Agencies in the United States and the European Union' (1997) Journal of European Public Policy 276 ff.

[15] JS Vara, 'The EU's Agencies: Ever More Important for the Governance of the Area of Freedom, Security and Justice' in A R Servant and F Trauner (eds), *The Routledge Handbook of Justice and Home Affairs Research* (Routledge 2019) 445-448.

[16] JS Vara and SR Sánchez-Tabernero, 'In Deep Water: Towards a Greater Commitment for Human Rights in Sea Operations Coordinated by Frontex?' (2016) European Journal of Migration and Law 81-87.

[17] See among others: L den Hertog, *The Rule of Law in the External Dimension of EU Migration and Asylum Policy: Organizational Dynamics Between Legitimation and Constraint* (Wolf Legal Publishers 2014).

[18] D Fernández-Rojo, *EU Migration Agencies: The Operation and Cooperation of FRONTEX, EASO and EUROPOL* (Edward Elgar Publishing 2021); S Carrera, L den Hertog and J Parkin, 'The Peculiar Nature of EU Home Affairs Agencies in Migration Control: Beyond Accountability versus Autonomy?' (2013) EJML 344-345; M Busuioc, *European Agencies Law and Practices of Accountability* (Oxford University Press 2013); M Busuioc, C Curtin and M Groenleer, 'Agency Growth Between Autonomy and Accountability: The European Policy Office as a "Living Institution"' (2011) Journal of European Public Policy 848-867.

Pact of Migration and Asylum,[19] also fails to address these gaps as it seems to adopt "an ambivalent approach towards administrative integration", recognizing in part the AFSJ agencies' increased role, but without fully taking into account their new powers, which can lead to further gaps in accountability.[20]

Frontex belongs to the third wave of agencies which were created after 2000. Exceptionally and similar to other agencies that came into existence in that period, such as Europol, Frontex was created by Council actions, rather than by Commission initiative. The agency's ever more important role in the field of EU law has drawn the interest of several authors that have amongst others dealt with the topic from the point of view of EU governance[21] and the politics of institutionalisation.[22] Frontex was initially established with the hybrid character of providing technical assistance to Member States in the implementation of integrated border management and of coordinating joint surveillance operations with the Member States.[23] With the consecutive developments of its mandate, the agency is adopting a more centralised role,[24] which is particularly relevant in terms of its potential responsibility in light of human rights violations.

III. Engagement in Greece in light of push backs and suspension of asylum law

The continuing presence of Frontex border guard teams in the Evros region of Northern Greece, since the first Rapid Border Intervention in 2010, has been questioned often in terms of its human rights compliance, including accusations of involvement of members of the teams in push backs.[25]

[19] Communication COM(2020) 609 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 23 September 2020 on a New Pact on Migration and Asylum.

[20] E Tsourdi, 'The New Pact and EU Agencies: An Ambivalent Approach towards Administrative Integration' (2020) EU Immigration and Asylum Law and Policy eumigrationlawblog.eu.

[21] S Wolff and A Schout, 'Frontex as Agency: More of the Same?' (2013) Perspectives on European Politics and Society 305-324.

[22] S Carrera, 'The EU Border Management Strategy: FRONTEX and the Challenges of Irregular Immigration in the Canary Islands' (CEPS Working Document n. 26/2007); J Pollak and P Slominski, 'Experimentalist but Not Accountable Governance? The Role of Frontex in Managing the EU's External Borders' (2009) West European Politics 904-924.

[23] J Rijpma, 'Hybrid Agencification in the Area of Freedom, Security and Justice and its Inherent Tensions: The Case of Frontex' in M Busuioc, M Groenleer and J Trondal (eds), *The Agency Phenomenon in the European Union: Emergence, Institutionalisation and Everyday Decision-making* (Manchester University Press 2014).

[24] JS Vara, 'The European Boarder and Coast Guard in the new Regulation: Towards Centralization in Border Management' in S Carrera, D Curtin and A Geddes (eds), *20 Year Anniversary of the Tampere Programme: Europeanisation Dynamics of the Area of Freedom, Security and Justice* (European University Institute 2020).

[25] Human Rights Watch, *Stuck in a Revolving Door: Iraqis and Other Asylum Seekers and Migrants at the Greece/Turkey Entrance to the European Union* (2008) www.hrw.org; Amnesty International, *Greece: The Dublin II Trap: Transfers of Asylum-Seekers to Greece* (2010) www.amnesty.org.

Issues regarding the involvement and the possible responsibility of Frontex for human rights violations became all the more relevant in March 2020 following the opening of the border by the Turkish government that allowed large numbers of people to cross simultaneously. According to the Executive Director of Frontex (ED), Fabrice Leggeri, when the agency was first contacted by the Greek officials to request an intervention, there were 15.000/20.000 people waiting at the land borders in Evros, while around 2.000 people crossed by sea during those first days.[26] The numbers dropped considerably in the next days, while many had taken the way back to Istanbul.[27]

The Greek government responded with mass push backs, the use of excessive widespread violence, including blank bullets and live ammunition, and unlawful detention.[28] Reports of push backs continued also after the events at the borders ended, this time involving the transport of people from camps and detention facilities in mainland Greece.[29] Moreover, a legislative amendment passed suspending the right to asylum.[30] In particular, the new Greek law suspended the registration of asylum claims for the month of March, and stipulated that whoever crossed the Greek border without the appropriate documentation in that period would be immediately returned. This way, Greece introduced push-backs in its formal legislation.

The request of the Greek government from requested emergency assistance, including a Rapid Border Intervention in the area was immediately approved,[31] and Frontex deployed 100 additional border guards from 22 Member States along with technical equipment (two boats, seven aircrafts, one helicopter, four vehicles equipped with

[26] Frontex, 'Statement by the Frontex Management Board' (3 March 2020) europa.eu.

[27] G Souliotis, 'Έτσι θα ενισχύσει την Ελλάδα ο Frontex' (2020) www.kathimerini.gr.

[28] Human Rights Watch, *Greece: Violence Against Asylum Seekers at Border. Detained, Assaulted, Stripped, Summarily Deported* www.hrw.org; M Stevis-Gridneff, P Kingsley, H Willis, S Almukhtar and M Browne, '"We Are Like Animals": Inside Greece's Secret Site for Migrants' (2020) New York Times www.nytimes.com; J Fisher, 'Migrants Clash with Greek Police at the Turkish Border' (2020) BBC News www.bbc.com; N Keady-Tabbal and I Mann, 'Tents at Sea: How Greek Officials Use Rescue Equipment for Illegal Deportations' (22 May 2020) Just Security www.justsecurity.org.

[29] Press Release, *Greece: Documented Pushbacks from Centres on the Greek Mainland* (2020) www.statewatch.org; Border Violence Monitoring Network, *Special Report: Covid-19 and Border Violence along the Balkan Route* (2020) www.borderviolence.eu; R Abdulrahim, 'Greek Police Are Rounding Up Asylum Seekers and Forcing Them Into Turkey, Migrants Say' (20 May 2020) The Wall Street Journal www.wsj.com; F Schmitz, A Kalaitzi and B Karakaş, 'Migrants Accuse Greece of Forced Deportations' (21 May 2020) Deutsche Welle www.dw.com.

[30] Greek Government Gazette, 'ΦΕΚ Α'45/2020: Αναστολή της υποβολής αιτήσεων χορήγησης ασύλου' (2020) LawNet lawnet.gr; Refugee Support Aegean, 'Analysis: Rights Denied during Greek Asylum Procedure Suspension' (April 2020) rsaegean.org.

[31] Tovima, *Rapid Response from FRONTEX to Greek Request of Aid to Guard Eastern Borders* (March 2020) tovima.gr; Frontex Press Release, 'Frontex to Launch Rapid Border Intervention at Greece's External Borders' (2 March 2020) europa.eu; Frontex Press Release, 'Statement by the Frontex Management Board' (3 March 2020) europa.eu.

thermal cameras).[32] At the time, 500 members of the EBCG teams had already been active in Greece in the context of the ongoing operation Poseidon in the Aegean sea.[33] In May the operation was extended to July 2020.[34]

In October 2020 the German news magazine, Der Spiegel, published evidence of a push back by Greek border guards, witnessed by a Frontex aircraft, which flew twice over the location of the migrant raft. The agency did not intervene. The journalists provide evidence that supports the complicity of Frontex to six push-backs by the Greek authorities between April and August.[35] The agency responded to the mounting evidence of systematic violations before March 2020 by asking the Greek authorities for information and a visit in the area of the Fundamental Rights Officer (FRO) in January 2019.[36] Following her visit, she explicitly recommended the suspension of operations in Evros.[37]

A low number of Serious Incidents Reports, all including the security forces of the host state, has been filed by members of the border guard teams in the context of the agency's monitoring mechanism. The investigations into them attributed no wrongdoing,[38] and serious concerns have been expressed as to the effectiveness of the mechanism.[39]

As the result of public attention due to the media inquiries several investigations have been opened related to the complicity of the agency in human rights violations in the Aegean. Most importantly, a special Scrutiny Group on Frontex has been established at the European Parliament to conduct an in-depth enquiry into the allegations.[40] The European Anti-Fraud Office (OLAF) has also launched an investigation into alleged misconduct and allegations of migrant pushbacks.[41]

In justification of its response, the Greek government has evoked art. 78(3) TFEU, which provides for adoption of provisional measures in emergency migratory situations at the EU's external borders, characterised by a sudden inflow of third country nationals. The requirements, however, of this article are not met in this case. Such provisional

[32] G Souliotis, 'Ετσι θα ενισχύσει την Ελλάδα ο Frontex' cit.; Frontex, 'Frontex Launches Rapid Border Intervention on Greek Land Border' (13 March 2020) europa.eu.

[33] G Souliotis, 'Ετσι θα ενισχύσει την Ελλάδα ο Frontex' cit.

[34] As announced by Frontex on its Twitter account. See Press release published on twitter.com.

[35] G Christides and others, 'EU Border Agency Frontex Complicit in Greek Refugee Pushback Campaign' (2020) Der Spiegel www.spiegel.de.

[36] K Karamanidou and B Kasparek, 'Consequences and Responses Fundamental Rights, Accountability and Transparency in European Governance of Migration: The Case of the European Border and Coast Guard Agency' (Working Papers 2020) Global Migration 62.

[37] *Ibid*. 65.

[38] *Ibid*.

[39] G Christides and others, 'EU Border Agency Frontex Complicit in Greek Refugee Pushback Campaign' cit.

[40] Multimedia Centre of European Parliament, 'Committee on Civil Liberties, Justice and Home Affairs' (04 March 2021) multimedia.europarl.europa.eu.

[41] G Christides and others, 'Scandals Plunge Europe's Border Agency into Turmoil' (05 February 2021) Der Spiegel www.spiegel.de.

measures are to be taken by the EU Council upon the proposal of the Commission and Consultation with the European Parliament. In any case, art. 78(3) TFEU may not suspend the right to asylum or the principle of *non-refoulement*, which is part of customary international law.

Moreover, the Greek law suspending the registration of applications violates refugee and human rights law, which provide no such exception.[42] In light of this unique situation, UN High Commissioner for Refugees (UNHCR) has issued a statement highlighting that "neither the 1951 Convention Relating to the Status of Refugees nor EU refugee law provides any legal basis for the suspension of the reception of asylum applications".[43] This manifest breach of international and European law refugee and human rights law constituted the environment within which the Frontex intervention took place. Thus, this intervention could not possibly be in accordance with fundamental rights and EU asylum law and is therefore not supported by the agency's mandate. The legality of Frontex intervention at the Greek-Turkish border has been questioned broadly.[44]

With respect to the push-backs at sea and land, the rights triggered could reach from *non-refoulement*, collective expulsion, seeking asylum and effective legal protection, violence engaging arts 2, 3, and 5 ECHR, or possibly the positive obligation to render assistance to a boat in distress. Moreover, the serious violations during this operation are considered to be systematic. Finally, plans of the Greek governments and the agency have been communicated regarding the returns of those that did manage to cross the borders during that period.[45] Any future Frontex-coordinated return operation will also face a lack of legal basis if the protection needs of the returnees are not examined.

IV. Involvement at the Hungarian-Serbian border

Another area of concern regarding the involvement of Frontex is the Hungarian-Serbian border. Under legislation introduced in 2015 in Hungary, all applicants that have previously been in a country that Hungary regards safe, including Serbia, are automatically rejected without applying the safeguards required under EU law.[46] As a result, the Fundamental Right Officer (FRO) reported in 2016 collective expulsions to Serbia, and summary dismissals of asylum claims at transit areas at border crossing points.[47]

[42] LM Monella, 'Frontex Operation in Greece "Lacks Legal Basis" after Greece Suspends Asylum Law' (2020) Euronews www.euronews.com.

[43] UNHCR, *Statement on the Situation at the Turkey-EU Border* www.unhcr.org.

[44] LM Monella, 'Frontex Operation in Greece' cit.

[45] G Souliotis, 'Έτσι θα ενισχύσει την Ελλάδα ο Frontex' cit.

[46] Asylum Information Database, *Country Report: Hungary* (2015) asylumineurope.org.

[47] Frontex Observations, *Situation at the Hungarian-Serbian Border* (2016) www.asktheeu.org.

That same year the European Commission initiated infringement proceedings against Hungary.[48] The Court ruled upon the Commission's request in December 2020.[49] It found that Hungary was in violation of EU rules on access to international protection, as it required applicants to lodge their asylum claim in person exclusively in the transit zones of Röszke and Tompa at the Serbian-Hungarian border. At the same time, access to these transit zones was restricted to only a few people per day, creating, thus, a waiting period of several months. Moreover, the Court found that the systematic detention in the transit zones to which applicants were subjected, constitutes unjustified restriction of liberty, as it failed to observe the conditions and guarantees provided by EU law.[50] Hungary was also found in violation of EU law for forcibly moving third-country nationals to a strip of land between the Hungarian border fence and the Serbian-Hungarian border with no infrastructure without observing the necessary procedural guarantees. Finally, the Court found Hungary in infringement of EU law for conditioning the right of applicants to remain in the country pending the examination of their asylum claim upon requirements contrary to EU law.

The Commission has started several new infringement proceedings against Hungary regarding its asylum legislation,[51] criminalisation of assistance to asylum seekers and non-provision of food in transit zones,[52] and restrictions to the asylum procedures pursuant to Covid-19.[53]

Already since 2016, the Frontex Consultative Forum on Fundamental Rights (CF) and the FRO had repeatedly suggested that the agency withdrew from return operations in Hungary because of the systematic nature of violations of human rights and asylum law.[54] Their recommendations were rejected by the ED in February 2017 upon recom-

[48] European Commission, Press release IP/15/6228 *Commission Opens Infringement Procedure against Hungary concerning its Asylum Law* (10 December 2015).

[49] Case C-808/18 *Commission v Hungary* ECLI:EU:C:2020:1029.

[50] In an earlier judgment the CJEU had already ruled that the placing of returnees in the Röszke transit zone at the Serbian-Hungarian border must be classified as "detention". Ruling upon the preliminary reference request, the Court held detention there must comply with the requirements of EU law, especially concerning the length of detention, the material reception conditions and the subjection of the detention decision to judicial review. Joined Cases C-924/19 PPU and C-925/19 PPU *FMS and Others v Országos Idegenrendeszeti Főigazgatóság Dél-alföldi Regionális Igazgatóság* ECLI:EU:C:2020:367.

[51] European Commission, Press Release IP/18/4522 *Migration and Asylum: Commission Takes Further Steps in Infringement Procedures Against Hungary* (19 July 2018).

[52] European Commission, Press Release IP/19/4260 *Commission Takes Hungary to Court for Criminalising Activities in Support of Asylum Seekers and Opens New Infringement for Non-Provision of Food in Transit Zones* (25 July 2019).

[53] European Commission, Press Release IF/20/1687 *October Infringements Package: Key Decisions* (30 October 2020).

[54] Frontex CF, Recommendation by the Consultative Forum to the Executive Director and Management Board of the European Border and Coast Guard Agency (2016) www.balkaninsight.com; Frontex, Frontex Observation, field visit to Hungary 13-15 March 2017 www.asktheeu.org; Frontex CF, Fourth Annual Report (2016) frontex.europa.eu; Frontex, 13th Meeting (2017) www.asktheeu.org.

mendation of the European Commission to continue the operations, supporting that Frontex can use its presence to contribute to the improvement of human rights compliance through the monitoring of the situation.[55] However, the hopes of the Commission did not materialise. Following that, the ED stated that reports of human rights violations were "not confirmed", referring to the low number of Serious Incidents Reports submitted and the conclusions of the Hungarian authorities, which found no violation.[56] Moreover, the violations have continued, while reports also implicate a Frontex Finnish dog team.[57] The number of officers has been reduced, but return and surveillance operations are still being conducted, despite the ongoing infringement proceedings.[58]

In May 2019, the UNHCR raised concerns regarding the role of Frontex in the return from Hungary to Serbia of two asylum-seeking Afghan families.[59] The families were escorted to the border with Serbia and were given the choice of entering Serbia or being returned to Afghanistan on a Frontex flight.

UNHCR noted that this type of rejection constitutes common practice in Hungary, and at the time of their statement 40 individuals, including Iraqi and Iranian nationals, were held in the pre-removal area of the transit zone and threatened with being returned to their country of origin or coerced to re-enter Serbia. When migrants are not sent back to Serbia, they are being returned in Frontex-coordinated return operations. Empirical research conducted by Statewatch shows that five Frontex-coordinated flights have been conducted from Hungary to Afghanistan deporting 31 persons in the period 2016-2018.[60] UNHCR characterised the incident of the return of the Afghan families "deeply shocking and a flagrant violation of international and EU law" and urged Frontex "to refrain from supporting Hungary in the enforcement of return decisions which are not in line with International and EU law".[61] The agency finally suspended its operations in Hungary on 27 January 2021 only after the infringement of Hungary by the Court of Justice of the European Union (CJEU) and under the pressure of the open investigations for its complicity in fundamental rights violations in Greece.[62]

[55] European Commission, *Situation at Hungary's Southern Border* (2016) www.asktheeu.org; Frontex, *Letter from Executive Director: Situation at Hungary's southern* border www.asktheeu.org; Frontex, *Letter from the ED to CF: Consultative Forum's request on Chios* (2016) www.asktheeu.org.

[56] Frontex, Serious Incident Report n. 341 (2016) www.asktheeu.org; Frontex, Serious Incident Report n. 375 (2016) www.asktheeu.org

[57] A Fotiadis, 'Frontex's History of Handling Abuse Evidence Dogs Balkan Expansionin' (6 February 2020) Balkan Insight balkaninsight.com.

[58] Frontex, 13th Meeting (2017) www.asktheeu.org; Frontex, 14th Meeting (2017) www.asktheeu.org; Migration and Asylum: Commission Takes Further Steps (2018) cit.

[59] UNHCR, 'Hungary's Coerced Removal of Afghan Families Deeply Shocking' (8 May 2019) www.unhcr.org.

[60] C Jones, J Kilpatrick and M Gkliati, 'Deportation Union: Rights, Accountability and the EU's Push to Increased Forced Removals' (2020) Statewatch www.statewatch.org 43 ff.

[61] UNHCR, 'Hungary's Coerced Removal of Afghan Families Deeply Shocking' cit.

[62] N Nielsen, 'Frontex Suspends Operations in Hungary' (27 January 2021) EU Observer euobserver.com.

V. Expanding competences

Being one of the prominent examples of agencification, Frontex has been experiencing a continuous expansion of its powers, with consecutive amendments of its mandate almost every two years, while its operational capacity has been growing steadily. With the EBCG Regulation in 2016, the agency came closer to a fully integrated scheme of border management. Still the plan fell short of the Commission's original idea of a permanent European Border Police Corps, as the host state still had the lead in the operation and the agency heavily relied on the voluntary contributions of participating states in personnel and budget.[63]

The next step towards this direction was taken soon after with the 2019 amendment of the EBCG Regulation. Aiming at greater autonomy and operational effectiveness, and moving towards full operational capacity the agency will now have its own equipment and personnel and is vested with an even broader mandate in border surveillance and returns.

