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Editorial note

Daniel Sarmiento*

ON THE ROAD TO A CONSTITUTIONAL COURT OF THE EUROPEAN UNION: THE COURT OF JUSTICE AFTER THE TRANSFER OF THE PRELIMINARY REFERENCE JURISDICTION TO THE GENERAL COURT

On 30 November 2022, the Court of Justice of the European Union referred to the Council, the European Parliament, and the European Commission a proposal of reform of the Statute, triggering for the first time ever the decentralising clause provided in Article 256(3) of the Treaty on the Functioning of the European Union (TFEU). According to this provision, 'the General Court shall have jurisdiction to hear and determine questions referred for a preliminary ruling under Article 267, in specific areas laid down by the Statute'. Following several frustrated attempts in which the Court of Justice voiced its concerns about the timeliness of making use of this provision, the transfer of the preliminary reference jurisdiction in specific areas to the General Court materialised into a genuine proposal in late 2022.

The transfer is, as Article 256(3) TFEU openly states, circumscribed to 'specific areas'. The Treaties therefore preclude a transfer *in totum* of the preliminary reference jurisdiction, thus preserving this remedy to its original court, at least to a degree that should not denaturalise the role assigned by the Treaties to the Court of Justice. There shall be no transfer to the General Court of the entirety of the preliminary reference procedure, and the current reform of the Statue is good proof of this. The first transfer will only concern five specific areas which can hardly be seen as an ambitious array of sectors now in the hands of the General Court. On the contrary, the reform proves that Article 256(3) TFEU has been used as a means to arrange certain housekeeping matters within the Institution, mostly in the wake of the General Court's enlargement, a reform that has not been seen as a success by most commentators.[1] All in all, the first transfer of the preliminary reference jurisdiction to the General Court could simply be characterised as a modest and low-profile initiative aimed at alleviating the Court of Justice's docket, increasing the workload of an overstaffed General Court, and promoting specialised

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[1] See, *inter alia*, A Alemanno and L Pech, 'Thinking Justice Outside the Docket: A Critical Assessment of the Reform of the EU's Court System' (2017) 54 Common Market Law Review 129; F Dehousse, 'The Reform of the EU Courts (II) – Abandoning the Management Approach by Doubling the General Court' (2016) Egmont – Royal Institute for International Relations, Paper 83.

chambers and Advocates General in very technical areas of Union law.

However, this portrayal of the reform is too limited in scope and it does not do justice to its genuine and long-term implications. In this editorial I will outline some of the consequences that this initiative will entail, particularly for the Court of Justice and for its role as a constitutional court within the European legal space. Paradoxically, the jurisdiction that will see its role most deeply transformed in the long term will not be the General Court, but the Court of Justice. The transfer of the preliminary reference procedure in 'specific areas' will pave the way for a new understanding of the Union judiciary, in which the General Court will carry the burden of dealing with the day-to-day judicial activity, leaving limited questions concerning constitutional principles to the Court of Justice. This is already a common feature in the case of direct actions, but it will be maximised once the preliminary reference jurisdiction lands on the General Court as well. The result will be the confirmation of the Court of Justice's role as an adjudicator handling cases on points of constitutional principle, setting a common criterion on issues that require a determination on crucial constitutional tensions affecting the protection of fundamental rights, Union competences, and legal bases. In sum, the reform paves the way for a new role for the Court of Justice, now firmly headed on the road to becoming a constitutional court for the Union. Whether that is desirable or not in the current context and for today's Union is a matter that will be addressed in this editorial comment.

The reform

The 2022 reform comprises two main amendments to the current rulebook of the Court of Justice of the European Union. First, a transfer of the preliminary reference jurisdiction in 'specific areas', and second, an increase in the number of dispute settlement bodies whose decisions, following a review in the General Court, trigger the filtering mechanism on appeals on points of law at the Court of Justice. Overall, the reform waives part of the burden carried by the Court of Justice in the past years, which has seen the number of cases increase steadily, at the same time that the General Court has gained further resources and workforce to deal with a larger docket. Of course, the protagonist of the reform is the transfer of the preliminary reference jurisdiction to the General Court in specific areas, and that will be the main focus of this section.[2]

The transfer of preliminary references to the General Court is circumscribed to specific areas, as required by Article 256(3) TFEU. The list is self-explanatory of the technical nature of these areas:

[2] S Iglesias Sánchez, 'Preliminary Rulings before the General Court: Crossing the Last Frontier of the Reform of the EU Judicial System?' (2022) EU Law Live Weekend Edition No 125, 15; C Amalfitano, 'The Future of Preliminary Rulings in the EU Judicial System' (2022) EU Law Live Weekend Edition No 125; and D Petrić, 'The Preliminary Ruling Procedure 2.0' (2023) 8 European Papers 25.

- the common system of value added tax;
- excise duties;
- the Customs Code and the tariff classification of goods under the Combined Nomenclature;
- compensation and assistance to passengers;
- and the scheme for greenhouse gas emission allowance trading.

According to the proposal, the transfer mechanisms do not alter the original jurisdiction of the Court of Justice: references shall be made by national courts to the Court of Justice, and the communication will be first articulated between the national court and the Greffe of the Court of Justice, not the General Court. The Court of Justice itself will have the jurisdiction to filter the reference and decide on the transfer, a mechanism that requires an analysis of whether the preliminary ruling 'comes exclusively within one or within several of the areas' previously mentioned. Therefore, there is a substantive test that must be made by the Court of Justice, according to which the transfer will ensue following a decision on the 'exclusive' subject-matter falling upon one of the specific areas enumerated above. This design entails that a request for a preliminary ruling addressing several subject matters, among which one of the 'specific areas', will be reserved for the Court of Justice. For the transfer mechanism to come into play, the question for a preliminary ruling must be exclusively devoted to one or several of the 'specific areas', or substantially devoted to them.

In accordance with Article 256(3) TFEU, the General Court is not the sole jurisdiction to adjudicate on the matter. Two additional routes are available for the Court of Justice to hear the case, even when it is exclusively focused on the 'specific areas'. First, when the General Court comes to the conclusion that the case requires a decision of principle 'likely to affect the unity or consistency of Union law', in which case the matter will be referred back to the Court of Justice. Second, in situations in which, once again, 'the unity or consistency of Union law' is at stake, the Court of Justice, upon a proposal of the First Advocate General, may review the decision of the General Court. The review procedure was put in place during the tenure of the Civil Service Tribunal, and the Court of Justice had the chance of interpreting similar provisions to those of Article 256(3) TFEU and the Statute.

The General Court will be profoundly affected by this reform. First, a good number of its judges will temporarily leave the deliberation and assume the role of an Advocate General. This option, already introduced in Article 49, first paragraph, of the Statute at the time of the creation of the Court of First Instance, remained dormant throughout the years until it was awakened by the 2022 proposal. On top of this, the 'specific areas' will be assigned to specialised chambers, thus reinforcing the process of specialisation in the General Court which began in 2019, when the chambers were split into two major groups, assuming a division of tasks in the handling of staff cases and trademark litigation. This tendency

towards specialisation among the judges (and Advocates General) will be in stark contrast to the traditional approach in the Court of Justice, reluctant to assume any specialisation.

The reform in perspective

This straightforward reform appears to be fully in line with the options made available in the Nice Treaty and now present in Article 256(3) TFEU. The transfer of preliminary reference jurisdiction was envisaged as a tool to alleviate the Court of Justice from a growing docket, leaving it to focus on major points of principle. This option is also in line with the General Court's original mission, to provide a more specialised jurisdiction in cases which may merit more attention to factual matters or specific areas. In sum, the reform of 2022 seems like a consistent step forward in materialising the options made available back in 2001.

However, on a closer look, this reform hides much more relevant undercurrents, not all of them to be found in the provisions of the Nice Treaty.

First, the reasons underlying the 2022 reform are foreign to the rationale of Article 256(3) TFEU. Whilst in 2001 the transfer mechanism was envisaged as a means to alleviate the Court of Justice's docket, in 2022 the reasons justifying the reform are exactly the opposite: a means to provide further work to an overstaffed General Court. This feature results from the reform of 2015, by virtue of which the number of judges of the General Court was doubled, thus resulting in an overstaffed jurisdiction with hardly any substantial increase in incoming cases. It is certainly true that the Court of Justice is overworked, particularly with requests for preliminary rulings, but it is also evident that the docket has remained mostly stable throughout the last decade, never exceeding the threshold of one thousand new cases per year. The workload has not become unsustainable for the Court of Justice, but it is the overstaffing of the General Court that justifies the transfer of jurisdiction.