V.1. Standing corps of 10,000 border guards

The most monumental change brought by the 2019 amendment was the establishment of a "standing corps of 10,000 operational EU staff with executive power and their own equipment",[64] *i.e*. mainly border guards, return escorts, and return specialists.

Currently, Frontex joint operations rely solely on the contributions of Member States. Now, the agency acquires its own operational arm: a EBCG standing corps with broad executive powers, including competence to perform identity checks, intercept persons, authorise or refuse entry, as well as the power to carry weapons. This is meant to form a "reliable intervention force" of agency staff (statutory) and seconded, deployed, or reserve officers (non-statutory).[65]

V.2. Returns

Another one of the most highlighted changes concerns the enhancement of the agency's mandate on returns of irregularly staying third country nationals, which has become a top priority. Frontex is now vested with a broad mandate in return-related activities, including, most importantly, providing its own return escorts and return monitors from the standing corps. It has further a considerably increased capacity to acquire its own aircrafts and

[63] Further supranationalisation, where European border guards would fully replace national coast guards, would be in violation of the division of competence between the EU and its Member states (art. 72 TFEU). R Mungianu, *Frontex and Non-Refoulement: The International Responsibility of the EU* (Cambridge University Press 2016) 43.

[64] State of the Union 2018: A Fully Equipped European Border and Coast Guard, in European Commission Press Release MEMO/18/5715 of 12 September 2018; art. 54(1)(a) EBCG Regulation.

[65] European Commission Press Release MEMO/18/5715 of 12 September 2018 cit.

vessels. Moreover, return operations (with the exception of return interventions and collecting operations) may be organised exclusively on the agency's initiative (art. 50).

VI. Responsibility implications

When the human rights sensitivities that are inherent in the agency's work materialise into real violations, the need arises to examine the possible contribution of the agency in these violations and establish its potential for legal responsibility.

VI.1. Liability in EU law and the EBCG Regulation

A natural first step in examining these issues is looking into the relevant EU law. The Treaty on the Functioning of the European Union (TFEU) provides the general framework on liability. In particular regarding non-contractual liability the starting point is art. 340(2) TFEU, which stipulates that an EU institution or agency shall make good any damage caused by its servants in the performance of their duties. The agency's own Regulation acknowledged until 2016 only the potential liability of individual team members, rather than that of the agency. Since then, as common in Regulations of EU agencies, it follows the pattern of art. 340(2) TFEU, and also gives jurisdiction to the CJEU for related disputes.[66]

Liability for any damage caused by deployed border guards is attributed to the host state, unless in case of gross negligence or wilful misconduct. Then the host state may turn to the deploying state in order to retrieve the damages it has paid.[67] No specific rules determine a priori the attribution of responsibility amongst the different actors involved, while neither the EU Treaties or the European Convention on Human Rights (ECHR) contain secondary rules regarding attribution, thus art. 97 EBCG Regulation needs to be actualised within the limited EU public liability regime.

The responsibility of Frontex should be dealt in a pluralist environment, acknowledging the overarching nature of EU law as a *sui generis* regime and *lex specialis*,[68] but also the fact that EU law does not exist in isolation, given the status of the EU as an international organisation and its place within the international legal order. Integration of this legal framework within a common environment is needed to avoid fragmentation and allow for complementarity and cross-fertilisation. For this reason, the issue of the responsibility of the EU for violations attributed to the agency needs to be studied also within the international framework on responsibility as presented in the International Law Commission (ILC) Draft Articles on the Responsibility of International Organisations (ARIO).

The strict binding nature of the ARIO is limited to those articles that reflect international customary law, while others may codify interpretations found in the case law of in-

[66] Art. 97(4)(5) EBCG Regulation.
[67] Art. 84 EBCG Regulation.
[68] Art. 64 ARIO.

ternational courts. For the rest the ARIO represent the progressive development of international law as interpreted by academic doctrine and less established case law and international practice. Within these limitations the ARIO can be used before the International Court of Justice (ICJ), while they have also been considered extensively by the ECHR and national courts.[69] They can also be used as a source of inspiration and in a heuristic way to mend existing gaps and aid the interpretation of EU liability law by the CJEU.

This is especially crucial given the fact that EU law and the relevant jurisprudence of the CJEU alone cannot provide a stable and authoritative answers to questions of attribution and the liability of agencies, especially in regard to multiple actors (joint liability).[70] Thus, while the CJEU cannot apply the ARIO directly, it can draw inspiration from the well-established framework in international law and pro-actively cover existing gaps, especially regarding instances where the responsibility can be attributed to both the agency and the member state. Particular procedural difficulties that result from the jurisprudence of the CJEU concern the binaries of causality and the competent court.[71]

Other areas of ever-growing cooperation in the EU system of judicial protection, including the joint execution of EU law, such as cooperation in fiscal matters, also struggle with fragmentation of jurisprudence, affecting in particular the right to an effective remedy, resulting in "inadequate and defective judicial protection".[72] More specifically, several authors have identified significant gaps in judicial protection resulting from strict and exclusive judicial competencies in the review of administrative acts.[73]

Cornelisse and Moraru argue that national legislation that results in shifting the border and intensifying returns, may in fact create more space for legal claims for migrant justice.[74] The potential for such incremental constitutionalisation that they ob-

[69] The interaction with the doctrine of positive obligations of the ECHR, its rules on jurisdiction, the accession of the EU to the ECHR and the future of the Bosporus presumption deserve separate attention and will need to be dealt with in a separate publication.

[70] Joined cases C-5, 7 and 13-24/66 *Kampffmeyer and Others v Commission* ECLI:EU:C:1967:31.

[71] Case C-101/78 *Granaria v Hoofdproduktschap voor Akkerbouwprodukten* ECLI:EU:C:1979:38; joined cases C-106/87 and C-120/87 *Asteris and Others v Greece and EEC* ECLI:EU:C:1988:457; joined cases C-6/90 and C-9/90 *Francovich and Others v Italy* ECLI:EU:C:1991:428; joined cases C-46/93 and C-48/93 *Brasserie du pêcheur and Factortame and Others v Germany and United Kingdom* ECLI:EU:C:1996:79; case C-352/98 P *Bergaderm and Goupil v Commission* ECLI:EU:C:2000:361; See for further elaboration, M Gkliati, *Systemic Accountability of the European Border and Coast Guard: The Legal Responsibility of Frontex for Human Rights Violations* (PhD thesis Leiden University 2021) on file with the author 149-161, 211-213, 230-259.

[72] P Mazzotti and M Eliantonio, 'Transnational Judicial Review in Horizontal Composite Procedures: Berlioz, Donnellan, and the Constitutional Law of the Union' (2020) European Papers www.europeanpapers.eu 41, 42, 68.

[73] G Della Cananea, 'The European Union's Mixed Administrative Proceedings' (2004) Law and Contemporary Problems 197-214; M Eliantonio, 'Judicial Review in an Integrated Administration: the Case of "Composite Procedures"' (2014) Review of European Administrative Law 65 ff. (in particular 96-102).

[74] G Cornellisse and M Moraru. 'Judicial Interactions on the European Return Directive: Shifting Borders and the Constitutionalisation of Irregular Migration Governance' (2022) European Papers www.europeanpapers.eu 151.

serve due to the judicial interaction of national courts, can nevertheless, not apply in the case of Frontex, as the CJEU has exclusive competence over the liability of EU agencies.[75] As a result, their liability cannot be examined by national courts.

Frontex through its joint operations implements a new model of cooperation, where a multiplicity of actors is involved. In such an environment, responsibilities get easily diluted. In particular, "the multitude of intertwining executive competences" creates uncertainty, combined with the lack of information on the operational plans or the actual chain of command in practice.[76] This, combined with the limited experience of EU law in such cases, has also allowed claims that Frontex may only incur responsibility from wrongful acts conducted by its own staff in Warsaw. A closer look to the rules of attribution and the international framework on responsibility reveals arguments that point both to the indirect and the direct responsibility of Frontex, especially after the latest amendment of the EBCG Regulation.

In particular, the violation of the human rights obligations of the agency constitutes breach of an international obligation that can bring upon the international responsibility of the agency, if the wrongful conduct can be attributed to it. This can be either due to wrongful conduct of its own statutory staff or via exercising effective control over the conduct of seconded personnel.

The agency may still also be held responsible if it has only contributed to an act that is not attributed to it. In the former case, the agency would be directly responsible in application of the principle of independent responsibility, while in the latter it would be indirectly responsible due to aiding and assisting in a violation or due to having direction and control over the wrongful act, in knowledge or presumed knowledge of the circumstances. Frontex may incur responsibility either via an act or via an omission to prevent an internationally wrongful act, given its positive human rights obligations and its widespread supervisory powers.

Until now, arguments in favour of the responsibility of Frontex were mainly based on the exceptional attribution of responsibility that can happen even if the conduct is not attributed to the organisation (indirect responsibility).

VI.2. Indirect responsibility

The agency may incur indirect responsibility for a wrongful act that is not attributed to it but solely to the host state, if it has contributed to it, facilitating its commission (art. 14 ARIO). Thus, international responsibility may arise from an act of the agency that does

[75] *Asteris and Others v Greece and EEC* cit.

[76] M Fernandez, 'Multi-stakeholder Operations of Border Control Coordinator at the EU Level and the Application of International Responsibilities' in T Gammeltoft-Hansen and J Vedsted-Hansen (eds), *Human Rights and the Dark Side of Globalization: Transnational Law Enforcement and Migration Control* (Routledge 2016) 239 ff.

not as such constitute an unlawful act under international law, but is linked to one that is conducted by a member state.

Such assistance can also be the result of failing to utilize its monitoring obligations in light of its positive obligations to prevent a violation. This will need to be shown on a case-by-case basis, but in principle, it can be safely argued that the agency can be responsible for "setting the scene that allows the result".[77] Vital in this case is whether Frontex knew or should have known about the violation, as this protection is provided not against all threats, but against reliable and predictable threats. Such knowledge can occur through the agency's own internal and external reporting mechanism, including vulnerability assessments in the context of the Schengen assessment mechanism, serious incidents reports, and the individual complaints mechanism, or via well-documented credible non-governmental organisations (NGOs) and media reports of recurring or systemic violations.

Thus, if it can be reasonably presumed that Frontex has been aware of a violation, or wilful ignored it, it may incur indirect responsibility for assisting in that violation by financial, operational and practical means, or by failing to exercise its positive obligations to prevent it.

VI.3. Direct responsibility before 2019

The responsibility of Frontex can also be engaged directly, if the wrongful act can be attributed to the agency (arts 3 and 4 ARIO). Given that it is the wrongful conduct of the agents and organs of an organisation that can be attributed to the organisation (arts 6-9 ARIO), this concerned until now the Frontex employees, mainly based in Warsaw, as the agency has very few employees on the ground. While the de jure agents of Frontex have been few with limited possibilities for engagement in violations, this can also extend to the members of the border guard teams seconded by Member States and their role as de facto organs of the agency. The responsibility rule of art. 6 ARIO is to be interpreted broadly to cover any person through whom the agency acts, regardless of the formal status of employment. Looking at the role of deployed border guards through the lens of effective control, persons seconded to Frontex by a member state, can be considered its agents, if it is proven that Frontex exercises effective control over their conduct (art. 7 ARIO).

Even though Frontex will at no point issue instructions directly towards the deployed officers, there are several levels of orders and control that are above the day-to-day command of the operation. The decisive elements on who has effective control over the conduct of the deployed personnel, as they have been interpreted by doctrine and jurisprudence are *a)* retention of disciplinary powers and criminal jurisdiction by the state, *b)*

[77] GS Goodwin-Gill, 'The Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement' (2011) IJRL 453.

decision-making power over the wrongful conduct, or in other words, operational command and control in accordance with formal arrangements and factual circumstances (factual control), *c)* power to prevent a violation of human rights (positive obligations).

The determination of either one of these elements can tip the balance towards the responsibility of either the state or the agency. Adding to the uncertainty over the debate on responsibility, there is no hierarchical order amongst the different elements and they can be balanced differently by different courts.

VI.4. Direct responsibility after 2019

While an argument was still to be made before the 2019 amendment of the EBCG Regulation regarding the de facto organs that can also bind the agency with their conduct, the direct responsibility of Frontex via its statutory staff is raised to a primary argument for the responsibility of the agency. The arguments for direct responsibility of the agency, however, are strengthened as the mandate, powers and operational capacity of the agency grow, especially after the amendment of the EBCG Regulation in 2019. This in particular regards the statutory staff, which will have extensive executive powers and operation with the agency's own equipment. In this context they may commit a wrongful act (art. 4 ARIO), that is in breach of an international obligation and affects the rights of individuals (art. 11 ARIO).

The fact that the statutory staff is employed by the agency and Frontex has disciplinary powers over them constitutes them de jure agents that bind the agency with their conduct. Following the principle of independent responsibility, any wrongful conduct of the statutory staff is attributed to Frontex, and thus, gives rise to its responsibility (arts 6-9 ARIO).

The situation of non-statutory staff remains unchanged and arguments concerning indirect responsibility and direct responsibility before 2019 continue to apply.

VII. Frontex responsibility for operations in Hungary and Greece

VII.1. Surveillance operations at land and sea borders

The many actors involved in a Frontex operation often create confusion as to the bearer of responsibility. The primary responsibility of either Greece or Hungary for violations committed at the border is not contested in this *Article*. In fact, it is often the responsibility of the host state that triggers that of the agency, that can incur responsibility not only as a result of its officers in Warsaw, but also for the conduct of its deployed teams on the ground. This will become all the more apparent when the 2019 Regulation is fully implemented.

When discussing the potential for the responsibility of Frontex for its activities at the Serbian-Hungarian and Turkish-Greek borders, we should first look at its indirect responsibility for aiding and assisting in the numerous violations that have been reported. Un-

doubtably, the facts of each case should be examined individually to make such determinations, but in principle, the agency's international responsibility may arise from an act that is not as such unlawful, but is linked to a human rights violation committed by the host state. Frontex may have a significant role in aiding and assisting in a violation. It finances, organises, coordinates and often initiates operations. It further supports the operations with its research and risk analysis infrastructure, as well as Eurosur.

It should be noted that the requirement is that the aid or assistance has contributed "significantly" to the commission of the act; it does not need to be essential, in the sense that the wrongful conduct could have not been committed without it.[78] Any of the aforementioned powers and competences and certainly their combination can be regarded as significantly contributing to the commission of a wrongful act during the 2020 Rapid Border Intervention in Greece and the surveillance operations in Hungary, especially after the legislative change in 2015.

As mentioned above, the agency needs to have known of a violation or have presumed knowledge of it. In both cases, the agency had been informed of the systematic nature and the extent of the violations both via independent reporting and via its internal monitoring mechanisms. While the reporting system and the complaints mechanism have failed to live up to the circumstances, the FRO and the CF have painted a vivid picture of the state of human rights compliance and have called for the agency to suspend its operations. Moreover, the legislative changes in both countries, including the non-examination of individual circumstances and blanket dismissal by Hungary of asylum claims of applicants transiting through Serbia, and the unprecedented suspension of asylum in Greece, create an environment, within which operations take place that does not allow, for human rights compliance. Thus, we may conclude that the agency had indeed knowledge of the systematic nature of violations in both countries and it may be found complicit to the extent that it has contributed to them.

Its contribution may also take a passive form, in the meaning of allowing for the violation to happen, given its positive obligations to prevent a foreseeable violation or similar violations in the future. In this regard, it should be assessed on a case-by-case basis whether the agency has done everything in its power to prevent violations committed by the host state in the context of a joint operation or with the involvement of its border guard teams (*e.g.* Finnish dog team in Hungary and Danish crew in Greece). What the agency could have done can range from the training of border guards and the instructions given to the teams by the Frontex coordinating officer on the ground, to the appropriate functioning of reporting and complaints mechanisms, including an obligation to investigate when there are substantial grounds for believing that violations are taking place,[79] and finally, to suspending an operation.

[78] ARIO commentary to art. 14(6).

[79] ECtHR *Hirsi Jamaa and Others v Italy* App n. 27765/09 [23 February 2012].

This last option is considered a last resort to be used in serious and persistent violations. In both case-studies the violations had been of a serious and systemic nature, while the agency has since 2016 been receiving strong and repetitive recommendations by the FRO and its CF to suspend its operations in Hungary. According to the letter of the EBCG Regulation this is an obligation for the ED. Nevertheless, the enforcement of this obligation in practice becomes problematic considering that the ED has a considerable degree of discretion, since there are no clear indications or guidelines as to when the conditions for suspending an operation are met. He will balance the human rights concerns with political and operational considerations.[80]

In fact, it has been argued that the presence of Frontex may improve the state of human rights compliance on the ground. This was also the ground upon which the Commission encouraged Frontex to continue its operations in Hungary despite the opposite advice of the FRO and the CF. This was not confirmed by the empirical circumstances in the following years. Similarly, Human Rights Watch notes that in the case of Greece: "European presence would presumably show that it is possible to enforce the border humanely. […] With the passing of time, we observe that the opposite has happened. That Frontex as an organization is gradually embracing the harsh reality of Greek violations […]".[81]

The agency has expressed further hopes to that direction regarding the deployment of the standing corps including Frontex statutory staff. The ED said in an interview in *die Zeit* that we could envisage such improvement with respect to incidents of abuse in the Western Balkans, as Frontex will have direct disciplinary powers over its own personnel.[82] The direct responsibility of the agency is also arguable regarding the degree of effective control exercised by the agency upon the deployed border guard teams. The seconded border guards may be considered de facto organs of the agency if a certain balanced of the following criteria is reached de jure or in practice: *i)* retention of disciplinary powers and criminal jurisdiction, *ii)* decision-making power over the wrongful conduct (formal or factual control), *iii)* power to prevent a violation of human rights (positive obligations).

None of these elements are exclusive and a complete answer calls for a balanced consideration of them all, and always on a case-by-case basis. In principle, it is derived from the EBCG Regulation that the decision-making powers, in the meaning of "who gives the orders" belong mainly to the host state (arts 21(1) and 40(3) EBCG Regulation).

[80] Parliamentary Assembly, Council of Europe, Resolution 1932 (2013), Frontex: Human Rights Responsibilities; EU Ombudsman, *Letter From The European Ombudsman to the Frontex concerning his draft recommendation - OI/5/2012/BEH-MHZ* ombudsman.europa.eu point 74.

[81] I Mann and N Keady-Tabbal, 'Torture by Rescue: Asylum-Seeker Pushbacks in the Aegean. How Summary Expulsions from Greece Have Continued with Impunity' (26 October 2020) Just Security www.justsecurity.org.

[82] C Lobenstein, P Middelhoff and L Mittel, 'Letztes Mittel' (19 February 2020) Die Zeit www.zeit.de.

However, the instructions of the host state are not independent, but shall be in implementation of and should comply with the Operational Plan (art. 21(1) EBCG Regulation), which is drafted by the agency. The Frontex Coordinating Officer also communicates the agency's views regarding the instructions of the host state. These views shall be taken into consideration and be followed upon to the extent possible (art. 21(2) EBCG Regulation).[83] It has been observed that the teams are in fact deployed "under the supervision of the Frontex Coordinating Officer[84] and that he is in fact the one who retains responsibility for the instructions given".[85]

Moreover, Frontex sets the environment on the basis of which operations take place, financing operations, deploying the teams and technical equipment, while it may initiate an operation. It further, conducts research and risk analysis on the basis of which all decisions regarding an operation are made, and coordinates the work of the different Member States. Thus, although Frontex will at no point issue instructions directly towards the seconded officers, there are several levels of orders and control that are above the day-to-day command of the operation.[86] In the words of Goodwin-Gill, notwithstanding the involvement of another actor, the agency can still be responsible for "setting the scene that allows the result […]. […] the EU agency […] exercises a sufficient degree of effective control; it may not be solely liable for what follows, but it is liable nonetheless".[87] Thus, it can be argued that Frontex can have effective control over the seconded personnel through a combination of its various operational, organisational, supervisory and other powers.[88]

Still, different levels of control by different actors are interlaced in a way that a singular answer to who has effective control becomes almost impossible. Effective control,

[83] Fink observes that the operational plans go in more detail into the control regime, or as it is referred to there, the operational and tactical command and control. However, they don't manage to create a comprehensive or consistent formal regime over the types of authority each actor exercises over the guest officers. M Fink, *Frontex and Human Rights: Responsibility in "Multi-Actor Situarions" under the ECHR and EU Public Liability Law* (Leiden University, EM Meijers Instituut 2017) 165.

[84] S Carrera, L den Hertog and J Parkin, 'The Peculiar Nature of EU Home Affairs Agencies in Migration Control' cit. 340.

[85] Amnesty International (European Institutions Office) and European Council on Refugees and Exiles (ECRE), Briefing on the Commission Proposal for a Regulation Amending Council Regulation (EC) 2007/2004 6.

[86] For other authors, the lack of direct instructions to the deployed personnel excludes the possibility of effective control by Frontex. 'Article 7 would require a transfer of certain command or similar powers that allow the organisation to directly determine the conduct in question. Since Frontex is not currently vested with such powers, conduct during Frontex operations is not attributable to the EU' in M Fink, *Frontex and Human Rights* 165.

[87] G S Goodwin-Gill, 'The Right to Seek Asylum' cit. 453.

[88] Similar conclusions have been drawn by several authors, among which, A T Gallagher and F David, *The International Law of Migrant Smuggling* (Cambridge University Press 2014) 347–348; I Majcher, 'Human Rights Violations During EU Border Surveillance and Return Operations: Frontex's Shared Responsibility or Complicity?' (2015) Silesian Journal of Legal Studies 60-64.

however, is not necessarily an exclusive quality. The effective control by a member state does not exclude the effective control by Frontex. In fact, the largest portion of effective control belongs to the member state hosting the operation, while participating states may also retain a certain degree of effective control. This non-singular answer as to who has effective control does not lead to a dead-end regarding the attribution of the wrongful conduct. To the contrary, it is the degree of effective control exercised by either party that is important. In case more than one parties are shown to exercise effective control, their responsibility can be determined under dual or multiple attribution. Thus, only if it can be proven that in a particular case, Frontex has exercised adequate effective control over a wrongful conduct, can its direct responsibility be engaged, and that, alongside the responsibility of the host state.

The direct control of Frontex over the operation will be clearer after the standing corps becomes operational, as the members of the agencies statutory staff will be de jure agents of the agency directly binding Frontex with their potential wrongful conduct. In this case, the member state will retain the every-day command and control, and thus, effective control over the agency's staff. This will determine the co-authorship of the act by the host state, thus, making the host state and Frontex jointly liable.

VII.2. Return operations

It should, first of all, be kept in mind that the ultimate responsibility for violations occurring in any return flights either to Afghanistan or to Serbia from Hungary belongs to the Hungary itself. The same holds for any returns to the countries of origin or readmission operations to Turkey from Greece regarding applicants whose claims have not been properly examined in the first semester of 2020.

This is the case even if we take into account the extensive powers of the agency newly acquired with the 2019 Regulation. For instance, the agency may now prepare return decisions, but it may not enter into the merits or provide information for such decisions (art. 28(1) EBCG Regulation). Frontex does not have any information about the asylum case files of the returnees. It only collects and processes personal data that are necessary for the purpose of the return operation, which is deleted ten days after the completion of the operation.[89] If further does not have the mandate to review the asylum claim, and would not, in principle, be responsible for the unlawful return of a refugee, in case of a wrongful examination of their asylum application.

Even though, however, the agency may not enter the merit of return decisions, it is still responsible for ensuring compliance with the principle of *non-refoulement*. On the basis of the principle of mutual trust, the agency operates with a presumption of validity of the decision that has been issued by a member state. This presumption cannot,

[89] J Pirjola, 'Flights of Shame or Dignified Return? Return Flights and Post-Return Monitoring' (2015) EJML 312.

nevertheless, be irrebuttable.[90] When structural deficiencies are found in the asylum system of the Member States, as has been the case in Hungary and potentially in Greece in case of any returns that resulted from the suspension of registrations of asylum claims, the presumption can be rebutted. Such deficiencies may result in an asylum and return decision that is in violation of the right to *non-refoulement*, the right to asylum, and the right to an effective remedy.

Frontex cannot be held responsible for the ineffectiveness or outright unlawfulness of the asylum procedures in Greece and Hungary, but it still has a positive duty to ensure compliance with human rights during return operations it coordinates. It can be argued that the agency will be able to better comply with its positive duties when the 2019 Regulation is implemented, as it will be able to conduct return operations with its own escorts and human rights monitors.

Still, however, in the case-studies at hand, the well-reported evidence or structural deficiencies, especially regarding the blanket rejection of applicants that originate or have transited through Serbia, provide legitimate reasons to believe that Frontex should have known of such violations, despite the low number of Serious Incidents Reports and the assurances of the Hungarian government.

By not complying with its positive obligation to take every appropriate action to prevent that or other similar violations, the agency risks being found complicit in the violation. Both UNHCR and the FRO had explicitly stated, years before the CJEU decision, that suspension of return operations in Hungary is necessary for the agency to comply with its fundamental rights obligations.

The new expansive powers of Frontex in the 2019 Regulation, increase the possibility for the agency to be held responsible for violations during returns, especially since return flights will be conducted in the agency's own aircrafts, by the agency's own escorts. It has been found that in practice in Frontex joint operations, when decisions are made that affect a plane or other large asset of a participating state, the consent of that member state is sought. Even though the participating member state does not have formal veto powers over the decision, in practice no decision is made until consensus is reached. Thus, there is a certain level of authority still exercised by the participating member state over its asset, arguably including the personnel deployed in that asset.[91] The same can hold true with respect to operations carried out in large assets owned by the agency, which is expected to be the rule in Frontex flights in the future. It remains to be seen, however, how this will operate in practice and whether the flag state of the plane or vessel will perhaps have operational command and control rather than the agency.[92]

[90] Case C-411/10 *N S and Others* ECLI:EU:C:2011:865.

[91] M Fink, *Frontex and Human Rights* cit. 85 and 86.

[92] Further on Frontex in return operations, see M Gkliati, 'Frontex Return Operations and their Human Rights Implications' in I Soysüren and M Nedelcu (eds), *Deportation of Foreigners: EU Instruments, Nation-State Practices and Social Actors' Involvement* (Peter Lang Editions forthcoming).

VIII. Conclusion

The EU has chosen to perceive migration as a threat, and is focusing its efforts in securing its borders, increasingly depending on the work of Frontex. The reach of the agency in European border control makes questions about its responsibility for breaches of fundamental rights of refugees and other migrants more urgent than ever. The mandate and powers of Frontex are continuously growing, while the agency has entered the next phase of its development, that of greater autonomy and operational effectiveness. The broader powers the agency acquired with the 2019 amendment of its Regulation reflect upon the potential for its legal responsibility.

In this *Article*, I studied this potential for responsibility through the two case-studies of the Turkish-Greek and the Serbian-Hungarian border, both areas where systematic violations have been well-reported. Through this examination, I conclude that there is considerable room for the responsibility of the agency even before the implementation of the 2019 Regulation, either through aid and assistance or through effective control.

The responsibility for the agency can be indirect, through assisting Greece or Hungary in the commission of the internationally wrongful act, either actively (*e.g.*, technical and financial support) or by omission due to the agency's positive obligations (*e.g.*, failure to suspend or terminate an operation). It is also arguable that under certain circumstances, the agency may also have a sufficient degree of effective control over the seconded personnel in the two countries, so that they can be considered its *de facto* agents, engaging the responsibility of the agency with their conduct.

I have also examined how the image of responsibility changes after the 2019 amendments are implemented. In fact, we may conclude that the legislative amendment brings a shift of focus from complicity, as the main form of responsibility for Frontex, to direct responsibility. While direct responsibility has also been conceivable before 2019, via effective control over de facto organs, now the extent to which the agency will operate with its own personnel and equipment, provides enhanced arguments for its direct responsibility.

Gaps and hindrances still remain with respect to implementing the above and holding the agency to account for reasons that have to do mainly with the inaccessibility of the CJEU to individuals and the liability jurisprudence of the CJEU, issues that fall out of the scope of the present article, which remains in the normative realm of legal responsibility.[93]

A further conclusion we can draw from the examination of the responsibility of the agency through these two case studies, is that we can derive two types of human rights violations. Those that result from operations, which were executed according to plan, and those that refer to operations going wrong and abuse of powers from the second-

[93] More regarding the difficulties in attributing responsibility and holding the agency or its statutory staff to account see ECRE, 'ECRE Comments on the Commission Proposal for a Regulation on the European Border and Coast Guard' (September 2018) www.ecre.org.

ed border guards. While the appropriate monitoring and accountability mechanisms are necessary to address the second type of violations (*e.g*. Finnish dog team), the structural nature of the former makes it almost unavoidable for the agency to launch or continue an operation without being found complicit. This is the case with respect to the 2020 Rapid Border Intervention in Greece or return operations from Hungary, that constitute dead-ends for the agency.

Finally, at this point we may remind ourselves of Majone's model of "mixed government", where EU agencies fulfil the purpose of balancing institutional autonomy and institutional cooperation in a way that all interests, those of the European people, the Member States, and that of European integration are balanced. The new framework after 2019 contributes to this balance as Member States still maintain a certain level of control while the agency achieves greater supranational autonomy and operational effectiveness that allows it to better fulfil the interest of border management. However, no real balance can be struck before human rights, amongst the core EU values, are properly upheld, and before suitable accountability safeguards are set.

Accelerated returns and border control priorities should not be at the cost of fundamental rights. These securitisation-led developments in the area of migration present inherent tensions with fundamental rights and create challenges for their protection. We should be ready for these challenges. The greater operational effectiveness and autonomy of the agency call for a more robust system of judicial and administrative accountability than ever; one that corresponds to the expansion of powers and competences of the agency and can address its potential responsibility for human rights violations.

ARTICLES

THE EU'S SHIFTING BORDERS RECONSIDERED: EXTERNALISATION, CONSTITUTIONALISATION, AND ADMINISTRATIVE INTEGRATION

edited by Evangelia (Lilian) Tsourdi, Andrea Ott *and* Zvezda Vankova

FRONTEX'S CONSULTATIVE FORUM AND FUNDAMENTAL RIGHTS PROTECTION: ENHANCING ACCOUNTABILITY THROUGH DIALOGUE?

CHIARA LOSCHI* AND PETER SLOMINSKI**

ABSTRACT: Frontex has been heavily criticized for disregarding fundamental rights in its border management from the outset. To address this critique, the EU legislators established a Consultative Forum on fundamental rights to provide independent advice in fundamental rights matters. Despite the importance of this issue, little effort has been made to study the role and impact of the Consultative Forum. Addressing this research gap, this *Article* seeks to answer whether the Consultative Forum has improved Frontex's fundamental rights accountability. Theoretically, we will combine the concept of accountability elaborated by Bovens and the notion of dialogues, allowing us to assess the interaction of the Consultative Forum with the various fora which are supposed to hold Frontex to account. As a special form of communication, dialogues focus on the giving and taking of various sorts including information, arguments and justifications. We argue that the status of the Forum and its possibility to engage with internal and external stakeholders on a regular basis provide an opportunity to strengthen

* Postdoctoral Researcher, University of Bologna, chiara.loschi@unibo.it.

** Assistant Professor, University of Vienna, peter.slominski@univie.ac.at. The research for this *Article* was funded by the Austrian Science Fund (FWF) under the project number P30703-G29.

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dialogues with and between Frontex's accountability fora. While the impact of these accountability dialogues has been modest so far, we nonetheless acknowledge their normative potential to enhance the accountability of Frontex.

KEYWORDS: Frontex – Consultative Forum – accountability – EU Border Management – fundamental rights – EU agencies.

I. INTRODUCTION

Since its inception, Frontex has been confronted with harsh criticism for disregarding human rights principles: while EU policy-makers have expected Frontex to tackle the problem of external border protection, civil society organisations and human rights groups have continued to raise concerns over the agency's behaviour with regard to fundamental rights.[1] Frontex had initially tried to reject this criticism, arguing that it only has a supporting or coordinating role and is therefore not responsible for fundamental rights protection.[2] Since the early 2010s, however, it has gradually become more sensitive to this concern. After introducing legally non-binding instruments such as a Code of Conduct and a Fundamental Rights Strategy, Frontex Regulation 1168/2011 established a Fundamental Rights Officer (FRO) and the Consultative Forum with a view to assist the Executive Director and the Management Board in fundamental rights matters.[3] Despite these institutional innovations, human rights groups have continued to criticize Frontex for human rights violations in the course of its border operations.[4] Accordingly, many scholars claim that the Consultative Forum is primarily a public relations exercise for Frontex, reflecting only a shallow or rhetorical commitment to fundamental rights without any corresponding efforts to improve fundamental rights protection in practice.[5] However, despite this

[1] E Papastavridis, '"Fortress Europe" and FRONTEX: Within or Without International Law?' (2010) ActScandJurisGent 75; A Fischer-Lescano, T Tohidipur and T Löhr, 'Border Controls at Sea: Requirements Under International Human Rights and Refugee Law' (2009) IJRL 256; M Fink, *Frontex and Human Rights: Responsibility in 'Multi-Actor Situations' under the ECHR and EU Public Liability Law* (Oxford University Press 2018).

[2] S Keller and others, 'Which Guarantees for Human Rights? A Study Conducted by Migreurope on the European External Borders Agency in View of the Revision of its Mandate' (March 2011) Greens/EFA in European Parliament www.migreurop.org 22; M Fink, 'Frontex: Human Rights Responsibility and Access to Justice' (30 April 2020) EU Immigration and Asylum Law and Policy blog eumigrationlawblog.eu.

[3] Regulation (EU) 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) n. 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, art. 26(a)(2).

[4] See *e.g.* the alleged involvement of Frontex in push backs in the Eastern Mediterranean, K Fallon, 'EU border force "complicit" in illegal campaign to stop refugees landing' (24 October 2020) The Guardian www.theguardian.com; Frontex, 'Frontex launches internal inquiry into incidents recently reported by media' (27 October 2020) frontex.europa.eu.

[5] N Perkowski, 'There Are Voices in Every Direction: Organizational Decoupling in Frontex' (2019) JComMarSt 1182; S Carrera, L Vosyliute, V Mitsilegas and J Allsopp, *Policing Humanitarianism: EU Policies Against*

broad criticism, there has been little scholarly effort to assess how the Consultative Forum has affected Frontex's accountability for ensuring compliance with fundamental rights standards. Addressing this research gap, we will examine how the creation of the Consultative Forum has contributed to Frontex's accountability.

In doing so, the study combines Boven's concept of accountability[6] with the notion of "dialogue" introduced by scholars such as Bohman, Roberts or Gkliati and Rosenfeldt.[7] Dialogue is a special form of communication that opens up a space for deliberation including the "giving and taking of various sorts".[8] This approach enables us to analyse the communicative interaction between the Forum and the various accountability fora of Frontex. Specifically, by exchanging information, arguments and justifications not only with actors who are inclined towards Fundamental Rights Protection (*e.g.* FRO or human rights groups) but also with more securitization-oriented actors (*e.g.* Frontex's Executive Director or Management Board), the Consultative Forum has contributed to mutual knowledge sharing, learning processes within and among fora which are expected to hold Frontex to account. While the Forum's impact on the accountability of Frontex has been modest so far, we acknowledge its potential to trigger accountability dialogues with and between Frontex's accountability fora.

Empirically, we examine relevant activities of the Consultative Forum in the periods from 2013 to 2019. Besides the relevant academic literature, our analysis reviews a broad range of primary sources including Consultative Forum annual reports as well as relevant documents by the European Ombudsman, the European Court of Auditor, the European Parliament (EP) and Non-Governmental Organizations (NGOs). In addition, we draw on 13 semi-structured interviews with various members of the Consultative Forum, the FRO and international organization conducted between June 2019 and May 2020.[9] We will argue that the creation of the Consultative Forum within Frontex's institutional architecture has enabled fundamental rights-oriented actors to enter into an institutionalised dialogue with internal and external stakeholders on a regular basis with a view to improve the fundamental rights accountability of Frontex. While the Consultative Forum has so far not significantly enhanced the accountability of Frontex, these accountability dialogues have

Human Smuggling and their Impact on Civil Society (Hart Publishing 2019) 47; D Fernandez-Rojo, 'The Introduction of an Individual Complaint Mechanism within Frontex: Two Steps Forward, One Step Back' (2016) Belgian Journal for Governance Studies and Public Law 225.

[6] M Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework' (2007) ELJ 447.

[7] J Bohman, *Public Deliberation: Pluralism, Complexity, and Democracy* (MIT Press 1996); NC Roberts, 'Keeping Public Officials Accountable through Dialogue: Resolving the Accountability Paradox' (2002) Public Administration Review 658; M Gkliati and H Rosenfeldt, 'Accountability of the European Border and Coast Guard Agency: Recent Developments, Legal Standards and Existing Mechanisms' (Refugee Law Initiative Working Paper 30-2018).

[8] J Bohman, *Public Deliberation* cit. 59.

[9] For reasons of anonymity, this *Article* uses interview codes, see the annex at the end of the *Article*.

the potential to facilitate the exchange of information and views and to strengthen the collective learning processes regarding fundamental rights protection.

II. Theoretical framework

Over the last two decades, scholars have been increasingly concerned with examining the accountability of many EU institutions and bodies such as European agencies.[10] Similarly, political actors such as the EP and the European Commission have advocated to improve the accountability of EU agencies.[11] This holds especially true of agencies that operate in the Area of Freedom, Security and Justice (AFSJ) such as Frontex which has not only enhanced its operational scope in the last decade, but has also developed a reputation for undermining or even violating the fundamental rights of refugees and migrants.[12] To analyse the impact of the Consultative Forum on the accountability of Frontex, we draw on the work of Mark Bovens who defines accountability as a relationship between an actor and a certain forum in which the actor provides information, explains and justifies his/her conduct.[13] In turn, the forum can ask questions, evaluate the conduct of the actor and pass judgement which may result in consequences for the actor.[14] With regard to Frontex, we will assess the following four types of accountability:[15]

a) Political accountability: relates to the account to be given before elected representatives and members of national parliaments, the EP and its subcommittees or voters in parliamentary elections.

b) Legal accountability: specifies the relation between an actor and national or EU courts or tribunals. It is based on established legal doctrine and methodology prescribed by statutes or precedent.

c) Administrative accountability: includes auditors and inspectors exercising administrative and financial supervision based on prescribed norms. At the EU level, it includes European Ombudsman or the European Court of Auditors.

[10] C Harlow, *Accountability in the European Union* (Oxford University Press 2002); D Curtin, 'Delegation to EU Non-Majoritarian Agencies and Emerging Practices of Public Accountability' in D Geradin, R Muñoz and N Petit (eds), *Regulation Through Agencies in the EU: A New Paradigm of European Governance* (Edward Elgar 2005) 88; D Curtin, 'Holding (Quasi-)Autonomous EU Administrative Actors to Public Account' (2007) ELJ 523.

[11] M Busuioc, *European Agencies: Law and Practice of Accountability* (Oxford University Press 2013) 8 ff.

[12] D Curtin, 'Delegation to EU Non-Majoritarian Agencies and Emerging Practices of Public Accountability Regulation Through Agencies' cit.; M Bovens, D Curtin and P t'Hart (eds), *The Real World of EU Accountability: What Deficit?* (Oxford University Press 2010); M Busuioc, 'European Agencies: Pockets of Accountability' in M Bovens, D Curtin and P 't Hart (eds), *The Real World of EU Accountability. What Deficit?* cit. 87.

[13] M Bovens, 'Analysing and Assessing Accountability' cit. 450.

[14] *Ibid*.