Second, the reform still leaves unanswered the key to its workability: how will the 'exclusivity' of jurisdiction operate? The reform states that the General Court shall hear cases when they refer 'exclusively' to one or several of the 'specific areas' enumerated above. However, this is far from clear, particularly when looking at the past case law and the highly relevant cases that the Court of Justice has rendered in some of these 'specific areas'. To give one example, *Akerberg Fransson* concerned VAT,[3] and so did *Taricco*,[4] whilst some major issues about the preliminary reference procedure have appeared in the course of cases on the Customs Code (see, for example, Advocate General Jacobs's Opinion in *Wiener*, on

[3] Case C-617/10 *Akerberg Fransson* ECLI:EU:C:2012:340.

[4] Case C-105/14 *Taricco and Others* ECLI:EU:C:2015:293.

the need for a filtering mechanism in Article 267 TFEU).[5] When is the General Court to refer such cases and what is the threshold of 'principledness' that justifies referring the case back to the Court of Justice? The question is important, particularly for the national court making the reference. In some Member States, the Court of Justice is the 'judge established by law' and that raises issues of constitutional relevance.[6] A national court needs to know if the reference was indeed adjudicated by the correct jurisdiction among the Union courts, or otherwise the ruling could be questioned in proceedings before the domestic constitutional court. This matter remains open and left to the discretion and good sense of the Court of Justice and the General Court in their day-to-day decision-making.

Third, by introducing a jurisdictional rule that leaves a margin of discretion to transfer a case to the General Court or to leave it within the remit of the Court of Justice, the reform paves the way to party disputes. The resulting judgment will satisfy one party and disappoint another, there will be winners and losers, but the procedure continues in the national court. The discretion in the triggering of the transfer will stimulate disagreements in the losing party as to the convenience of having transferred (or not) the case to the General Court. These disagreements can result in claims by the losing party to either have the judgment reviewed, something that is not available to the parties or to the referring court to request, unless the court makes a new preliminary reference questioning the findings of the first ruling. Alternatively, national grounds of review may be available, including potential remedies before the European Court of Human Rights. In sum, the reform introduces the risk of party litigation over the outcome of the preliminary reference procedure, but in ways that are unknown to date.

Fourth, the reform will deepen the process of specialisation in the General Court, confirming the existence of a specialised jurisdiction in areas such as staff cases, trademarks, and now the 'specific areas' enumerated above. The specialisation also reaches the profile of individual judges, inasmuch as a number of them will assume the task of Advocate General, and with a specialised profile as well. However, the specialisation through the preliminary reference procedure entails new implications, since the interlocutors of the General Court are not parties to the case, but the referring court. A new specialised court will be open for business, offering its interpretative services to national courts, many of which are also specialised in specific subject matters. Time will tell if this specialisation will prompt specialised national courts to rely more frequently on the preliminary reference procedure, knowing that its chambers are specialised and have a detailed know-how of common areas of adjudication.

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[5] Case C-338/95 *Wiener v Hauptzollamt Emmerich* ECLI:EU:C:1997:352, Opinion of Advocate General Jacobs.

[6] See H Thiedemann, 'The Lawful Judge' (2003) 36 Verfassung und Recht in Übersee / Law and Politics in Africa, Asia and Latin America 228.

The same will apply to Advocates General, specialised in specific areas of the law, in contrast with the Advocates General of the Court of Justice, whose generalist profile will highlight the expertise of their counterparts in the General Court.

And fifth, the reform will not only entitle the General Court to interpret provisions on the 'specific areas' subject to a transfer. By granting jurisdiction to the General Court to rule in a preliminary reference procedure, the reform also empowers this court to interpret the procedural rules that govern this remedy, including points of law such as the interpretation of a 'jurisdiction', the implementation of admissibility and jurisdictional pleas, the scope and effects of its judgments, and many other matters that belong to the terrain of procedural law, not of the 'specific areas' on which the transfer is justified. The expansive task of the General Court will not stop in procedural matters only. If the questions referred for a preliminary ruling tackle incidental issues which are not strictly within the remit of the 'specific areas', the General Court is not precluded from ruling on those matters. Think, for example, of a reference on VAT in which there is a question of abuse of rights, or the principle of tax legality. In that situation, the General Court will rule on the interpretation of the relevant VAT rules, but also on the general principles which apply to the case. Therefore, the 'specific areas' are only a gateway for a broader array of subject matters in which the General Court will have to introduce itself to properly assist national courts requesting the interpretative support of the Union courts.