[15] *Ibid*. 455 ff. In addition, Bovens also discusses professional accountability which deals with relationships to professional associations and disciplinary tribunals. As it does not relevant for Frontex, we will not discuss professional accountability in this *Article*. For further details see M Gkliati and H Rosenfeldt, 'Accountability of the European Border and Coast Guard Agency' cit. 8.

d) Social accountability: defines the relationship with a forum made up of stakeholders, civil society and NGOs, interest groups, charities, and the public at large, encouraged by the rise of internet which allows for the public availability of assessments and reporting results made by stakeholders.

As it is the task of the Consultative Forum, as an advisory body, to assist Frontex and provide independent advice in fundamental rights matters, we will focus particularly on how these contributions have impacted on the various types of accountability. In doing so, we will draw on the notion of dialogue which focuses on the exchange of information, arguments and justifications among the parties concerned. A dialogue can be conceived as a special form of communication in which both sides treat each other as equals and "listen and engage each other fully".[16] Although dialogues are not a means to solve problems, the back-and-forth exchange of information, claims and justification, has the potential to create the necessary conditions for resolving disputes or developing mutual understanding.[17] From such a perspective, the Consultative Forum can be regarded as an institutional space for dialogue that empowers fundamental rights-oriented NGOs, EU agencies or international organizations to cooperate with each other and engage with various EU institutions and bodies as well as with securitized-oriented Frontex officials on a regular basis.[18] Accountability is thus not only a mechanism of control but also a communicative process for an exchange of information, arguments and justifications that works towards mutual learning and understanding.[19] "Being accountable is about being open with stakeholders, engaging with them in an ongoing dialogue and learning from the interaction."[20] To facilitate accountability dialogues, it is crucial that the Forum operates on par with Frontex officials, receives relevant information about border practices and has privileged access to important stakeholders inside and outside of the agency such as the FRO, the European Ombudsman or Members of the European Parliament (MEPs). If these conditions are met, the Forum's communicative efforts with the different political, administrative or social fora can strengthen dialogues so that Frontex can be held to account more effectively.

Dialogues occurring within one accountability forum can feed into other fora as well. For example, dialogue between the Consultative Forum and the European Ombudsman may, first, enhance administrative accountability. If, in a second step, MEPs refer to this dialogue in a hearing of the Executive Director before the EP, the same dialogue may (indirectly) also improve political accountability. Institutionalised and regular dialogues

[16] NC Roberts, 'Keeping Public Officials Accountable through Dialogue' cit. 660.

[17] J Bohman, *Public Deliberation* cit. 58 ff.

[18] J S Dryzek, *Deliberative Global Politics. Discourse and Democracy in a Divided World* (Polity Press 2006); AW Neal, 'Securitization and Risk at the EU Border: The Origins of FRONTEX' (2009) JComMarSt 333.

[19] NC Roberts, 'Keeping Public Officials Accountable through Dialogue' cit. 661.

[20] M Blagescu, L de las Casas and R Lloyd, *Pathways to Accountability: The GAP Framework* (One World Trust 2005) 11.

initiated and facilitated by the Consultative Forum have the power to provide numerous opportunities to hold Frontex accountable "across the whole range of [...] policies, minor as well as major, routine as well as controversial".[21] Specifically, the back-and-forth exchanges between the Consultative Forum and the various accountability fora can strengthen the capacity of the latter to hold Frontex to account. These dialogues are therefore key elements for holding Frontex accountable which is particularly relevant in the absence of sound legal or political accountability mechanisms.

III. Frontex's bumpy road towards fundamental rights protection

Frontex has faced strong criticism for its fundamental rights record from both the general public and human rights groups since the beginning of its operational activities in 2005. The initial 2004 Frontex Regulation contained only one general reference to fundamental rights.[22] It was not until March 2011 that Frontex adopted a legally non-binding Code of Conduct for all persons participating in Frontex operational activities, clarifying the obligations of officials participating in Frontex operations.[23] A few days later, Frontex adopted another legally soft law document – its Fundamental Rights Strategy (FRS).[24] Like the Code of Conduct, the FRS can be considered a major improvement in the human rights discourse. The adoption of the Code of Conduct and the FRS were the result of the continuous advocacy of human rights-minded actors who regularly reminded EU institutions and governments that observing international law in the course of border control is a crucial pre-requisite for the legitimacy of Frontex.[25] The 2011 Frontex recast Regulation not only transformed the FRS and the Code of Conduct into hard law, but it also established a FRO and a Consultative Forum. The Forum was tasked not only with developing and implementing the Code of Conduct and the FRS but also with assisting the Executive Director and the Management Board in fundamental rights matters more broadly.[26] In September 2012, the Frontex Management Board adopted the working methods of the Consultative Forum,[27]

[21] R Mulgan, *Holding Power to Account: Accountability in Modern Democracies* (Palgrave Macmillan 2003) 66.

[22] Regulation (EC) 2007/2004 of the European Council of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, recital 22.

[23] Frontex, *Code of Conduct: For all Persons Participating in Frontex Operational Activities* (21 March 2011) frontex.europa.eu.

[24] Frontex, 'Fundamental Rights Strategy' (31 March 2011) www.gdr-elsj.eu. In February 2021, Frontex adopted an updated and more detailed Fundamental Rights Strategy that replaced the 2011 version, for further details see Frontex, 'Fundamental Rights Strategy' (14 February 2021) frontex.europa.eu.

[25] P Slominski, 'The Power of Legal Norms in the EU's External Border Control' (2013) International Migration 41.

[26] Arts 26 (a)(2) and 26 (a)(3) of the Regulation 1168/2011 cit.

[27] Frontex, 'Management Board decision No. 18/2012' on the working methods of the Frontex Consultative Forum and the modalities of the transmission of information to the Frontex Consultative Forum (26 September 2012) frontex.europa.eu.

which started its activities in the beginning of 2013. The Regulation 2016/1624 transformed the agency into the European Border and Coast Guard Agency, enhancing its supervisory and operational functions with the intention of strengthening the uniform and efficient implementation of EU border management.[28] While the 2016 Regulation upgraded the status of the Consultative Forum by including it in the "administrative and management structure of the Agency", the subsequent 2019 Regulation reversed this decision and made clear that the Forum is not part of Frontex's administrative and management structure and has only advisory functions.[29] To assess the fundamental rights implications of border activities, the EU legislators considered it crucial that the Consultative Forum have "effective access, in a timely and effective manner, to all information concerning the respect for fundamental rights".[30] Yet, its members do not have comprehensive access to fundamental rights-relevant information as they are also expected to sign a so-called "Declaration of Adherence to Professional Secrecy" that requires them not to disclose "any information of a sensitive or non-public nature".[31] Furthermore, the Management Board possesses leeway to decide "on the terms of the transmission of information" to the Forum.[32]

Notwithstanding these restrictions, the Forum is entitled to carry out on-the-spot visits to joint operations or rapid border interventions and to hotspot areas, return operations and return interventions.[33] The possibility to conduct such field visits allows the Consultative Forum to observe border practices of Frontex operations and engage with Frontex and national border officers on the ground. A Forum member highlighted the considerable initial distrust on the part of Frontex with respect to on-the-spot visits.

> "It took time to overcome the lack of confidence between us [the Forum] and Frontex. At the beginning, we negotiated for quite some time; we reassured Frontex we were not monitors, only visitors, and we had to explain that site visits are important to provide solid advice. Before our first visit, Frontex sent to us a 70-page document with instruction about what we are not allowed to do during the visit. Over time, the trust increased and Frontex accepted us".[34]

[28] Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard; D F Rojo, 'It's a New Agency. It's a Federal Agency. It's the European Border Coast Guard! No Wait… it's Frontex' (28 February 2017) EU Law Enforcement eulawenforcement.com.

[29] Art. 61(c) of the Regulation 2016/1624 cit.; Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624, art. 99.

[30] Art. 108(5) of the Regulation 2019/1896 cit.

[31] Frontex, 'Management board decision No. 18/2012' cit. 8 ff.

[32] Art. 108(2) of the Regulation 2019/1896 cit.; case T-31/18 *Izuzquiza and Semsrott v Frontex* ECLI:EU:T:2021:173.

[33] Art. 70(5) of the Regulation 2016/1624 cit.; art. 108(5) of the Regulation 2019/1896 cit.

[34] Interview 13 in the annex of this *Article*.

This provision not only enabled the Forum members to enhance their understanding of the agency's work and its fundamental rights implications, but also to include their findings from the visits in the Forum's annual reports.[35] According to the Forum, the "most significant change" brought by the Regulation 2019/1896, is the obligation of Frontex to inform the Consultative Forum of the follow-up with regard to its recommendations.[36] In doing so, the EU legislature addressed a long standing complaint by Forum members of not knowing how Frontex has reacted to specific Forum recommendations.[37] Another novelty of the regulation is the creation of at least forty fundamental rights monitors under the lead of the FRO who shall constantly assess the fundamental rights compliance of the Frontex.[38] Together with the renewed commitment that the FRO should have sufficient financial and human resources, the Consultative Forum was optimistic that these new provisions provide a "unique opportunity" to "prevent and address potential fundamental rights violations" of the agency.[39] The Consultative Forum is currently composed of thirteen organizations. The 2019 recast Regulation stipulates that Frontex shall invite the EU Agency for Fundamental Rights (FRA), the European Asylum Support Office (EASO) and the UN High Commissioner for Refugees (UNHCR) to participate in the Consultative Forum. Other Forum members are selected for a period of three years by the Frontex Management Board based on the proposal of FRO and after consulting the Executive Director.[40] The Consultative Forum elects two chairs who represent the Forum *vis-à-vis* Frontex staff, the Management Board, the FRO and external interloc-

[35] It is difficult to establish how many visits Forum members have made over the years. According to anecdotal evidence from a Forum member: "[w]e witnessed return operations in Greece as part of the Poseidon operation, before the implementation of the hotspot approach. We also observed six operations and put the findings in our annual report. Following the operations, we organised focus groups with member state authorities" (interview 2 in the annex of this *Article*).

[36] Art. 108(3) of the Regulation 2019/1896 cit.; see also Consultative Forum, *Seventh annual report. Frontex Consultative Forum on Human Rights* (2019) frontex.europa.eu.

[37] See Interviews 8, 10 and 11 in the annex of this *Article*.

[38] Art. 110 of the Regulation 2019/1896 cit.

[39] See Consultative Forum, *Seventh annual report* cit.

[40] Art. 108(2) of the Regulation 2019/1896 cit.; Since January 2020, the Consultative Forum consists of the following thirteen members: EASO, FRA, UNHCR, the Council of Europe (CoE), the International Organization for Migration (IOM), the Organization for Security and Co-operation in Europe – Office for Democratic Institutions and Human Rights (OSCE ODIHR), Office for the High Commissioner for Human Rights, Amnesty International European Institutions Office, Churches' Commission for Migrants in Europe, International Commission of Jurists, Jesuit Refugee Service Europe (JRS), Red Cross EU Office and Save the Children, see the website of Frontex at frontex.europa.eu. See also Frontex, 'Management Board Decision 26/2019' (14 October 2019) frontex.europa.eu. For an extensive discussion of the relationship between the Consultative Forum and the FRO, see section IV.3 below.

utors and ensure the strategic direction and overall coordination of the Consultative Forum's work.[41] Despite the concerns of some NGOs members about their difficulties to cope with the workload, they stressed the good working atmosphere among Forum members and how their understanding of Frontex has increased over time.[42]

IV. The Consultative Forum's contribution to Frontex's accountability

There is a widespread consensus in scholarly literature that the accountability of Frontex is insufficient.[43] By applying Bovens' accountability concept, we can observe that these amendments have affected Frontex's accountability obligations to different fora. In particular, the creation of the Forum has institutionalised fundamental rights dialogues with different internal and external stakeholders on a regular basis. In the following, we discuss the Consultative Forum's impact on the political, legal, administrative and social accountability of Frontex. We argue that the Forum provides an opportunity for dialogue, exchange of views and networking between Frontex and human rights advocates.

IV.1. Political accountability

The European Parliament can be regarded as the main forum for political accountability of Frontex.[44] Besides a general obligation to inform and report on various issues,[45] the EP has the right to invite the Executive Director to report *inter alia* on the activities of Frontex and the implementation and monitoring of the fundamental rights strategy. The Executive Director is required to make a statement before the European Parliament and answer parliamentary questions about Frontex activities. Furthermore, the Executive Director has the obligation to report regularly to the appropriate bodies and committees of the EP.[46]

The establishment of the Consultative Forum has not fundamentally improved the political accountability mechanisms of Frontex. The formal status of the Forum, however, has provided an opportunity for the EP, notably the Committee on Civil Liberties, Justice and Home Affairs (LIBE), to invite its members to discuss fundamental rights issues in the

[41] Frontex, 'Working Methods of the Frontex Consultative Forum on Fundamental Rights' frontex.europa.eu. In the past the Forum was chaired by FRA and the JRS (2013-2015) and then by the UNHCR and JRS (2015-2019). The current co-chairs of the Forum are FRA and UNHCR.

[42] Interview 1, 2, 4 and 10 in the annex of this *Article*.

[43] J Pollak and P Slominski, 'Experimentalist but not Accountable Governance? The Role of Frontex in Managing the EU's External Borders' (2009) West European Politics 904; S Wolff and A Schout, 'Frontex as Agency: More of the Same?' (2013) Perspectives on European Politics and Society 305; S Horii, 'Accountability, Dependency, and EU Agencies: The Hotspot Approach in the Refugee Crisis' (2018) Refugee Survey Quarterly 204.

[44] Art. 6 of the Regulation 2019/1896 cit.

[45] *E.g*. arts 42(2) or 50(7) of the Regulation 2019/1896 cit.

[46] Art. 106(2) of the Regulation 2019/1896 cit.

context of Frontex's various border activities "on a regular basis".[47] These meetings have proved to be particularly important for NGO Forum members who do not usually enjoy privileged access to the EP.[48] Over time, the encounters facilitate networking activities and create a regular dialogue between MEPs and the Forum. In particular, the regular meetings allow the Forum to sensitize MEPs to specific human rights problems such as push and pull back practices or the situation of migrants' rights in third countries.[49]

Moreover, the Consultative Forum and the EP have also been in a dialogue concerning on-going legislative work. For example, the Forum recommended the introduction of an effective mechanism to monitor the respect for fundamental rights in all activities of the agency. In particular, it "should also offer an effective complaints mechanism for individuals who consider that their fundamental rights have been violated in the context of a Frontex coordinated operation".[50] While Frontex has accepted the introduction of a complaint mechanism, it has also opposed the Forum's proposal that the FRO should have executive powers to resolve external and individual complaints. Instead, Frontex suggested, these complaints should be referred to national or EU courts.[51] Along with the Ombudsman and the FRO, the Consultative Forum has exchanged views with MEPs on various occasions in order to push for the introduction of a Frontex complaint mechanism. While the 2016 recast Regulation ultimately adopted an individual complaint mechanism, its design differed from the suggestions advocated by the Forum or the Ombudsman.[52]

In addition to the Forum's recommendations, some Forum members used their privileged access to the EP to improve their advocacy strategy by submitting independent assessments and recommendations to the LIBE committee.[53] These reports and recom-

[47] Interview 4 in the annex of this *Article*; Consultative Forum, *Annual Report. Frontex Consultative Forum on Human Rights* (2013) frontex.europa.eu 12; see also Consultative Forum, *Seventh annual report* cit.; Consultative Forum, *Fifth annual report. Frontex Consultative Forum on Human Rights* (2017) frontex.europa.eu; Jesuit Refugee Service, 'The Frontex Consultative Forum on Fundamental Rights' (27 June 2013) www.europarl.europa.eu.

[48] Interview 4 in the annex of this *Article*.

[49] *Ibid*.

[50] Frontex, Annual report, *Frontex Consultative Forum on Fundamental Rights* (2013) frontex.europa.eu 43.

[51] *Ibid.*

[52] Art. 72 of the Regulation 2016/1624 cit.; For example, the Forum criticized that the adopted mechanism was unclear with regard to the follow-up of complaints at the national level, the lack of reference to any means of appeal or the unclear link between the mechanism and the power of the Executive Director to suspend border operations, for further details see Consultative Forum, *Fourth annual report. Frontex Consultative Forum on Human Rights* (2016) frontex.europa.eu 20-21.

[53] Interview 1 in the annex of this *Article*; see International Commission of Jurists, ECRE and Amnesty International, 'Joint briefing on the European Border and Coast Guard Regulation' (April 2016) www.ecre.org; UNHCR, Comments on the Commission proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) 2007/2004, Regulation (EC) 863/2007 and Council Decision 2005/267/EC (April 2016) www.refworld.org.

mendations by the Forum could in turn be picked up by MEPs in holding Frontex's Executive Director to account. For instance, against the background of an internal inquiry about Frontex's involvement in push-backs of refugees at the Greek-Turkish border, the LIBE Committee stepped up the pressure on Frontex's Executive Director by referring to the Forum's concern about the absence of an effective monitoring system within the agency.[54] Conversely, the LIBE Committee can use its scrutiny function to publicly point to the Forum's difficulties in conducting its work.[55] In sum, the activities of the Consultative Forum and its regular dialogue with members of the LIBE committee enhance the control power of the EP over Frontex.[56] This is particularly important if we bear in mind that the hearings of the Executive Director before the LIBE committee have thus far been perceived as "too shallow and not very substantiated".[57]

IV.2. Legal accountability

Since Frontex provides support to national border authorities, its operational activities are generally not reviewed by a court. Instead, national border authorities can be held accountable for fundamental rights violation before national courts.[58] Moreover, legal responsibility is often shared between several member states as well as Frontex, which makes it difficult for individuals to lodge a complaint before a court.[59] Hence, cases that have been handled by the Court of Justice of the EU do not deal with Frontex operations but with refusals of access to documents[60] or procurement actions and public services.[61] The establishment of the Consultative Forum as an advisory body in the field of fundamental rights does not remedy Frontex's lack of legal accountability. The Forum has neither the mandate nor the capacity to monitor or assess the fundamental rights compliance of Frontex activities.[62]

Instead, the Forum mainly deals with "soft issues" that do not directly challenge Frontex's activities and joint operations but engage with Frontex officials on fundamental rights

[54] See European Parliament, 'MEPs to Grill Frontex Director on Agency's Role in Pushbacks of Asylum-seekers' (30 November 2020) www.europarl.europa.eu; European Parliament, 'Final Mission Report' (5 June 2020) www.statewatch.org.

[55] See European Parliament, Report on the fact-finding investigation on Frontex concerning alleged fundamental rights violations (14 July 2021) www.europarl.europa.eu 9-10.

[56] Interview 3 and 4 in the annex of this *Article*.

[57] Interview 3 in the Annex of this *Article*.

[58] L Karamanidou and B Kasparek, 'Fundamental Rights, Accountability and Transparency in European Governance of Migration: The Case of the European Border and Coast Guard Agency FRONTEX' (Respond Working Papers 59-2020).

[59] M Fink, *Frontex and Human Rights* cit.

[60] *Izuzquiza and Semsrott v Frontex* cit.

[61] S Tas, 'Frontex Actions: Out of Control? The Complexity of Composite Decision-making Procedures' (TARN Working Papers 3) 6 ff.

[62] Interviews 4 and 9 in the annex of this *Article*; Consultative Forum, *Seventh annual report* cit. 17.

issues.[63] All the Forum's written output, namely the annual reports and the recommendations, is legally non-binding. Frontex is thus not obliged to comply with these recommendations. Previous to the Regulation 2019/1896, Frontex was also not required to inform the Forum of the follow-ups to its recommendations.[64] As a consequence, Forum members had no specific knowledge about whether Frontex ultimately followed their recommendations. In the words of some Forum members: "[W]e feel we have very limited impact: our reports are detailed and informed, but we cannot say how and if Frontex is really responding to our recommendations".[65] It is obvious that such a lack of dialogue between the Consultative Forum and the Executive Director or the Management Board is highly problematic from an accountability point of view. Similarly, some Forum members are concerned that it is often difficult to identify the responsible official in the context of a specific Frontex operation. "[W]e noticed that whenever we tried to identify the responsible person for a specific return, we entered a grey area. We saw that Frontex tried to hide behind the statement 'this is competence of MSs, not ours'. This means that for some operations or parts of operations, it was not possible to identify a responsible person or authority".[66]

There are, however, other instances where we can witness that the work of the Forum can contribute to enhancing the legal accountability of the agency. For example, in 2016, the Forum sent a letter to the Executive Director recommending that Frontex should suspend operational activities at the Hungarian-Serbian border because of fundamental rights violations that "are of a serious nature and are likely to persist".[67] This was not taken into consideration. As the situation further deteriorated, the Forum reiterated their recommendation to Frontex by referring to relevant jurisprudence of the European Court of Human Rights.[68] However, the Executive Director rejected the recommendation of the Forum again, thereby demonstrating the "limited power of the Forum".[69] In December 2020, the European Court of Justice declared that Hungary's asylum process and border practices including push-backs to Serbia were not in accordance with EU law.[70] In its application, the European Commission used several reports including those from Forum members such as UNHCR and the Council of Europe as evidence in support of its claim that Hungary had failed to fulfil its obligation under EU law.[71] Shortly after the ruling, Frontex announced it

[63] Interview 2 in the annex of this *Article*.

[64] See art. 108(3) of the Regulation 2019/1896 cit. which now requires Frontex to inform the Consultative Forum of the follow-up to its recommendations.

[65] Interview 11; see also interview 8 and 10 in the annex of this *Article*.

[66] Interview 2 in the annex of this *Article*.

[67] See Frontex Consultative Forum on Fundamental Rights, *Fourth Annual Report* (2016) www.frontex.europa.eu 39.

[68] *Ibid*. 2 referring to ECtHR *Ilias and Ahmed v Hungary* App n. 47287/15 [14 March 2017].

[69] Interview 10 and 12 in the annex of this *Article*.

[70] Case C-808/18 *Commission v Hungary* ECLI:EU:C:2020:1029.

[71] Referring to the Consultative Forum recommendation, the Parliamentary Assembly of the Council of Europe also urged Frontex to suspend its operation at the Hungarian-Serbian border, see Resolution

would suspend all operational activities in Hungary.[72] It is difficult to say to what extent the Court has actually benefitted from the work of the Consultative Forum. Also, in February 2021 a group of human rights activists invited Frontex to act pursuant to Article 265 TFEU and to suspend or terminate its activities in the Aegean Sea Region. To support their argument, they referred to the Forum's unsuccessful recommendations to end Frontex's operation in Hungary.[73] Similarly, an action submitted to the Court of Justice of the European Union also pointed to activities of the Consultative Forum with the view to bolster its legal argument.[74] These cases illustrate how the work of Forum members can also be used in legal proceedings,[75] thereby modestly enhancing the legal accountability of Frontex. In addition, Forum members also stress the potentially preventive role played by their dialogue with Frontex. "We have had a pedagogical role. When we started, Frontex knew nothing about fundamental rights issues [...] we improved their awareness. As a result, Frontex has adapted the language of fundamental rights and realized that the views of Forum members "are unavoidable to consider".[76] While this does not mean that Frontex always follows the advice of the Forum, this shows how these institutionalised legal dialogues on (potential) violations of human rights and refugee law, make it clear to the agency that these issues are increasingly difficult to ignore.

IV.3. Administrative accountability

The institutional architecture of the EU exhibits several "*quasi*-legal" fora that exercise independent administrative and financial supervision and control.[77] With regard to Frontex, the most relevant administrative fora are the "external" European Court of Auditors (ECA), the European Ombudsman and the "internal" Management Board and the FRO.[78] The European Court of Auditors audits Frontex – along with all other European agencies

2299 of the Council of Europe, 'Pushback policies and practice in Council of Europe member States' (28 June 2019) assembly.coe.int para. 17.

[72] J Barigazzi, 'EU Border Agency Suspends Operations in Hungary' (27 January 2021) Politico www.politico.eu.

[73] See above section IV.2; as well as Legal Centre Lesvos, *Immediate Suspension of Termination of Activities in the Aegean Sea Region* www.front-lex.eu 12.

[74] See Legal Centre Lesvos, *Immediate Suspension of Termination of Activities in the Aegean Sea Region* cit. 16 and 38.

[75] L Gianetto, *More than Consultation. Civil Society Organisations Mainstreaming Fundamental Rights in EU Border Management Policies: The case of Frontex and its Consultative Forum* (PhD Thesis University of Trento 2018) eprints-phd.biblio.unitn.it 133; L Giannetto, 'CSOs and EU Border Management: Cooperation or Resistance? The Case of Frontex Consultative Forum' (2020) American Behavioral Scientist 501.

[76] Interview 7 in the annex of this *Article*.

[77] M Bovens, 'Analysing and Assessing Accountability' cit. 456.

[78] M Gkliati and H Rosenfeldt, 'Accountability of the European Border and Coast Guard Agency' cit. 8.

– on a regular basis with a view to protect the EU's financial management.[79] There are, however, a few special reports in which the ECA explicitly focuses on Frontex or issue areas in which Frontex is considerably involved.[80] In all these reports, the ECA mainly deals with the effectiveness of certain policy objectives such as hotspots or return but not on their fundamental rights implications. As a result, the work of the Consultative Forum has had no impact on the reports of the ECA. The dialogue between the Forum and the European Ombudsman seems to be more extensive.[81] Generally, the Ombudsman can conduct inquiries, either on his own initiative or on the basis of complaints submitted to him directly or through a MEPs. In cases of maladministration, the Ombudsman enters into a dialogue with Frontex about the matter of concern which ultimately leads to a report that is then forwarded to Frontex.[82] In addition, the report is also sent to the EP, which further underlines the close links between political, legal and administrative accountability.[83] Along with the EP and various human rights groups, the Ombudsman not only has the ability to confront Frontex itself to ensure it acts in accordance with its fundamental rights obligations, but also to invite human rights groups to join this dialogue and offer their position on the matter concerned.[84] In 2016, following a recommendation by the European Ombudsman,[85] the EU legislators adopted an individual complaint mechanism within Frontex that is overseen by the FRO.[86] While from a normative perspective the establishment of a complaint mechanism is a step in the right direction, the actual implementation has been considered suboptimal by various observers or

[79] See *e.g*. European Court of Auditors, *Annual Report on EU Agencies For The Financial Year 2019* (2020) www.eca.europa.eu.

[80] European Court of Auditors, *Report on the Annual Accounts of The European Border and Coast Guard Agency (Frontex) For The Financial Year* 2019 (2020) www.eca.europa.eu. In these reports the ECA assesses, *inter alia*, whether the Frontex support in the field of return has been "effective and swift". Fundamental rights implications of return, by contrast, have not been dealt with by the ECA see European Court of Auditors, *Asylum, Relocation and Return of Migrants: Time to Step Up Action to Address Disparities between Objectives and Results* (2019) www.eca.europa.eu. Similarly, European Court of Auditors, *EU Information Systems Supporting Border Control – A Strong Tool, But More Focus Needed on Timely and Complete Data* (2019) www.eca.europa.eu; European Court of Auditors, *EU Response to the Refugee Crisis: The "Hotspot" Approach* (2017) www.eca.europa.eu.

[81] For an insightful discussion on the relationship between the European Ombudsman and EASO see E L Tsourdi, 'Holding the European Asylum Support Office Accountable for its Role in Asylum Decision-Making: Mission Impossible?' (2020) German Law Journal 506 and 526-530.

[82] Art. 228 TFEU.

[83] P Magnette, 'Between Parliamentary Control and the Rule of Law: The Political Role of the Ombudsman in the European Union' (2003) Journal of European Public Policy 677; N Vogiatzis, 'Frontex: Human Rights Obligations and the Role of the European Ombudsman' in A Karatzogianni, D Nguyen and E Serafinelli (eds), *The Digital Transformation of the Public Sphere* (Palgrave Macmillan) 303.

[84] N Perkowski, 'There Are Voices in Every Direction' cit. 1193.

[85] European Ombudsman, *Special Report of the European Ombudsman in Own-Initiative Inquiry OI/5/2012/BEH-MHZ Concerning Frontex* (2013) www.ombudsman.europa.eu.

[86] Art. 72 of the Regulation 2016/1624 cit.

stakeholders.[87] The Consultative Forum, in particular, emphasised in two annual reports and several meetings with the Ombudsman that the governing rules of the mechanism should be further specified and – even more importantly – that the FRO should receive adequate resources in order to fulfil its obligations.[88] In late 2020, the Ombudsman responded to these concerns and suggestions and launched an inquiry triggering further accountability dialogues with Frontex, the FRO, the EP and other stakeholders, notably human rights NGOs.[89]

Internally, accountability dialogues may also take place between the Consultative Forum, the Management Board and the FRO. The Management Board is responsible for taking the strategic decisions of the agency and also appoints the Executive Director.[90] With regard to the Forum, the Management Board decides on its composition and the terms of the transmission of information to the Forum. The Board may also consult the Forum on any matter related to fundamental rights.[91] The interaction between the Forum and the Management Board is limited. While the chair of the Management Board usually attends the meetings of the Forum and receives the recommendations made by the Forum to the Board, several Forum members have been concerned that the Board has not been interested in a meaningful dialogue but rather in protecting established border practices.[92] Some Forum members have even stated that the Management Board "doesn't care" what the Forum thinks.[93] This lack of dialogue is also reflected in some Forum members' view that it is unclear if or how the Board has responded to the recommendations of the Forum.[94]

By contrast, the FRO and other members of the Consultative Forum are in a more constructive dialogue about how to promote Frontex's fundamental rights approach.[95] Com-

[87] See S Carrera and M Stefan, 'Complaint Mechanisms in Border Management and Expulsion Operations in Europe: Effective Remedies for Victims of Human Rights Violations?' (Working Papers 2018) Centre for European Policy Studies www.ceps.eu; C Jones, J Kilpatrick and M Gkliati, 'Deportation Union: Rights, Accountability, and the EU's Push to Increased Forces Removals' (2020) Statewatch www.statewatch.org 52.

[88] Interview 3 and 4 in the annex of this *Article*; Consultative Forum, *Fifth annual report* cit. 22; Consultative Forum, *Sixth annual report* cit. 21ff.

[89] European Ombudsman, *Ombudsman Opens Inquiry to Assess European Border and Coast Guard Agency (Frontex) 'Complaints Mechanism'* (2020) www.ombudsman.europa.eu; European Ombudsman, *Letter from the European Ombudsman to the European Border and Coast Guard Agency (Frontex) Concerning its Complaints Mechanism* (2020) www.ombudsman.europa.eu.

[90] Art. 100 of the Regulation 2019/1896 cit.

[91] Art. 108(1) and (2) of the Regulation 2019/1896 cit.

[92] Interview 2, 8, 10,11 and 13 in the annex of this *Article*.

[93] Interview 10 and 11 in the annex of this *Article*.

[94] Interview 2 and 4 in the annex of this *Article*.

[95] Interview 2, 3, 4, 6, 9 and 13 in the annex of this *Article*.

pared to the Consultative Forum, the FRO has a much more privileged position within Frontex and plays a crucial role in the internal complaint mechanism.[96] There is, however, widespread concern that the FRO has difficulties living up to its potential mainly due to limited resources.[97] Hence, the Consultative Forum has repeatedly pointed out that the FRO should be better resourced, which also reflects its importance for the Forum as well as the good working relationship between the two bodies.[98] The FRO assists the Forum in navigating the information flow and refers it to relevant issues such as complaints or serious incident reports. Without this assistance, the Forum would often be unable to identify or process fundamental rights-relevant cases.[99] Conversely, Forum members provide the FRO with their own expertise on certain issues (return policy; vulnerable groups) and with reports that include relevant information about certain countries.[100]

IV.4. Social accountability

This type of accountability deals with the relationship between Frontex and human rights groups, relevant stakeholders or even the public at large. Prior to the establishment of the Consultative Forum, numerous human rights groups monitored the fundamental rights implications of Frontex activities and did so relatively independently. However, since the activities of these fora have not been clearly demarcated from each other, the institutionalisation of the Consultative Forum could have paved the way for a more coherent and authoritative form of social accountability.[101] However, Forum members have complained that they have insufficient resources (*e.g.* lack of their own secretariat)[102] and time available to cope with the Forum's workload.[103] As one Forum member put it: "NGOs are usually overwhelmed by their own work and projects without having the capacity to

[96] Art. 99 of the Regulation 2019/1896 cit.; art. 109(2)(b) of the Regulation 2019/1896 cit. One interviewee noted: the FRO can "monitor whatever and wherever she wants" (Interview 2 in the annex of this *Article*).

[97] *E.g.* International Commission of Jurists, ECRE and Amnesty International, 'Joint Briefing on the European Border and Coast Guard Regulation' (April 2016) www.ecre.org 6. At the same time, the Consultative Forum can be invited to visit Frontex Joint Operations, see e.g. Consultative Forum, *Third annual report. Frontex Consultative Forum on Human Rights 2015* op.europa.eu 15 ff.

[98] Interview 2, 3, 4, 6, 9, 10 and 13 in the annex of this *Article*; Consultative Forum, *Fifth Annual Report. Frontex Consultative Forum on Human Rights 2017* cit. 22; Consultative Forum, *Sixth Annual Report Frontex Consultative Forum on Human Rights 2018* cit. 21 ff.

[99] Interview 3, 4 and 6 in the annex of this *Article*. Frontex's reluctance to disclose documents to the Forum does not only apply to sensitive information but is also induced by the agency's concern not to upset member states, see Interview 2 in the annex of this *Article*.

[100] Interview 3 in the annex of this *Article*.

[101] M Bovens, 'Analysing and Assessing Accountability' cit. 457.

[102] The secretariat of the Consultative Forum is provided by the FRO, see art. 109(h) of the Regulation 2019/1896 cit.

[103] Interview 13 and 5 in the annex of this *Article*.

do much more".[104] In addition, they often lacked the information and knowledge expertise to hold Frontex accountable. While EASO, FRA and the UNHCR had working relations with Frontex prior to the establishment of the Consultative Forum and were therefore familiar with the agency, many of the NGOs struggled to develop an adequate understanding of the agency.[105] In the early years, Frontex was particularly unwilling to enter into a meaningful dialogue with the Consultative Forum and share internal documents with its members. While this has improved recently, Forum members have suggested that Frontex should be more proactive when it comes to providing the Forum with relevant information about border operations.[106]

Interestingly, another Forum member complained not about the lack of information, but about the "inflation of information"[107] and the flow of unedited documents that are sometimes conflicting, redundant or confusing. This poses a serious challenge for Forum members who are struggling with their limited resources. At times, the FRO has assisted them in browsing these documents and pointing to relevant issues.[108] Notwithstanding these constraints, Forum members have highlighted that their presence and regular involvement in Frontex's affairs have strengthened their dialogue with the FRO which often serves as a mediator between other Forum members and Frontex. Moreover, it also facilitated the dialogue among Forum members whose various expertise provided an opportunity for mutual learning and networking.[109] They acknowledged that at the beginning of the Forum's establishment "we mainly focused on learning how Frontex actually works [...] what are the main legal implications of Frontex's activities [...] and figure out how the Forum can have an impact to improve training and practices suitable to the agency".[110] Here, the "excellent working relations"[111] and mutual support within the Consultative Forum have also partly mitigated the problems of the heavy workload and the sometimes uncooperative and indifferent attitude of Frontex officials.

Over time, Forum members have gained a deeper understanding of what Frontex "does do and does not do"[112] and a more nuanced grasp of fundamental rights challenges in border control.[113] While this evidence may support the view that the establishment of the Consultative Forum has enhanced the social accountability of Frontex, the institutionalisation of a dialogue between Frontex and human rights NGOs can also be

[104] Interview 1 in the annex of this *Article*.
[105] Interview 2 in the annex of this *Article*.
[106] Interview 1, 2 and 4 in the annex of this *Article*.
[107] Interview 2 and 12 in the annex of this *Article*.
[108] Interview 10 in the annex of this *Article*.
[109] Interview 2, 3, 4, 5 and 6 in the annex of this *Article*.
[110] Interview 1 in the annex of this *Article*.
[111] Interview 4 in the annex of this *Article*.
[112] Interview 2 in the annex of this *Article*.
[113] Interview 1 and 2 in the annex of this *Article*.

regarded as more ambivalent. In fact, the Forum's annual reports are basically the only tool through which the Forum communicates with the general public. As one Forum member put it: "the annual report is our moment of accountability".[114] At the same time, the annual reports are also forwarded to the Executive Director and Management Board as well as to lower levels within the Frontex organization.[115] While the publication of the annual reports has the potential to contribute to the public dialogue about fundamental rights, it also commits Forum members to working long hours to reach a mutual consensus on the wording of a specific recommendation.[116] Some Forum members have observed that the institutionalised involvement in the Consultative Forum nudges them towards "less confrontational" and more diplomatic behaviour towards Frontex which may even compromise the overall goal of accountability.[117]

V. Conclusions

Frontex has been and still is criticized for its lack of accountability with regard to fundamental rights protection. As one of the means to address this critique, the EU legislators established a Consultative Forum that should assist the agency in enhancing its accountability. Being an advisory body, the Consultative Forum cannot be regarded as a viable alternative to sound political and legal accountability. The Forum itself has stated that it merely complements the role of the FRO and cannot replace the "necessary oversight by stakeholders such as the European Parliament, national parliaments, national human rights institutions, civil society and the judiciary".[118] The creation of the Consultative Forum can be conceived as an institutionalised involvement of relevant international organisations and NGOs in the field of fundamental rights. It provides an opportune structure for constant dialogue between Frontex and the political, administrative or social accountability fora of Frontex and serves as a communication facilitator between the various fora themselves. However, the challenges for the Consultative Forum in contributing to holding Frontex to account are manifold ranging from limited access to internal documents, insufficient resources and the lack of any formal power with regard to fundamental rights violations. As a result, the Forum has to resort to legally non-binding reporting and informal advocacy both inside and outside of Frontex.

Relying on their status as a formal component of the Frontex institutional architecture, Forum members must use their expertise and reputation to raise relevant fundamental rights concerns that emerge in the context of Frontex's activities. The analysis of

[114] Interview 1 in the annex of this *Article*.
[115] Interview 2 in the annex of this *Article*.
[116] Interview 7 in the annex of this *Article*.
[117] Interview 10 and 13 in the annex of this *Article*.
[118] Consultative Forum, *Seventh annual report* cit.

the empirical data showed that it remains difficult for them to assess to what extent Frontex follows the advice of the Forum and complies with its recommendations.[119] In many cases, Frontex has denied access to documents that have been requested by the Forum or – as the Hungarian case demonstrated – has rejected the recommendation to suspend a specific border operation due to fundamental rights concerns. This uncooperative and sometimes even confrontational stance on the part of Frontex has made it difficult for the Forum to have a relevant impact on the agency's activities. Moreover, insufficient resources in terms of personnel, time and administrative support have also hampered the impact of the Consultative Forum on Frontex's accountability with regard to fundamental rights. Despite these difficulties, we observed that the Consultative Forum has the potential to strengthen the accountability dialogues between Frontex and the fora but also among the various fora themselves. Due to its formal status as an advisory body, Forum members get privileged access to documents and powerful stakeholders. With regard to administrative accountability, the excellent working relations between the Forum and the FRO can serve as a case in point here. While the FRO has assisted the Forum to navigate the information flow, thereby helping to reduce the information deficit of many Forum members, the Forum, conversely, has offered its expertise in certain areas (*e.g.* return, vulnerable groups) or has publicly raised its concerns about the FRO's insufficient resources in several annual reports. In this vein, it can be expected that the 2020 establishment of 40 fundamental rights monitors under the lead of the FRO will in turn also benefit the work of the Forum. Considering Frontex's political accountability, there was no indication that the Consultative Forum has led to a fundamental improvement in that regard.