These are some of the far-reaching implications that the reform will bring about, particularly for the General Court. However, the consequences will be even more significant for the Court of Justice, the apparent passive beneficiary of the new framework. In contrast to what appearances might reveal, the Court of Justice will begin a major process of transformation as a result of this reform. It is not correct to characterise the transfer mechanism as a measure targeting mostly the General Court. On the contrary, the main protagonist in the long term is the Court of Justice, now ready to become a genuine constitutional court of the Union.

A new Court of Justice?

In principle, the reform will have a direct impact on the functioning of the Court of Justice, considering that, according to the Court's analysis in its 2022 proposal, 16% of its docket will be transferred to the General Court. This decrease in the activity of the Court of Justice will not result in lower productivity, but in more time to deal with some of the highly sensitive and complex matters that reach its doors. The fact that the Court of Justice has been dealing with highly technical matters, or with cases of scarce systemic impact, has raised concerns about its ability to properly address and devote its valuable time to other more sig-

nificant procedures. Even the cases that are resolved through a reasoned Order, or judgments in chambers of three judges with no Opinion of the Advocate General, will nevertheless require the full involvement of the Court's human and material resources, from the attention of its judges and legal secretaries, the translation machinery, the selection process and thematic profiling of the case, and many other steps along the way that require the Court's full involvement. The transfer of 16% of the docket (at least as calculated by the Court in 2022), mostly in cases holding a high degree of specialisation (and, in principle, low systemic impact), should facilitate the Court of Justice's investment of time and resources into more substantive matters.

However, this portrait is not entirely correct. The transfer of cases will not entail an immediate reduction of resources in those cases, because the Court of Justice will have the duty to examine each request for a preliminary ruling and decide on its 'transferability' to the General Court. This task will require the attention of a reduced number of players within the Court of Justice, but it will nevertheless demand a non negligeable number of resources. Once the General Court rules on the matter, the review procedure will consume the First Advocate General's time, and the triggering of this procedure upon his or her proposal will also require a chamber of the Court of Justice to look into the matter. The review procedure proved to be a time-consuming mechanism when applied to staff cases during the tenure of the Civil Service Tribunal.[7] Therefore, it is not foreseeable that the transfer of cases will immediately entail a loss of work and attention on the part of the Court of Justice.

This apparent paradox adds to another contradiction previously mentioned when referring to the aims of the reform and the objectives of the 2001 Nice amendments. Article 256(3) TFEU was introduced to alleviate the Court of Justice from a rising workload. However, the current reform does not aim at that goal, but rather to compensate for the General Court's overstaffing following the 2015 reform that doubled its size. On top of that, the current reform will not entail a major reduction of resources on the cases being transferred, because a considerable number of decisions will have to be made either before or after the transfer of a case to the General Court. As a result, one wonders what the true aims of this reform are as well as its long-term implications.

The only reasonable explanation underlying the current reform is the gradual transformation of the Court of Justice into a constitutional court, exclusively or mostly entrusted with the resolution of disputes of constitutional relevance. In a Union of twenty-seven and more Member States, assuming powers of a sovereign nature and undertaking tasks of high political sensitivity, the Court of Justice will struggle to continue to operate and adjudicate with the standard features it has held to date.

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[7] X Tracol, 'The New Rules of Procedure on the Review Procedure and the Application of General Principles in EU Civil Service Law and Litigation: Strack' (2014) 51 Common Market Law Review 993.

When seen from a broader angle, there is a subtle but consistent tendency in past reforms to prepare the Court of Justice to become a constitutional court of the Union. In Nice, with the imminence of enlargement in sight, decentralisation of jurisdiction was introduced into the Treaties. Although the way in which decentralisation worked in Nice was different to how it eventually materialised, the underlying rationale of the reform was to prepare the Court of Justice for an enlarged Union in which more powers would be granted to the General Court as well as to specialised tribunals, leaving the Court of Justice as an ultimate arbiter on matters constitutional. The reform of the General Court and the doubling of judges was a means to put into action a housekeeping measure, at a time when the rising duration of procedures was worryingly affecting the General Court, but we have now seen that the main consequences of the reform was to facilitate a future decision to transfer further competences from the Court of Justice. A filtering mechanism was introduced later in 2019, to reduce the number of appeals on points of law heard by the Court of Justice, a tool that was further reinforced in the 2022 reform.[8] In this evolutive trend, the transfer of preliminary reference jurisdiction to the General Court confirms even further the growing role of the Court of Justice as a constitutional adjudicator.