However, and similarly with regard to administrative accountability, the formal status of the Forum has provided an opportunity for the EP, notably the LIBE committee, to invite members of the Forum to discuss fundamental rights issues. These meetings have not only strengthened the power of the EP to hold Frontex to account, they have also improved Frontex's social accountability. By offering NGOs in their capacity the opportunity to enter into a regular dialogue with relevant MEPs, the creation of the Consultative Forum has also enhanced the capacity for NGOs to hold Frontex accountable. The lack of an independent and meaningful legal review mechanism is still the weakest point in Frontex's accountability framework. However, the privileged access to documents and stakeholders may increase the knowledge but also the confidence of the Forum to include relevant evidence in its annual reports that may in turn be used in legal proceedings. While we do not want to argue that this serves as a substitute for a full and proper legal review, the Consultative Forum may nonetheless be regarded as an opportunity to enter into a dialogue with courts, which may slightly improve Frontex's legal accountability. To

[119] As said, the 2019 Regulation includes a new provision that obliges Frontex to inform the Forum of the follow-up to its recommendations, see art. 108(3) of the Regulation 2019/1896 cit. It remains to be seen, though, how this provision will be implemented.

conclude, we have shown that the work of the Forum can be regarded as a positive, albeit modest, step towards strengthening the accountability of Frontex.

Annex: List of interviews

No.	Organization	Date of interview	Code
1	International NGO 1	21 June 2019	Interview 1
2	European Agency 1	29 August 2019	Interview 2
3	European Agency 2	28 November 2019	Interview 3
4	International NGO 2	11 December 2019	Interview 4
5	European Agency 2	15 January 2020	Interview 5
6	International NGO 3	16 January 2020	Interview 6
7	International NGO 4	27 January 2020	Interview 7
8	International NGO 5	31 January 2020	Interview 8
9	International NGO 6	15 April 2020	Interview 9
10	International NGO 7	4 May 2020	Interview 10
11	International Organization 1	5 May 2020	Interview 11
12	International Organization 1	5 May 2020	Interview 12
13	International Organization 2	13 May 2020	Interview 13

ARTICLES

THE EU'S SHIFTING BORDERS RECONSIDERED: EXTERNALISATION, CONSTITUTIONALISATION, AND ADMINISTRATIVE INTEGRATION

edited by Evangelia (Lilian) Tsourdi, Andrea Ott *and* Zvezda Vankova

FUNDAMENTAL RIGHTS VIOLATIONS IN THE HOTSPOTS: WHO IS WATCHING OVER THEM?

SARAH TAS*

ABSTRACT: The European Commission introduced the EU 'hotspot' approach in its European Agenda on Migration (2015). The objective of that approach was to provide operational support on the ground to Member States under particular and disproportionate migratory pressure at their external borders. These centres are put in place in a sensitive environment significantly affecting fundamental rights. Criticism rapidly arose from various UN bodies, civil society organisations and scholars as to the violations of fundamental rights occurring in the hotspots. The present *Article* analyses the role of five European monitoring mechanisms, being the European Commission, the European Parliament, the European Ombudsman, the Fundamental Rights Agency, and the Agencies' internal monitoring mechanisms. The analysis shows that the various mechanisms are insufficient to monitor the complex environment of the hotspots. It becomes clear that it is essential to enhance political and social monitoring mechanisms to ensure an efficient protection of fundamental rights in the hotspots.

KEYWORDS: hotspots – fundamental rights violations – monitoring – European institutions – Fundamental Rights Agency – internal mechanisms.

* PhD Researcher in European Law, European University Institute, sarah.tas@eui.eu.

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I. Introduction

"Is this the Europe that says it protects human rights? Where we came to seek protection?" asked Abdallah, a migrant from Sudan.[1] "There is no peace, no safety, no dignity in Moria. It's worse than jail. We are not treated as belonging to society, as human beings," described Roula, a Syrian mother of two children.[2] "I can't handle this. Sometimes I think it would have been better to have been killed in Afghanistan" claimed an Afghan woman.[3]

A swathe of similar accounts attests to the deplorable conditions of the hotspots in Greece and in Italy, and the violation of fundamental rights occurring in them. Incoming migrants entering the European Union (EU) through Greece or Italy are held in hotspots that are reception centres. These have been created as an immediate response to help border controls and deal with the migratory pressure in these two Member States (MS).[4] The approach was recommended by the European Commission in 2015, in the European Agenda on Migration,[5] and later implemented in Greece and in Italy, with five reception centres set up in Greece (Lesvos, Chios, Samos, Leros and Kos) and four in Italy (Taranto, Messina, Pozzallo and Lampedusa).[6] As the challenges to fundamental rights in these centres proliferate, the need for their rigorous monitoring is enhanced.[7]

The present *Article* seeks to ascertain whether efficient monitoring mechanisms have been put in place to watch over the hotspots in Greece and in Italy, and particularly over the fundamental rights violations occurring in them.

In that regard, the *Article* will not focus on the judicial review of these operations, namely by national courts, the Court of Justice of the EU and the European Court of Human Rights, nor on the possibilities of administrative reviews of potential violations. Whilst Cornelisse and Moraru offer in their *Article* a more optimistic approach to judicial oversight, notably with regards children rights, the same cannot be seen in this area.[8] In

[1] Amnesty International, *Hotspot Italy: How EU's Flagship Approach Leads to Violations of Refugee and Migrant Rights* (1 November 2016) www.amnesty.org.

[2] E Ćerimović, 'Asylum Seekers' Hell in a Greek Hotspot' (30 November 2017) Human Rights Watch www.hrw.org.

[3] *Ibid*.

[4] S Horii, 'Accountability, Dependence and EU Agencies: The Hotspot Approach in the Refugee Crisis' (2018) Refugee Survey Quarterly 204.

[5] Communication COM(2015) 240 final from the Commission of 13 May 2015 on a European Agenda on Migration.

[6] Fundamental Rights Agency (FRA), *Update of the 2016 Opinion of the European Union Agency for Fundamental Rights in the "Hotspots" set up in Greece and Italy of 11 March 2019* fra.europa.eu.

[7] Dutch Council for Refugees and others, *The Implementation of the Hotspots in Italy and in Greece (2016)* www.ecre.org.

[8] See in this *Special Section* G Cornelisse and M Moraru, 'Judicial Interactions on the European Return Directive: Shifting Borders and the Constitutionalisation of Irregular Migration Governance' (2022) European Papers www.europeanpapers.eu 127.

fact, the limited nature of judicial and administrative control over EU agencies and national authorities in the hotspots has been repeatedly pointed out in the literature, notably due to the composite and opaque nature of the area.[9] Thus, we must look at alternative solutions to fill this gap. By focusing on the political and social nature of monitoring actions, the *Article* intends to offer an analysis of political and social mechanisms and strategies which can be operationalized to monitor the activities of EU agencies, national authorities and other third parties in the hotspots.

In response to this question, the *Article* will start by shedding light on the hotspots approach, by showing the fragmented and complex nature of these reception centers (II). Pursuant to this, an illustration of the fundamental rights violations in the hotspots will ensue. Any attempt to control fundamental rights violations will require pre-existing knowledge of such violations. Thus, this *Article* will demonstrate how the monitoring and reporting mechanisms, whether national, European, or international are essential in enabling awareness of violations (III). Finally, a focus will be made on European institutional ways of monitoring and on five monitoring mechanisms in particular: the European Commission, the European Parliament (EP), the European Ombudsman (EO) the Fundamental Rights Agency (FRA) and Agencies' internal monitoring mechanisms (IV).

II. Shedding the light on the hotspots approach: legal framework and actors

The hotspots approach has been criticized for lacking a clear and precise framework.[10] Thus, this section intends to illuminate on the legal and policy framework of the hotspots (II.1) as well as on the actors involved (II.2).

II.1. Legal and policy framework of the hotspots

No single over-arching legal framework describing the hotspots and their management exists. Instead, various legal and policy documents mention aspects of these reception centres. Only by pulling these sources together, does a true picture of the hotspots and the role of agencies emerge. The understanding of hotspots is based on a mosaic collection of several legal and policy documents drawn from various levels.

[9] S Tas, 'Frontex Actions: Out of Control? The Complexity of Composite Decision-Making Procedures' (TARN Working Papers 3-2020); G Lisi and M Eliantonio, 'The Gaps in Judicial Accountability of EASO in the Processing of Asylum Requests in Hotspots' European Papers (European Forum Insight of 21 October 2019) www.europeanpapers.eu 589.

[10] D Neville, S Sy and A Rigon, *On the Frontline: The Hotspot Approach to Managing Migration* (European Parliament Study 2016).

a) The European level.

At the European level, the main instrument that needs mentioning is the European Commission's European Agenda on Migration of 2015.[11] It is the first instrument that mentioned the hotspots approach and the involvement of EU agencies, notably of Frontex, Europol and the European Asylum Support Office (EASO). It did not however offer a clear definition of the approach. Consequently, the Commissioner to the Justice and Home Affairs Council, Avramopoulos, adopted an explanatory note clarifying the approach: "The aim of the Hotspot approach is to provide a platform for the agencies to intervene, rapidly and in an integrated manner, in frontline Member States when there is a crisis due to specific and disproportionate migratory pressure at their external borders, consisting of mixed migratory flows and the Member State concerned might request support and assistance to better cope with that pressure".[12] This note provides greater clarity on the hotspots and describes the role of EU agencies therein.[13]

In addition, the Regulations of the EU agencies also offer some insights. Whilst the Regulation of the EASO and Europol do not mention the hotspots, they still indicate the potential functions the agencies could perform in the centres. In that regard, Chapter three of the EASO Regulation mentions for example the possibility for the agency to deploy Asylum Support Teams to MS under particular migratory pressure.[14] Europol's Regulation also clarifies Europol's involvement in the fight against migrant smuggling and human trafficking,[15] which is Europol's core function in the hotspots.[16] Finally, Frontex's Regulation mentions the hotspots and the agencies involvement through the screening, debriefing, identification and fingerprinting, and help in return operations.[17]

b) The international and national level.

At the international level, the deal agreed between the EU and Turkey on the 18 March 2016 affected in essence the functioning of the hotspots in Greece,[18] transforming them from reception centres to return and detention centres.[19] That deal sought to end irregular migration flows from Turkey to the EU.

[11] Communication COM(2015) 240 final cit.

[12] State Watch*, Explanatory note on the "Hotspot" approach* www.statewatch.org.

[13] *Ibid*.

[14] Regulation (EU) 439/2010 of the European Parliament and of the Council of 19 May 2010 on a European Asylum Support Office.

[15] Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on Europol.

[16] DF Rojo, 'An Enforcement Role for EUROPOL in the Aftermath of the "Refugee Crisis"?' (31 May 2018) EU Law enforcement eulawenforcement.com.

[17] Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard.

[18] EU-Turkey Statement of 18 March 2016, in European Council Press Release 144/16 of 18 March 2016.

[19] D A Papapanagiotou-Leza and N Garipidis, 'Implementing the "Hotspot Approach" on the Greek Islands: Legal and Operational Aspects' (2017) Diritto, Immigrazione e Cittadinanza 1.

At the national level, national rules have been adopted in Greece and in Italy to frame the establishment of their hotspots. In that regard, Italy adopted 'Standard Operating Procedures applicable to Italian hotspots' in 2015.[20] These procedures regulated the hotspots and clarified the role of the various actors in them. Greece did not adopt such operating procedures, but adopted a new legislation on the 3rd of April 2016, Law n. 4375 that not only regulated the hotspots but also implemented the EU-Turkey deal.[21]

The rules which regulate the hotspots are found in a variety of documents of different legal character deriving from different institutions. In attempting to understand the hotspots approach, one must pull from different levels of legal and political authority. This leaves the rule on hotspots fragmented, cloudy and difficult to join into a cohesive whole. Additionally, none of these documents mention the need for independent monitoring mechanisms to watch over the activities occurring in these centres. Only the Explanatory note refers to the possible function of the FRA in the hotspots, not as monitoring but as influencing EU agencies.[22]

II.2. Main actors involved in the hotspots

A variety of actors can be involved at one stage or another in the hotspots in Greece and in Italy. For this *Article*, it is unnecessary to examine in-depth the role of each actor, but basic knowledge is important.

In Greece and in Italy, national authorities and EU agencies work together and cooperate vertically and horizontally in a so-called "shared administration".[23] In fact, whilst the agencies supposedly merely assist national authorities, in practice they strongly influence them and have operational competences.[24] With regards national actors, various authorities can play a role. In Greece, for example, four national authorities participate daily in the hotspots: the Greek Asylum Service, the Hellenic Police, the Hellenic Army and the Hellenic Centre for Disease Control and Prevention.[25] In the performance of their activities, national authorities are near individuals, and as such can affect their fundamental rights at any moment. Concerning EU actors, the European Commission plays an important managing role, but it is the EU agencies that continuously assist MS in the hotspots (Frontex, EASO and

[20] Italian Ministry of the Interior, *Standard Operating Procedures Applicable to Italian Hotspots (2016)* www.libertaciviliimmigrazione.dlci.interno.gov.it.

[21] E Tsourdi, 'Bottom-Up Salvation? From Practical Cooperation towards Joint Implementation through the European Asylum Support Office' (2016) European Papers www.europeanpapers.eu 998, 1022.

[22] Communication COM(2015) Explanatory note cit.

[23] H Hofmann, GC Rowe and A Türk, *Administrative Law and Policy of the European Union* (Oxford University Press 2011) 50.

[24] DF Rojo, 'Frontex, EASO and Europol: From a Secondary to a Pivotal Operational Role in the Aftermath of the "Refugee Crisis"' (9 April 2019) Open Migration openmigration.org.

[25] Communication COM(2015) Explanatory note cit.

Europol).[26] Frontex is the agency that deploys the most personnel.[27] It offers technical and operational support by providing assistance in the screening of incoming migrants, by providing initial information and by helping in the return operations.[28] Its tasks can affect fundamental rights and influence Greek officials in their decision-making.[29] EASO can offer technical and operational support to national authorities by helping with the asylum applications.[30] In Greece, the agency is expressly involved in the registration and admissibility interviews of asylum seekers, thereby exceeding its classical role as envisaged by its Regulation.[31] Finally, Europol has strong operational powers in the hotspots ranging from conducting secondary security checks of suspicious individuals to fast-tracking information exchange and assisting in debriefing arriving migrants.[32]

In addition, international organizations and non-governmental organizations (NGOs) play a role in the hotspots. The United Nations High Commissioner for Refugees (UNHCR) and the International Organization for Migration (IOM) are present in Greece and in Italy,[33] namely to provide accommodation, assistance, and information.[34] NGOs will also be on the field to provide services to incoming migrants, such as medical help or education. The tasks carried out by the various actors mentioned engage fundamental rights and thus demand efficient monitoring.

III. The fundamental rights violations in the hotspots and their reporting

The media and particularly, national, European, and international bodies have reported on the critical situations of migrants within the hotspots (III.2), and the numerous fundamental rights violations that occur in them (III.1).

III.1. Which fundamental rights are being violated?

The Charter of fundamental rights (Charter) has the same legal value as the Treaties of the EU and is legally binding. It applies to EU institutions and EU agencies, as well as MS

[26] Communication COM(2015) 240 final cit.

[27] Dutch Council for Refugees and others, *The Implementation of the Hotspots in Italy and in Greece (2016)* cit.

[28] Regulation 2019/1896 cit.

[29] DF Rojo, 'Migration, Asylum and Border Management: the New Role of Frontex in the Aftermath of the "Refugee Crisis"' (3 April 2019) Open Migration openmigration.org.

[30] EASO, *EASO Operating Plan to Italy of December 2016* easo.europa.eu.

[31] D A Papapanagiotou-Leza and N Garipidis, 'Implementing the "Hotspot Approach" on the Greek Islands' cit. 10; E Tsourdi, 'Holding the European Asylum Support Office Accountable for its role in Asylum Decision-Making: Mission Impossible?' (2020) German Law Journal 506, 515.

[32] Europol, *Europol Review of 2016-2017* www.europol.europa.eu.

[33] *Ibid*.

[34] European Court of Auditors, *EU response to the refugee crisis: the 'hotspot' approach* www.eca.europa.eu.

implementing EU law.[35] By implementing the hotspots approach, Greece and Italy act within the scope of EU law. Consequently, EU agencies and national authorities' activities in the centers fall firmly within the scope of the Charter. Additionally, Greece and Italy are members of the European Convention on Human Rights (ECHR), they must therefore also respect this instrument.

Reports have shown that the situation in the hotspots could be characterized as inhumane. In fact, the living and reception conditions are inadequate,[36] and violence frequently occurs (whether from the police or between refugees).[37] Incoming migrants are being denied access to adequate asylum procedures and lack relevant information.[38] Consequently, as witnessed in the hotspots of Greece and Italy, the following fundamental rights are generally the most susceptible to violation: the right to human dignity, the prohibition of torture and inhuman or degrading treatment, the prohibition of trafficking in human beings, the right to liberty and security, the respect for private and family life, the right to asylum, the right to equality and non-discrimination, the rights of the child and of the elderly, the right to good administration and finally the right to an effective remedy and to fair trial.[39]

The situation on the hotspot is constantly shifting and varies between different locations and times. In Greece for example, the situation worsened after the EU-Turkey Statement[40] and it has more recently been exacerbated by the Covid-19 pandemic. The EU-Turkey deal prescribed the return to Turkey of new arrivals who were yet to request asylum or whose applications were inadmissible. However, this deal could only be implemented if Greece ceased transfers from individuals on the islands to the mainland.[41] Thus, individuals faced generalized detention followed by a geographical restriction on the island[42] which consequently lowered their basic fundamental rights protection.

The Covid-19 pandemic further deteriorated the already precarious situation of refugees. As described above, hotspots, such as the Moria hotspot, are overcrowded, ill-equipped and unhygienic,[43] and health measures mandated by each national government

[35] Art. 51 of the Charter of Fundamental Rights of the European Union [2012].

[36] Dutch Council for Refugees and others, *The Implementation of the Hotspots in Italy and in Greece (2016)* cit.

[37] G Matevžič, *Crossing a Red Line. How EU Countries Undermined the Right to Liberty by Expanding the Use of Detention of Asylum Seekers upon Entry: Case Studies on Bulgaria, Greece, Hungary and Italy* (Hungarian Helsinki Committee 2019).

[38] E Ćerimović, 'Asylum Seekers' Hell in a Greek Hotspot' cit.

[39] FRA, *Opinion of the European Union Agency for Fundamental Rights in the "Hotspots" set up in Greece and Italy of 29 November 2016* fra.europa.eu.

[40] EU-Turkey Statement (2016) cit.

[41] A Dimitriadi, 'Governing Irregular Migration at the Margins of Europe' (2017) Etnografia e ricerca qualitativa 75.

[42] E Takou, 'The Implementation of the "Hotspot Approach" and the EU-Turkey Statement in Greece: a Crisis Contained, But Not Over' (12 November 2017) Human Rights 360 www.humanrights360.org.

[43] *Ibid*.

are impossible to respect in camps.[44] In addition, NGOs were forced to suspend their operations, which can significantly affect the lives of migrants in the reception centres.[45]

III.2. Who monitors and reports on these violations? A multi-level approach

To know the existence and content of fundamental rights violations, it is imperative that reports are made. Reports continue to be published on the national, European, and international level, pursuant to the multi-level approach regulating the hotspots, its framework, and its actors.

At the European level, various institutions offered detailed reports on the hotspots and violations of fundamental rights occurring therein. Five European monitoring mechanisms can be mentioned: the European Commission, the EP, the European Court of Auditors, the FRA and the Consultative Forums (CF). The European Court of Auditors for example highlighted fundamental rights violations in its reports, notably linked to the overcrowding of the centres.[46] The European Commission has a constant presence on the field and plays the role of manager and monitor of these centres. In its monitoring function, it publishes various reports on the "Implementation of the European Agenda on Migration" and on the "Implementation of the hotspots".[47] The EP also conducted numerous visits on the field and published Missions Reports about the hotspots in Italy,[48] and in Greece,[49] where it also pointed out the inadequate living conditions and other fundamental rights violations occurring in the centres. The FRA also published two reports, one in 2016,[50] and an update of it in 2019[51] that solely focused on the fundamental rights challenges. The EO also conducted own-initiative inquiries on Frontex, and notably on the agency's compliance with human rights standards, and the role of the Fundamental Rights Consultative Forum and Officer.[52] Finally, CF of EU agencies specifically report on the agency's role in the hotspots.[53]

[44] S Tas, 'The Institutional Response to the COVID-19 Pandemic in the Greek Hotspots: Sufficient to Stave off a Disaster?' (31 May 2020) EU Law Enforcement eulawenforcement.com.

[45] *Ibid*.

[46] European Court of Auditors, *EU response to the refugee crisis: the 'hotspot' approach* cit.

[47] Communication COM(2018) 301 final from the Commission of 16 May 2018 on the progress report on the implementation of the European Agenda on Migration.

[48] European Parliament Mission Report of 12 June 2017 following the mission to Italy of 18-21 April 2017, Committee on Civil Liberties, Justice and Home Affairs.

[49] European Parliament Mission Report of 30 June 2017 following the LIBE mission to Greece hotspots and Athens 22-25 May 2017, Committee on Civil Liberties, Justice and Home Affairs.

[50] FRA, *Opinion of the European Union Agency for Fundamental Rights in the "Hotspots" set up in Greece and Italy of 29 November 2016* cit.

[51] FRA, *Update of the 2016 Opinion of the European Union Agency for Fundamental Rights in the "Hotspots" set up in Greece and Italy of 11 March 2019* cit.

[52] European Ombudsman Special Report OI/5/2012/BEH-MHZ in own-initiative inquiry concerning Frontex of 07 November 2013.

[53] Frontex, *Frontex Consultative Forum on Fundamental Rights Seventh Annual Report (2019)* frontex.europa.eu.

Out of these European mechanisms, four will be subject to an in-depth study in Part four of this *Article*.

Monitoring on a national level can be performed either by national Parliaments and national officials, or by independent national fundamental rights monitoring bodies and NGOs. National Parliaments were for example invited to conduct visits to the hotspots in Italy and in Greece to report back on the situation in these MS.[54] National fundamental rights monitoring bodies, such as the Greek National Commission for Human Rights (GNCHR) for example monitored the fundamental rights protection in the Greek hotspots.[55] It reported on the fundamental rights challenges linked to the deprivation of liberty as well as the detention measures taken in Greece.[56] Finally, NGOs are also important reporting actors, since they are in principle independent and have no strategic or political interest in the hotspots.[57]

On the international level, international NGOs can report on the situation, such as Amnesty International,[58] as well as bodies of the Council of Europe, such as the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), the Commissioner for Human Rights and the Group of Experts on Action against Trafficking in Human Beings (GRETA). The CPT for example visited the hotspots in Chios, Lesvos and Samos in Greece in July 2016 to report on the situation in these centers.[59]

By way of summary, the table below offers a non-exhaustive list of the various monitoring and reporting mechanisms that exist at the European, national, and international levels. The reporting and monitoring mechanisms operating at each level serve to elucidate the extent of the fundamental rights challenges in the hotspots and to raise awareness of the fundamental rights violations occurring therein.

European mechanisms	National mechanisms	International mechanisms
European Commission European Parliament Fundamental Rights Agency European Court of Auditors European Ombudsman Consultative Forums	National Parliaments National fundamental rights bodies (Greek National Commission for Human Rights…) National NGOs (Danish Council for Refugees…)	NGOs (Amnesty International, *Médecin Sans Frontières*…) Council of Europe instruments: the European Committee for the Prevention of Torture, the Commissioner for Human Rights… UN Special rapporteur

TABLE 1: European, national and international reporting and monitoring mechanisms.

[54] D Neville, S Sy and A Rigon*, On the Frontline* cit.

[55] Greek Council for Refugees, *Greece Country Report: Reception and identification procedure*' asylumineurope.org

[56] The Greek National Commission for Human Rights, *Statement: The GNHCR expresses its deep concerns about the situation in the Reception Centers of Eastern Aegean Islands* www.nchr.gr.

[57] Dutch Council for Refugees and others, *The Implementation of the Hotspots in Italy and in Greece (2016)* cit.

[58] Amnesty International, *Hotspot Italy* cit.

[59] Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *The CPT visits "hotspots" in Greece from 19-25 July 2016 of 26 July 2016* www.coe.int.

IV. Focus on the European monitoring mechanisms

The section will consider the four main EU institutions and bodies that are involved in the monitoring of the EU hotspots approach: the European Commission (IV.1), the EP (IV.2), the EO (IV.3) and the FRA (IV.4), as well as internal monitoring mechanisms in place within the EU agencies (IV.5). Although understudied, these monitoring mechanisms are interesting to analyse. The role of the Court of Auditors will not be developed here since it mainly concerns the financial and administrative aspects of the hotspots.

IV.1. A contradictory monitoring role of the European Commission

The European Commission has a coordinating and monitoring role in the hotspots. As guardian of the Treaties, it must ensure that the EU hotspot approach is implemented and managed in line with EU law and protects fundamental rights. This dual role of both management and oversight places the Commission in a delicate position. In addition to its reporting role, mentioned above, the Commission issues recommendations on the implementation of the hotspots approach.

a) The Commission's negative influence in Italy and in Greece.

With regards to Italy, at the end of 2015 the Commission published the "Progress Report on the Implementation of the hotspots in Italy" in which it pointed out what still needed to be done.[60] Amongst its recommended measures, some served to protect fundamental rights: the need to increase the medical presence and the reception conditions, as well as to improve the transfer systems to the mainland. Others, however, undermined their protection. The Commission requested the Italian authorities to adopt legislation authorizing "[...] the use of force for fingerprinting and to include provisions on longer term retention for those migrants that resist fingerprinting".[61] However, it seems hard to believe that that the use of force to obtain fingerprints can ever be justified. In fact, the FRA stated in its report that the use of physical or psychological force may result in the violation of the prohibition of torture and inhuman or degrading treatment, as well as the right to human dignity.[62]

The objective in the hotspots is to ensure a 100 per cent fingerprint rate for incoming migrants into the European Asylum Dactyloscopy Database (Eurodac). Following Italy's failure to do so, the Commission opened an infringement procedure against Italy, but also Greece, for violation of the Eurodac Regulation.[63] However, the Commission did not

[60] Communication COM(2015) 697 final cit.

[61] *Ibid*.

[62] FRA, *Fundamental rights implications of the obligation to provide fingerprints for Eurodac of 22 October 2015* fra.europa.eu.

[63] European Commission *Implementing the Common European Asylum System: Commission escalates 8 infringement proceedings of the 10 December 2015* ec.europa.eu.

have to go beyond the first step of the infringement procedure; after sending out letters of formal notice, both MS reached the 100 per cent fingerprinting rate.

Whilst Italy did not change its legislation, it has been reported that coercion and force were used to obtain fingerprints, as requested by the Commission.[64] Amnesty International and the FRA reported and interviewed victims of supposed excessive use of force,[65] allegedly at least 24 individuals.[66] That use of force ranged from severe beatings to infliction of electric shocks and sexual humiliation, violations that should not been taken lightly.[67] As of today, no new cases of excessive use of force have been noted, neither in Italy nor Greece.[68] Despite this, the fact remains that the Commission encouraged MS to take an approach that goes against the basic protection of fundamental rights. It prioritized the implementation of EU law and the Eurodac Regulation over the protection of fundamental rights, and its managing role over its monitoring role.

In Greece, the Commission's negative influence relates to the EU-Turkey deal - a political decision adopted by the MS. Thus, whilst the Commission was not party to the agreement, it regularly reports on the implementation of the statement,[69] and influenced it through the adoption of the EU "safe countries of origin" list.[70] The EU put Turkey on this list at a time where national countries did not recognize Turkey as a "safe" country (with the exception of Bulgaria). Thus, initially, the Greek asylum appeal bodies disagreed with Turkey being considered safe and rejected the sending back of asylum seekers.[71] Nevertheless, since the implementation of the deal, Greece has returned more than 300 individuals to Turkey, having been at least indirectly influenced by the Commission. Whilst this decision does not affect the hotspots as such, in sending back individuals to a country that does not respect fundamental rights, the national authorities are themselves violating fundamental rights.[72]

[64] Communication COM(2015) 697 final cit.

[65] FRA, *Opinion of the European Union Agency for Fundamental Rights in the "Hotspots" set up in Greece and Italy of 29 November 2016* cit.

[66] Amnesty International, *Hotspot Italy* cit.

[67] *Ibid*.

[68] FRA, *Update of the 2016 Opinion of the European Union Agency for Fundamental Rights in the "Hotspots" set up in Greece and Italy of 11 March 2019* cit.

[69] European Commission, *Factsheet of 4 October 2016 Managing the Refugee Crisis, EU-Turkey Statement* reliefweb.int.

[70] Communication COM(2015) 452 final from the Commission of 9 September 2015 on the proposal for a Regulation of the European Parliament and of the Council establishing an EU common list of safe countries of origin for the purpose of Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection and amending Directive 2013/32/EU.

[71] S Carrera, 'An Appraisal of the European Commission of Crisis: Has the Juncker Commission Delivered a New Start for EU Justice and Home Affairs?' (CEPS Working Papers 2018).

[72] E Roman, T Baird and T Radcliffe, 'Why Turkey is Not a "Safe Country"' (February 2016) Statewatch www.statewatch.org.

b) The Commission's more positive impact in its response to Covid-19.

The European Commission actively participated in the response to the Covid-19 pandemic, and in this regard, it positively impacted the situation of refugees in the hotspots in two ways.

First, the Commission took an active stand with regards to the right to asylum. This was exemplified when, during the pandemic, the Greek authorities decided to suspend the right to asylum. In response, Commissioner for Home Affairs Ylva Johansson stated that "Individuals in the European Union have the right to apply for asylum. This is in the treaty; this is in international law. This we can't suspend."[73] The Commission thus published in April 2020 a "Guidance on the implementation of relevant EU provisions in the area of asylum and return procedures and on resettlement".[74] The aim of this guidance was to support MS in ensuring continuity of asylum and return procedures to the extent possible, and ensuring the full protection of people's health and fundamental rights in compliance with the Charter.[75] In this regard, the Commission tried to safeguard the fundamental rights of refugees in extraordinary circumstances and to positively impact the hotspots. Greece, however, continued to suspend its Asylum services until the 15th of May on grounds of public health, thereby ignoring the Commission's recommendations.[76]

Second, the Commission stressed the need for enhanced solidarity in times of a global health pandemic. It pointed out the need to continue resettlement activities, highlighting the need for greater solidarity and increased relocation to decongest the hotspots.[77] Thus, it is closely working with MS in order to offer support and assist in the relocation of more refugees. In addition, it also provided reception centres with health materials and financial support of 350 million euros. These measures aim at preventing potential fundamental rights violations and can be considered as positive measures taken by the Commission.

[73] ECRE, *Violations Continue in Greece, EU Says Asylum Procedures Cannot be Suspended* (13 March 2020) ECRE www.ecre.org.

[74] Communication COM(2020) 2516 final from the Commission of 16 April 2020 on COVID-19: Guidance on the implementation of relevant EU provisions in the area of asylum and return procedures and on resettlement.

[75] *Ibid*.

[76] S Tas, 'The Institutional Response to the COVID-19 Pandemic in the Greek Hotspots' cit.

[77] *Ibid*.

IV.2. An insufficient democratic oversight from the European Parliament?

The EP enjoys its classical role of democratic oversight of EU institutions and agencies. The added value is that it can monitor the role of the EU agencies and of the European Commission. Oversight of the EP can be done through oral and written questions,[78] from the right to information and reports from other EU institutions and bodies, and through visits.[79]

a) The EP's visits on the field.

The Committee on Civil Liberties, Justice and Home Affairs of the EP went on a mission to Greece and to Italy to visit the hotspots and exchange information with the relevant actors. During its mission in Italy for example, they visited the hotspot in Pozzallo and met with EU agencies at the EU Regional Task Force (EURTF).[80] In Greece, the delegation visited the hotspots in Kos and Lesvos.[81] There, the delegation engaged in informal discussions with the representatives of organizations active in the hotspots and received explanations on their work.

The work done by the Committee is helpful for the EP as it sheds light on what still needs to be revised at the European level. In this respect, the delegation confirmed the need to revise EU asylum legislation, to accelerate relocation and family reunification and to increase the protection granted to vulnerable individuals.

These visits are however limited and strategically maneuvered, prepared and controlled by national authorities. During the mission in Greece for example, the delegation could not visit the hotspot on Samos and Chios, that are to date important camps frequently criticized for fundamental rights violations.[82] The cited reason being that the islands were having "ongoing construction works".[83] Due to this, we cannot be certain that the delegation grasped the full picture and challenges of the Greek hotspots. Additionally, it failed to interview all important actors in the hotspots, such as Europol in Greece[84] and FRA in Italy.[85] Consequently, whilst it is an organ that could have a significant monitoring role and influence on the hotspots, its role is in fact very limited and its impact unclear. Additionally, reports are not being made frequently enough and considering the dynamism of the sector it would benefit from regular assessments.

[78] N Font and I P Duran, 'The European Parliament Oversight of EU Agencies Through Written Questions' (2016) Journal of European Public Policy 1349.

[79] H Hofmann, GC Rowe and A Türk, *Administrative Law and Policy of the European Union* cit.

[80] European Parliament Mission Report of 12 June 2017 following the mission to Italy cit.

[81] European Parliament Mission Report of 30 June 2017 following the LIBE mission to Greece hotspots and Athens cit.

[82] FRA, *Update of the 2016 Opinion of the European Union Agency for Fundamental Rights in the "Hotspots" set up in Greece and Italy of 11 March 2019* cit.

[83] European Parliament Mission Report of 30 June 2017 following the LIBE mission to Greece hotspots and Athens cit.

[84] *Ibid*.

[85] European Parliament Mission Report of 12 June 2017 following the mission to Italy cit.

b) The commissioning of reports.

The EP can commission reports from two important bodies. First, it commissioned reports and research papers from the Policy Department for Citizen' Rights and Constitutionals Affairs on the hotspots approach. These reports intend to provide independent expertise on the topic to support the EP in its exercise of democratic scrutiny.[86] They do not however "represent the official position of the European Parliament" and are thus an addition to the EP's traditional monitoring role.

Second, it commissioned reports from the FRA. In fact, it is the EP that requested the FRA to submit its first opinion on the fundamental rights situation in the hotspots.[87] It is also the institution that requested the FRA to update its opinion of 2016.[88] Thus, whilst the EP has a limited monitoring role with an unclear impact,[89] it remains the initiator of further protection and monitoring of fundamental rights offered by a decentralized body of the EU, the FRA.

c) Towards a more active stance: adoption of a Resolution and the monitoring of Frontex.

The EP did, however, adopt a more active stance with regards to Covid-19 and, more recently, Frontex. When Covid-19 hit the EU, the EP tried to promote discussion by sending a letter to the Commissioner for Crisis management,[90] and by organizing a Meeting with the Committee on Civil Liberties, Justice and Home Affairs in which the Greek situation was discussed with relevant stakeholders. In addition, it adopted a Resolution on "EU coordinated action to combat Covid-19 pandemic and its consequences" in April 2020 in which it referred to the Greek hotspots.[91] Due to the lack of adequate health care, the EP urged for solutions to be taken such as "the preventive evacuation and relocation of population at high risk".[92] It also emphasized the duty of MS to protect fundamental rights and European asylum law, and as such tried to positively impact the situation of refugees in the hotspots.[93]

In addition, the EP recently decided, in response to widespread heavy criticism towards Frontex, to set up a Frontex Scrutiny Working Group that would investigate allegations on violations of fundamental rights committed by Frontex. Their work will focus on the

[86] D Neville, S Sy and A Rigon*, On the Frontline: The Hotspot Approach to Managing Migration* cit.

[87] FRA, *Opinion of the European Union Agency for Fundamental Rights in the "Hotspots" set up in Greece and Italy of 29 November 2016* cit.

[88] FRA, *Update of the 2016 Opinion of the European Union Agency for Fundamental Rights in the "Hotspots" set up in Greece and Italy of 11 March 2019* cit.

[89] E Collet and C Le Coz, *After the Storm: Learning From the EU Response to the Migration Crisis* (Migration Policy Institute Europe 2018) 1, 36.

[90] European Parliament, Letter of 23 March 2020 from Janez Lenarčič Commissioner for Crisis Management, IPOL-COM-LIBE D(2020)1153 www.europarl.europa.eu.

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

[92] *Ibid*.

[93] S Tas, 'The Institutional Response to the COVID-19 Pandemic in the Greek Hotspots' cit.

agency's role in the illegal pushbacks on the Greek coast, as well as more generally the functioning of Frontex, their compliance with fundamental rights and accountability to the European Parliament.[94] The scope of the inquiry will however be limited, in the sense that it will not specifically focus on the situation of the hotspots, and that it excludes for example the role of important actors of the inquiry (other EU agencies, the Commission…).[95] The Working Group gathered relevant information regarding the implementation of the fundamental rights provisions as well as Frontex's activities in the Aegean Sea,[96] and published its report on the 14th of July 2021. The report showed that the agency failed to acknowledge, prevent, and reduce fundamental rights violations.[97] Thus, it came up with a list of recommendations aiming at safeguarding fundamental rights during their operations. The way these recommendations will be implemented remain, however, uncertain.

IV.3. An attempted role to self-inquire from the European Ombudsman

The EO essentially investigates complaints that are made against EU institutions, bodies, offices, and agencies. This specific function of the Ombudsman does not fall into the analysis of the *Article* since it relates to a complaint, and not to monitoring as such. However, the EO can also perform own-initiative inquiries, which give the Ombudsman a monitoring function.[98]

a) The use of own-initiative inquiry by the EO.

The EO performed several self-inquiries into Frontex. A first one in 2013 that concerned the agency's compliance with fundamental rights, and the role of the Fundamental Rights Officer and Consultative Forum, where the EO recommended the introduction of a complaint mechanisms for infringements of fundamental rights.[99] A second inquiry opened in 2020, on Frontex's complaints mechanisms and the role of the Fundamental Rights Officer, in which the Ombudsman assessed the situation and suggested several improvements. The aim was notably to increase the accessibility of the complaint's mechanisms and the accountability of the agency.[100] Finally, a third report on the meeting of the Ombudsman's inquiry team with agency's representatives, which is the only one that briefly

[94] N Nielsen, 'MEPs Agree to Mandate and Probe into Frontex' (1 February 2021) EU Observer euobserver.com.

[95] *Ibid*.

[96] ECRE, 'Frontex: One Investigation Closes as Another Begins and the Agency's Role in Return and Ability to Purchase Firearms Under Scrutiny' (5 March 2021) ECRE www.ecre.org.

[97] European Parliament LIBE Committee, Report of the 14th of July 2021 on the fact-finding investigation on Frontex concerning alleged fundamental rights violations www.europarl.europa.eu.

[98] Art. 228 TFEU.

[99] European Ombudsman Special Report OI/5/2012/BEH-MHZ cit.

[100] European Ombudsman Decision OI/5/2020/MHZ on the functioning of the European Border and Coast Guard Agency's (Frontex) complaints mechanism for alleged breached of fundamental rights and the role of the fundamental Rights Officer of 15 June 2021.

mentions the role of the Fundamental Rights Officer in the hotspots.[101] The report, however, does not go further into the agency's action in the hotspots and has thus no impact on the situation in them. Moreover, no self-inquiry is to be found on the hotspots in general, nor on the role of EASO and Europol in them.

b) Insufficient and limited attempts of monitoring.