The transfer of jurisdiction in preliminary reference procedures is not an endgame, but rather a starting point. Once the gates of the transfer have opened, further transfers will follow. It is reasonable to assume that, when the reform is put into effect and its consequences are visible, other 'specific areas' will be ready for a transfer to the General Court. Data protection and GDPR are possible candidates, once the Court of Justice has finished fleshing out the main contours of this new area of law; a similar fate could follow for trademark and intellectual property law, State Aid law, the Digital Markets Act, and the Digital Services Act, as well as Banking Union. These are all areas in which, after their main pillars are defined by the Court of Justice, could very well be assigned as part of future transfers to the General Court.

What would be left for the Court of Justice? For starters, the allocation of competences between the Member States and the Union would remain in the Court of Justice's remit, as well as the interpretation of the Charter of Fundamental Rights. Issues on the horizontal distribution of power among the Union's institutions and issues on the choice of legal bases would also remain outside the scope of any future transfer. The interpretation of free movement rules, as a backbone of the internal market, would stay within the Court of Justice's competences, as well as any other new area of law in which new legislation is introduced. In sum, the Court of Justice will remain busy, but focusing on issues which are akin to a constitutional jurisdiction, blending the features of a typical con-

[8] C Oro, 'Filtering of Appeals on Points of Law Before the Court of Justice' in D Sarmiento, H Ruiz Fabri and B Hess (eds), *Yearbook on Procedural Law of the Court of Justice of the European Union First Edition – 2019*, MPILux Research Paper 2020 (2).

tinental constitutional court, together with some traits of common-law supreme courts with a generalist, but highly selective, jurisdiction.

The Court of Justice will nevertheless remain in charge of the review procedure and it will be entitled to filter any appeals brought to its attention. The potential to rule on any matters which may not be of constitutional relevance will be perfectly available to the Court of Justice, so its ability to rule on any point of law will remain. However, the reality of the future setting will probably confirm that the appetite of the Court of Justice for non-constitutional matters will be modest. The weight of the subjects it will have to handle will be sufficient to demand the Court's full attention. Once a constitutional court, always a constitutional court. The incentives to become once again an interpreter of 'ordinary points of law' will be close to zero.

This is, of course, an exercise in futurism. Nonetheless, it is an exercise that is not removed from how the future could eventually look. It is therefore appropriate to inquire as to whether such a future is in line with the Treaties, with the role traditionally assigned to the Court of Justice and with the task of ensuring uniformity and consistency in the Union's legal order.

First, a framework in which the Court of Justice becomes a constitutional adjudicator, leaving the bulk of the adjudicative task to the General Court, is far from the portrait of the judiciary system currently enshrined in the Treaties. Any reader that glances through the TEU and the TFEU will notice the pre-eminence of the Court of Justice and the modesty of the General Court's presence. It would be surprising for that reader to realise that the majority of judicial tasks are performed by the General Court and not the Court of Justice. It is true that the Court of Justice would be able to claim its jurisdiction and rule on practically any matter brought before the General Court. But in reality the system would be inverted and reversed from its original design. At some point, the reality of the Union's judiciary would have to be reflected in the Treaties in a clear and transparent way.

Second, by inflating the General Court and turning it into a massive adjudicating machine, some reflection should be made as to the need to streamline and adapt this jurisdiction to its new role. In terms of achieving optimal efficiency and legitimacy, it could be open to discussion if the centralised model of Union adjudication is the best way forward. In the 1990s, Joseph Weiler and Jean-Paul Jacqué proposed a territorial decentralised judicial system in which the tasks of the General Court would be split into several 'circuits', with the Court of Justice sitting at the apex, in line with the US model.[9] This approach deserves careful attention, but it is proof of the existence of alternative models to the centralised role

[9] J-P Jacqué and JHH Weiler, 'On the Road to European Union – A New Judicial Architecture: An Agenda for the Intergovernmental Conference' (1990) 27 Common Market Law Review 185.

played by the General Court, particularly in a highly diverse Union in which its number of Member States could reach the mid-thirties. Does the transformation of the Court of Justice into a constitutional court make the decentralisation of the General Court inevitable? To some extent, and as long as the Member States see the role of the Court of Justice increasing, it is likely that the decentralised 'circuit' model will become more and more attractive for a growing number of stakeholders.

Third, the expanding role of the Court of Justice as a constitutional adjudicator will also raise questions as to its relationship with national constitutional and supreme courts. How will these jurisdictions react to the Court of Justice's new role in the European judicial landscape? Will the new role stimulate and facilitate relations, portraying the Court of Justice as a genuine constitutional jurisdiction with sufficient credentials to rule on the *kompetenz-kompetenz* question and trigger the trust of its counterparts? Or will it, on the contrary, promote even higher risks of rupture in a context in which constitutional courts will reject a new role that is nowhere to be found in the Treaties? In an environment of growing tensions, with a significant number of constitutional courts having rejected the primacy of Union law in the past years, the spontaneous reconfiguration of the Court of Justice into a new constitutional court could very well demand new checks and balances to convince national courts of the convenience of the new model. In that vein, the creation of a Mixed Chamber, in which members of the Court of Justice and of constitutional courts sit jointly to rule on points of competence, could be the way to balance things appropriately for all stakeholders.[10]

The previous points lead us to an almost inevitable conclusion: despite the fact that the trend towards a new framework has found recognition in primacy law, both in the Nice reforms and the successive reforms of the Statute, at some point it will be necessary to address Treaty reform from a more holistic perspective. Turning the General Court into the 'ordinary court of Union law', operating a territorial decentralisation of the Union's judiciary, introducing a Mixed Chamber and, all in all, transforming the role of the Court of Justice into a constitutional adjudicator, is a sufficiently serious evolution that would deserve its proper reflection in the Treaties. And once the Treaties are open for reform, other measures affecting the Union's judiciary could follow, including measures that are perceived as necessary and overdue. To name a few, the reappointment system of judges is an archaism that should be repealed once and for all, substituting it with longer mandates of nine or twelve years, in line with the practice of national constitutional courts. The Committee of Article 255 should either act jointly with parliamentary scrutiny, or it should be

[10] JHH Weiler and D Sarmiento, 'The EU Judiciary after Weiss: Proposing a New Mixed Chamber of the Court of Justice' (*Verfassungsblog*, 2 June 2020) <https://verfassungsblog.de/the-eu-judiciary-after-weiss/> accessed 8 November 2023. See also the proposal of a Mixed Chamber but with no power to render binding rulings, in the French-German Report on institutional reform, 'Sailing on High Seas: Reforming and Enlarging the EU for the 21st Century', 18 September 2023.

substituted by another procedure in which transparency is guaranteed. This should mostly affect the candidates to sit in the Court of Justice, whose constitutional tasks will rightly deserve a selection procedure of judges in line with the practice of the Member States. And of course, the issue of guaranteeing a judge for every Member State is also an archaic reminiscence that should be avoided. If the International Court of Justice is able to perform its tasks with a limited number of judges, so should the Court of Justice, particularly when the General Court is twice its size, or when future territorial circuits would provide close links with each Member State.

In sum, what started as an editorial comment on a modest reform apparently conceived to put into practice a very specific provision of the Nice Treaty has finished with a general consideration on the Court of Justice as a constitutional court and the long-term implications of the steps now being taken. The evolution of the argumentative line of this editorial comment shows that the 2022 reform is opening a door that could very well lead the Union's judiciary to a point of no return, triggering a process which would eventually require further Treaty reforms, the content of which could trigger other additional reforms, leading to the total mutation of the current court system. It is no wonder that the European Parliament refused to approach this reform as a standard and low-key measure.[11] In fact, this reform is the most relevant development in the history of the Institution since the creation of the Court of First Instance in 1989. It is therefore important that due consideration is given to its implications, with a clear view on the objectives and possible destinations, so that a modest reform does not lead to an uncertain and undesired point of arrival.

Suggested citation: D Sarmiento, 'Editorial Note: On the Road to a Constitutional Court of the European Union: The Court of Justice After the Transfer of the Preliminary Reference Jurisdiction to the General Court' (2023) 19 CYELP VII.

[11] See the European Parliament's Report on the draft regulation of the European Parliament and of the Council amending Protocol No 3 on the Statute of the Court of Justice of the European Union, 27 September 2023 (07307/2022 – C9-0405/2022 – 2022/0906(COD)).