Whilst the EO showed no fear in conducting inquiries *vis-à-vis* Frontex and other migratory aspects, the reports brought limited change to the situations in the hotspots for two reasons. The first reason is the limited scope and impact of the self-inquiry on the functioning and work in the hotspots. As pointed out above, the inquiries do not deal with the role of EASO and Europol in the hotspots, and only one inquiry on Frontex mentions the role of the agency in the hotspots. However, even this inquiry does not address the real issues in the hotspots.[102] The second reason is the limited powers of the EO. In fact, the decisions taken by the Ombudsman are not legally binding, which ultimately weakens their findings and recommendations.[103] Thus, sometimes the only option for the EO is to seek support of other bodies, such as the EP. This is precisely what Emily O'Reilly, the current Ombudsman, did after the inquiry of 2013 where Frontex rejected her recommendations.[104]

IV.4. A STRONGER ROLE FOR THE FRA

The FRA is an EU agency that was established to provide expert advice to EU institutions and agencies, but also MS on how to safeguard fundamental rights. As such, it can provide advice to the Greek and Italian authorities, as well as the EU agencies involved in the hotspots. Whilst the FRA originally has an informational function and cannot be as such considered a monitor, it did take on a monitoring role, as witnessed in the hotspots.[105]

The Explanatory Note on the hotspots approach already mentioned the role of the FRA in the implementation of the approach: "The expertise of the Fundamental Rights Agency (FRA) and its advice on how to address fundamental rights challenges can be used by all EU agencies, in line with existing bilateral cooperation agreements".[106] Thus, the FRA holds a direct and active role on the field, reporting and offering recommendations to the various actors, but also an indirect role within the internal mechanisms of EU agencies.

[101] European Ombudsman Report OI/5/2020/MHZ on the meeting of the European Ombudsman inquiry team with FRONTEX representatives of 23 March 2021.

[102] *Ibid*.

[103] M Busuioc, *European Agencies: Law and Practices of Accountability* (Oxford University Press 2013) 222.

[104] European Ombudsman Special Report OI/5/2012/BEH-MHZ cit.

[105] S Horii, 'Accountability, Dependence and EU Agencies' cit.

[106] State Watch*, Explanatory note on the "Hotspot" approach* cit.

a) An active role and presence of the FRA on the field.

As mentioned above, the FRA has issued a first report about fundamental rights in the hotspots in 2016[107] and updated it in 2019.[108] Within them, it offered various recommendations for national authorities and EU agencies to deal and respond to the current challenges. In its first opinion, the recommendations centred around five key areas: access to international protection, rights of the child, identification of vulnerabilities, safety for all persons in the hotspots and readmissions. In sum, it gave 21 recommendations to participating actors in the hotspots. In its updated opinion, it pointed out that only three of the 21 issues had been properly addressed, the others still needed improvements. The recommendations still furnish guidelines and indications to actors on how to improve the fundamental rights situation on the field. The FRA even prepared short videos on fundamental rights protection for Frontex and EASO deployed experts on the field.

Furthermore, the FRA published a focused report on the "Fundamental rights implications of the obligation to provide fingerprints for Eurodac" which comprised a compliance checklist based on fundamental rights to guide Frontex and responsible national authorities in the collection of fingerprints for Eurodac.[109] The FRA also reported on the Covid-19 pandemic and published a bulletin in this regard. In the first bulletin, the agency expressly dealt with Covid-19 and the Greek island hotspots, but only described the situation in there without providing any recommendations.[110]

Finally, the FRA is present in the EURTF in Piraeus (Greece), and sometimes in Catania (Italy). The EUTRF is established to ensure operational coordination and exchange of information between national authorities, EU agencies and other participating actors.[111] The FRA's presence within EUTRF can influence other participating actors and promote and ensure the protection of fundamental rights.

b) A direct and indirect role and influence on the EU agencies.

The Explanatory Note on the hotspots approach emphasized the extent to which the FRA could impact the EU agencies.[112] This occurs through bilateral cooperation agreements, and through the agency's participation in the CF.

[107] FRA, *Opinion of the European Union Agency for Fundamental Rights in the "Hotspots" set up in Greece and Italy of 29 November 2016* cit.

[108] FRA, *Update of the 2016 Opinion of the European Union Agency for Fundamental Rights in the "Hotspots" set up in Greece and Italy of 11 March 2019* cit.

[109] FRA, *Fundamental rights implications of the obligation to provide fingerprints for Eurodac of 22 October 2015* cit.

[110] FRA, *Coronavirus pandemic in the EU – Fundamental rights implications #1 of 8 April 2020* fra.europa.eu.

[111] F Casolari, 'The EU's Hotspot Approach to Managing the Migration Crisis: A Blind Sport for International Responsibility?' (2015) Italian Yearbook of International law 109.

[112] State Watch*, Explanatory note on the "Hotspot" approach* cit.

Frontex, EASO and Europol traditionally play a role in the hotspots. Whilst Europol's Regulation does not mention the involvement of the FRA, the Regulations of the other agencies expressly refer to it. EASO's Regulation provides in art. 52 that the agency should cooperate with the FRA through bilateral agreements.[113] Frontex's Regulation also refers to the FRA to encourage cooperation between the two agencies and to invite the agency to attend their Management Board meetings when fundamental rights challenges are concerned.[114] The FRA adopted a working arrangement with EASO in 2013,[115] and a co-operation arrangement with Frontex in 2010.[116] As of today, no cooperation agreement between Europol and the FRA has been adopted.

A close examination of the bilateral agreement reveals several interesting junctures where the FRA stands to influence the agency. The FRA can offer its fundamental rights expertise to Frontex at any stage of a joint operation, participate in the training on fundamental rights for border guards and Frontex staff and it helps to develop codes of conducts and good practices for the return activities of Frontex. The working arrangement with EASO follows the same pattern. The FRA can participate in the training of EASO staff and will share information and expertise on vulnerable groups. In that regard, it can influence the activities Frontex and EASO perform in the hotspots in Greece and in Italy. Whilst no publicly available information exists on the concrete support the agency is offering, these agreements show that there is a strong legal mandate for this type of support and that an enhanced monitoring role of the FRA is legally conceivable.

Secondly, the FRA can also indirectly influence EU agencies policies and behaviors in the hotspots regarding fundamental rights as a member of the CF. The FRA is a member of the CF of Frontex and EASO.[117] Europol, as of today, has not established a CF. Whilst their role will be developed later, it is important already to note the agency's role in the CF.

CF are set up to offer independent advice to the given agency in fundamental rights matters.[118] The CF of Frontex for example offers advice to the agency on how to respect fundamental rights and establish a fundamental rights strategy.[119] The EASO, the FRA, the UNHCR, the Council of Europe, the IOM and other civil society organizations sit in the CF. The FRA, through its participation can directly influence Frontex and indirectly impact other actors that are part of the hotspots (EASO, UNHCR and IOM). The CF of EASO is open to any relevant actor operating in the field of asylum policy at national, European,

[113] Regulation 439/2010 cit.

[114] Regulation 2019/1896 cit.

[115] EASO and FRA, Working Arrangement of 11 June 2013 between the European Asylum Support Office and the European Union Agency for fundamental rights.

[116] FRA and Frontex, Cooperation Arrangement of 26 May 2010 between the European Union Agency for the Management of operational cooperation at the external borders of the Member State of the European Union and the European Union Agency for Fundamental Rights.

[117] S Horii, 'Accountability, Dependence and EU Agencies' cit. 1625.

[118] Art. 108 of the Regulation 2019/1896 cit.

[119] Frontex, *Consultative Forum* frontex.europa.eu.

or international level. In that sense, it can include stakeholders ranging from NGOs, international organizations, academia, and EU institutions.[120] The FRA is part of that CF,[121] and the UNCHR and IOM are also very engaged in it. Both forums involve actors that play a role in the hotspots and that deal with matters linked to the hotspots approach. Consequently, the FRA's role in them can influence the protection of fundamental rights.

Whilst the FRA seems to have an interesting influence, particularly with regards to Frontex and EASO, a clearer role and a stronger presence of the agency in the hotspots would increase its impact and help better address obvious fundamental rights challenges.[122] The FRA can however not take legally binding decisions and whilst it can offer advice to the actors, and influence their strategies, it cannot coerce them to do so.

IV.5. Internal monitoring mechanisms: stronger influence on EU agencies?

Since EU agencies play an essential role in the shared administration of the hotspots, it is essential to complete the analysis by looking at the internal monitoring mechanisms of the EU agencies. The aim is not to mention the internal administrative review mechanisms that exist, such as the individual complaint mechanisms of Frontex, but rather to focus on the monitoring functions, namely of the CF and the Fundamental Rights Officer and future fundamental rights monitors of Frontex.

a) An interesting insider role of Consultative Forums.

As Loschi and Slominski pointed out in this special issue, the CF plays an interesting role within agencies and can contribute to their accountability,[123] for example by monitoring the situation and giving advice on fundamental rights matters. As of today, only Frontex and EASO established a CF, which worked and advised on the hotspots and the work of the agencies therein.

The CF of Frontex can carry on-the-spot visits to hotspot areas to witness the situation in practice,[124] and publish annual reports. The Annual Report of 2016 is the first to include the hotspots and the visit of the CF in Greece of Joint Operation Poseidon Sea and to the hotspots of Chios and Lesvos.[125] During that visit, the focus was on the fundamental rights challenges of Frontex's operational briefing, public security, and readmission in and from the hotspots. In its Annual Report in 2017, it did not expressly mention a visit

[120] EASO, *Consultative Forum* www.easo.europa.eu.

[121] Art. 12 of the Regulation 439/2010 cit.

[122] D Neville, S Sy and A Rigon*, On the Frontline* cit.

[123] See in this *Special Section*, C Loschi and P Slominski, 'Frontex's Consultative Forum and Fundamental Rights Protection: Enhancing Accountability Through Dialogue' (2022) European Papers www.europeanpapers.eu 195.

[124] Art. 108(5) of the Regulation 2019/1896 cit.

[125] Frontex, *Frontex Consultative Forum on Fundamental Rights Fourth Annual Report (2016*) frontex.europa.eu.

to the hotspots but pointed out issues occurring therein, notably the overcrowding of them.[126] It offered general recommendations to be applied to all functions performed by Frontex, including the hotspots. Recommendations were offered on child protection, on the search and rescue operations on the sea and on trainings of the agency's staff regarding fundamental rights. The same can be said in the Annual Report in 2018, where the CF pointed out the difficult living conditions in hotspots and the persistent overcrowding and gave recommendations on how the agency could deal with the fundamental rights challenges.[127] The Annual Report of 2019 also mentioned the visit carried out by the CF to the hotspots.[128]

Similarly, the CF of EASO also dealt with matters linked to the hotspots approach. During the 6th plenary meeting of the CF for example, the focus was particularly on relocation and EASO's work in the hotspots.[129] The meeting took place in Athens, close to the hotspots in Greece, which allowed civil societies and actors participating in them to join the meeting. What emerged was a need for enhanced EASO participation in the hotspots, longer deployments and a better training.[130] In a similar vein, during the 7th CF plenary meeting, fundamental rights challenges linked to EASO's role in the hotspots were developed, and in particular regarding the treatment of vulnerable individuals, the reception conditions and the coordination of EU agencies with civil societies.[131] Finally, at the latest plenary meeting, the CF mentioned EASO's operation support in Member States, including Greece and Italy as well as EASO's impact on vulnerable groups.[132]

The CF are interesting monitoring mechanisms put in place within EU agencies. However, their role remains limited for various reasons. First, their scope is limited since they will only directly impact EASO or Frontex. Second, they face issues of access to information. The CF of Frontex for example noted that the forum had difficulties in obtaining relevant operation references and guiding documents.[133] Third, the close relationship that CF maintains with the Management Board members of the EU agencies leads to questioning their independence and effectiveness.[134] Finally, and most importantly, their material scope is limited in the sense that the Management Board and Executive Director are not obliged to seek advice from the CF, nor take into account their reports.[135]

[126] Frontex, *Frontex Consultative Forum on Fundamental Rights Fifth Annual Report (2017)* frontex.europa.eu.

[127] Frontex, *Frontex Consultative Forum on Fundamental Rights Sixth Annual Report (2018)* frontex.europa.eu.

[128] Frontex *Consultative Forum on Fundamental Rights Seventh Annual Report (2019)* cit.

[129] EASO, *2016 Consultative Forum* easo.europa.eu.

[130] EASO*, EASO Consultative Forum on Fundamental Rights Sixth Forum Report (2016)* easo.europa.eu.

[131] EASO, *EASO Consultative Forum on Fundamental Rights Seventh Forum Report (2017)* easo.europa.eu.

[132] EASO, *EASO Consultative Forum on Fundamental Rights 10th Edition of the EASO Consultative Forum Online – Plenary Meeting (2020)* easo.europa.eu.

[133] Frontex, *Frontex Consultative Forum on Fundamental Rights Fifth Annual Report (2017)* cit.

[134] L Giannetto, 'Frontex, Civil Society Organisations, and Human Rights at EU Borders: A Complex Relationship' (28 October 2020) Border Criminologies www.law.ox.ac.uk.

[135] Statewatch, *"Regaining Control": New Powers of Frontex* (2020) Statewatch www.statewatch.org.

b) The limited monitoring functions of the Fundamental Rights Officer and monitors.
Out of the three active EU agencies, only Frontex possesses a Fundamental Rights Officer. EASO's proposal for a new Regulation intends however to establish a Fundamental Rights Officer. Europol, as of today, has not manifested this desire. Whilst their role is interesting, they are therefore still prevented from influencing an agency that plays an essential role in the hotspots, Europol, and also currently remain excluded from influencing EASO.

The old Regulation of EASO does not mention the Fundamental Rights Officer. However, the proposal for the strengthening of EASO creates the role of Fundamental Rights Officer. The latter will be in charge of monitoring and ensuring respect for fundamental rights in the Agency's activities.[136] As of today, the new Regulation has still not been adopted rendering the extent of its influence uncertain. However, a provisional agreement was reached in June 2021 between the Council presidency and the European Parliament.[137] Alongside the Fundamental Rights Officer, the proposal introduces in Chapter 5 the concept of a monitoring mechanism. The idea is to set up a team of expert that carries out the monitoring of thematic or specific aspects of the Common European Asylum System, to prevent shortcomings in the system. Thus, it can be envisioned that the role of the agency in the hotspots will be subjected to monitoring, or the asylum system in general within them. In fact, the proposal mentions for example that "the reception conditions, capacity, infrastructure [...]" may be susceptible to monitoring,[138] and that on-site vists can be performed. This could offer an interesting new mechanism, which implementation will be worth studying in the future.

The new Regulation of Frontex from 2019 has extended the already existing monitoring powers of Fundamental Rights Officer of Frontex.[139] It strengthens its function through an increase in staff, notably with the deployment of fundamental rights monitors that will be mentioned later, as well through an increase in powers. The Fundamental Rights Officer can now monitor compliance with fundamental rights by conducting investigations, by offering advice on its own or upon request of the agency, by providing opinions on operational plans and by carrying out on-the-spot visits.[140] Thus, it could influence Frontex's role in the hotspots. Limits however are apparent, notably with regards its independence. In fact, the Fundamental Rights Officer is appointed by the Management Board of the Agency and only cooperates with the CF (and does not report to it anymore). The biggest limit however is that the Fundamental Rights Officer cannot adopt legally binding decisions and the Agency merely has a duty to take into account the reports of

[136] E Narrillos (European Parliament, LIBE Committee), New Asylum Agency to ensure respect of EU asylum rules and fundamental rights Press Release of 29 June 2017.

[137] Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No 439/210 (First reading) of 30 June 2021.

[138] *Ibid*. art. 13(3)(c).

[139] Statewatch, *"Regaining Control": New Powers of Frontex* cit.

[140] Art. 109 of the Regulation 2019/1986 cit.

the Fundamental Rights Officer.[141] In any case, as Commissioner Ylva Johansson stated, the Agency has yet to appoint a permanent Fundamental Rights Officer.[142] Additionally, no Annual Report of the Fundamental Rights Officer is publicly available, and only independent observations can be found in the latest "Annual report on the Implementation of Regulation (EU) 624/2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by Frontex".[143] The report only marginally addresses the hotspots with regards to the principle of *non-refoulement*.

More specifically for Frontex, one of the key EU agencies in the hotspots, recent developments were announced to enforce stronger monitoring of the EU agency. Next to the EP Working Group mentioned above, Fundamental Rights monitors would be employed to monitor Frontex operations at EU borders.[144] Frontex, in cooperation with FRA, will establish the fundamental rights monitors and design their training – the aim being to promote fundamental rights throughout the agency's activities.[145] The fundamental rights monitors will be integrated within the agency's Fundamental Rights Office and the Fundamental Rights Officer will oversee their work.[146] Strong criticism arose, since as of today, no fundamental rights monitor has been employed, the objective being to establish a team of 40 monitors by December 2020. Commissioner Ylva Johansson stated that "We should have 40 fundamental rights monitors. We have zero".[147] These fundamental rights monitors were planned for in the Regulation of 2019 and shall have the following tasks: monitor compliance with fundamental rights, monitor forced-returns, provide advice and assistance, conduct and evaluate operational activities, conduct visits, contribute to training activities…[148] Thus, legally, fundamental rights monitors could visit the hotspots on-site, as well as oversee the operations of Frontex therein. However, it remains an internal mechanism, whose independence can be put into question, notably by its link with the Fundamental Rights Office. In fact, the Fundamental Rights Officer participates in the appointment of the fundamental rights monitors and they work under his supervision.

[141] Art. 80(4) of the Regulation 2019/1896 cit.

[142] N Nielsen, 'MEPs agree to mandate and probe into Frontex' cit.

[143] Frontex, Frontex Fundamental Rights Officer Annual report on the implementation of Regulation (EU) 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by Frontex (2018) data.consilium.europa.eu.

[144] L Giannetto, 'Frontex, Civil Society Organisations, and Human Rights at EU Borders' cit.

[145] Frontex, *Frontex and FRA agree to establish fundamental rights monitors* (10 June 2020) frontex.europa.eu.

[146] *Ibid*.

[147] N Nielsen, 'MEPs agree to mandate and probe into Frontex' cit.

[148] Art. 110 of the Regulation 2019/1896 cit.

V. Conclusion

This *Article* aimed to analyse the monitoring mechanisms in place in the hotspots in Greece and in Italy. Whilst technically speaking judicial and administrative review could be applied to EU agencies, and other actors involved in the hotspots, the literature shows that such a control has proven difficult. Thus, alternative monitoring mechanisms were analyzed in this *Article*. The hotspots approach is characterized by its complex and the multi-level nature. Thus, their monitoring follows the same multi-governance trajectory. Monitoring fundamental rights violations in the hotspots occur at the national, the European and the international level. Reports have been published that expose the fundamental rights challenges which abound these reception centers. Through a focus on the European monitoring mechanisms, the EP, the European Commission and FRA, one can draw the ensuing conclusions. First, the European Commission plays a controversial role, sometimes negatively impacting the protection of fundamental rights, other times positively enhancing them. Second, the EP's role is disappointing and insufficient. Third, the EO self-inquiries fail to address the fundamental rights issues occurring in the hotspots. Fourth, the FRA is an interesting alternative mechanism, whose influence seems to be broader, but whose impact remains ambiguous. Thus, an enhanced role for the FRA should be expressly stated and implemented in Greece and in Italy. Finally, the internal monitoring mechanisms play an interesting "insider role" within the EU agencies, but their competence remains limited in terms of scope and powers. In sum, these European mechanisms can control national authorities, and EU agencies and institutions on different scales, but have a clear limited impact on international organizations. Even with regards to the monitoring of national authorities and EU actors, gaps appear that need to be palliated with improvements. In fact, political and social monitoring mechanisms need to have an enhanced and broader role to ensure an efficient protection of fundamental rights. The future will show the efficiency of the new fundamental rights monitors of Frontex, as well as the future monitoring mechanism of the European Union Asylum Agency and will hopefully enhance the existing mechanisms or create new ones. In any case, the need for enhanced monitoring is undeniable, and the new Pact on Migration and Asylum highlighted this once again by introducing the need for an effective and stronger monitoring of migration management and respect of fundamental rights.[149] However, there again, concerns are raised with regards notably the limited scope of the mechanism and its independence.[150] Consequently, whether new mechanisms are put in place, or existing ones are strengthened, it is essential for them to have an extensive scope of action, a presence on the field, and the power to impact and influence the existing situation.

[149] Communication COM(2020) 609 final from the Commission of 23 September 2020 on a New Pact on Migration and Asylum.

[150] R Lanneau, 'The Commission's Proposal for a New Independent Monitoring Mechanism at the External Border of the EU: a Necessary but Limited Mechanism' (22 February 2021) EU Migration and Asylum Law and Policy eumigrationlawblog.eu.

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