APPLYING SOLIDARITY AS A PROCEDURAL OBLIGATION IN EU CITIZENSHIP LAW

Niamh Nic Shuibhne*

Abstract: Building on recent EU case law, which underlines that a commitment to solidarity in the European context produces concrete legal obligations, this paper highlights that solidarity has procedural as well as normative and substantive dimensions. It then explores the potential of procedural solidarity in the context of Union citizenship and, more specifically, the free movement of Union citizens. The overall objective is to consider if the conception of solidarity as a procedural obligation under EU law can provide fresh ways to think about persisting challenges around freedom of movement. Procedural solidarity emphasises the fair sharing of responsibility, including financial responsibility, when implementing EU objectives and the taking of decisions collectively, respecting the general requirements of EU law. Fundamentally, while adherence to procedural solidarity might not produce significantly different outcomes in contested areas of EU citizenship law, it would strengthen the decision-making processes that deliver those outcomes, cultivating, in turn, better accountability for the choices made by both EU and national institutions.

Keywords: solidarity, Union citizenship, free movement, procedural solidarity.

'The key question is whether solidarity has the status of a legal principle and, if it does, what its nature and scope are. The alternative would be for that concept to have a purely symbolic value with no prescriptive force'.[1]

1 Introduction

Already in the Schuman Declaration of 9 May 1950, it was appreciated that 'Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a *de fac-*

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[1] Case C-848/19 P *Germany v Poland* ECLI:EU:C:2021:218, Opinion of AG Campos Sánchez-Bordona, para 63.

to solidarity'.[2] Now, in Article 2 of the Treaty on European Union (TEU), solidarity is described as one of the principles that 'prevails' when the common values on which the European Union is 'founded' are respected (Article 2 TEU).[3] The substantive and normative significance of solidarity is widely discussed in EU scholarship, both generally[4] and for the free movement of Union citizens more specifically:[5] in essence, substantively, what does an EU legislative provision or a ruling of the Court of Justice tell us about how much solidarity we can detect in EU citizenship law; and does that reflect, more normatively, the degree of solidarity that we would wish to see there (which is necessarily a contested standard)?

Fundamentally, then, solidarity requires us to ask how much we do – and how much we should – care about the Member State nationals who cross borders because they have been conferred not only with a legal permission but with a legal right to do so. In that sense, solidarity contributes both an origin story and a continuing benchmark of assessment for the development of free movement law. But reflecting on solidarity from both substantive and normative perspectives can also feel futile: taking us either too far, towards conceiving a free movement system that has no political chance of actually being realised; or not far enough, towards conceding that the free movement law framework cannot be progressed or improved because there is simply not enough *de facto* solidarity in the fabric of Member State relations to achieve that. Thus, to build on nor-

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[2] Schuman Declaration May 1950 <https://european-union.europa.eu/principles-countries-history/history-eu/1945-59/schuman-declaration-may-1950_en>. AG Sharpston has observed that '[t]hat statement found an echo in the third recital to the Treaty establishing the European Coal and Steel Community – ECSC Treaty (the precursor to the EEC Treaty, of which the present TEU and TFEU are direct descendants), which spoke expressly of "recognising that Europe can be built only through practical achievements which will first of all create real solidarity, and through the establishment of common bases for economic development"' (Joined Cases C-715/17, C-718/17 and C-719/17 *Commission v Poland, Czech Republic and Hungary* ECLI:EU:C:2019:917, Opinion of AG Sharpston, para 247).

[3] Article 2 TEU provides that '[t]he Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail'.

[4] For a range of perspectives and reflections on concepts, contexts, and models of solidarity in EU law, see G de Búrca (ed), *EU Law and the Welfare State: In Search of Solidarity* (OUP 2009); F de Witte, *Justice in the EU: The Emergence of Transnational Solidarity* (OUP 2015); and A Sangiovanni 'Solidarity in the European Union' (2013) 3 Oxford Journal of Legal Studies 213.

[5] Eg M Dougan and E Spaventa (eds), *Social Welfare and EU Law* (Hart Publishing 2005); M Everson, 'A Citizenship in Movement' (2014) 15 German Law Journal 965; S Giubboni, 'Free Movement of Persons and European Solidarity: A Melancholic Eulogy' in H Verschueren (ed), *Residence, Employment and Social Rights of Mobile Persons: On How EU Law Defines Where They Belong* (Intersentia 2018) 75; A Somek, 'Solidarity Decomposed: Being and Time in European Citizenship' (2007) 32 European Law Review 787; D Thym (ed), *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU* (Hart Publishing 2017); and H Verschueren, 'EU Free Movement of Persons and Member States' Solidarity Systems: Searching for a Balance' in E Guild and PE Minderhoud (eds), *The First Decade of EU Migration and Asylum Law* (Brill 2011) 47.

mative and substantive conceptions of solidarity in EU citizenship law as well as developments in other areas of EU law underlining that a commitment to solidarity in the European context produces concrete legal implications, this paper explores instead the procedural dimensions of solidarity and considers the potential of that idea for resolving some persistent tensions within EU law on the free movement of Union citizens.

The paper first underlines the legal nature of solidarity in the Treaties and in foundational EU case law (Section 2) before showing how generalisable legal obligations have been developed in two main areas of EU activity more recently: immigration and energy (Section 3). In these fields, solidarity has been engaged to reinforce the importance of *collective responsibility* and *fair responsibility-sharing* as obligations of EU law. After framing that approach as procedural solidarity, the paper then applies it to two intensively debated examples from the free movement of Union citizens (Section 4): situations where welfare entitlement across borders is ruled out, which concerns the vulnerability of those who move; and contentions that freedom of movement is experienced unevenly by the Member States, which highlights the vulnerability of free movement law in a more systemic sense.

While adherence to procedural solidarity might not produce significantly different outcomes in contested areas of EU citizenship law, its emphasis on collective action and fair responsibility-sharing does hold some potential to take us beyond the poles of futility noted above. Above all, procedural solidarity strengthens the decision-making processes that deliver outcomes, cultivating, at least, clearer ownership of and better accountability for the choices made by both EU and national institutions. However, it is also acknowledged that procedural solidarity will only ever take things so far. The legal implications of solidarity flow from a more profound commitment – and perhaps, therefore, require a recommitment – to being in something together; to recognising that a legal space that promises freedom of movement represents a goal rooted in the common good. In that sense, two related provisos underlie the assessment that follows. First, the difficult questions that we must confront are *created by* the practice, the system, and the objectives of free movement: and we cannot create something and then just walk away from or try to ignore its implications. Second, Union citizenship and freedom of movement remain objectives *agreed to* by – not forced or imposed on – the European Union and its Member States. That is also why solidarity's procedural accenting of the fair sharing of responsibility and of coordinated as opposed to unilateral responses really matters. In essence, it reorients the debate from burden to choice.

2 Solidarity as a procedural principle of EU law: early foundations

Solidarity has been vividly described as the 'lifeblood of the European project'.[6] It is also, more prosaically, woven into the EU legal order.

First, solidarity frames several Treaty provisions addressing Union specific policies. For example, in its relations with the wider world, Article 3(5) TEU requires the Union to contribute to 'solidarity and mutual respect among peoples'.[7] There are also specific manifestations of both the spirit and the mechanics of solidarity in Articles 122(1) and 194(1) TFEU (energy) and in Article 222 TFEU, which is commonly referred to as the Union's 'solidarity clause'.[8] Solidarity also features prominently in the Area of Freedom, Security and Justice (AFSJ). Article 67(2) TFEU requires that ensuring 'the absence of internal border controls for persons' and instituting 'a common policy on asylum, immigration and external border control' shall be '*based on* solidarity between Member States'. This provision builds on the significance of solidarity in political programmes that shaped, over time, the objectives and competences now codified in Title V TFEU.[9] Article 80 TFEU further states that both AFSJ policies and their implementation 'shall be *governed by* the principle of solidar-

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6 Opinion of AG Sharpston (n 2) para 253.

7 That objective is elaborated in Article 21(1) TEU, which establishes that '[t]he Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law'. Additionally, Article 24 TEU frames the Common Foreign and Security Policy in terms of 'mutual political solidarity' (Articles 24(2) and 24(3)) and 'a spirit of loyalty and mutual solidarity' (Article 24(3)) for the Member States' relationships both with each other and with the Union. See also Articles 31(1) and 32 TEU.

8 Article 222(1) requires the Union and the Member States to 'act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster' mandates the Union to 'mobilise all the instruments at its disposal, including the military resources made available by the Member States' in certain circumstances, ie to '(a) prevent the terrorist threat in the territory of the Member States; protect democratic institutions and the civilian population from any terrorist attack; assist a Member State in its territory, at the request of its political authorities, in the event of a terrorist attack; (b) assist a Member State in its territory, at the request of its political authorities, in the event of a natural or man-made disaster'. See also, Declaration 37 on Article 222 TFEU: '[w]ithout prejudice to the measures adopted by the Union to comply with its solidarity obligation towards a Member State which is the object of a terrorist attack or the victim of natural or man-made disaster, none of the provisions of Article 222 is intended to affect the right of another Member State to choose the most appropriate means to comply with its own solidarity obligation towards that Member State. Article 222(2) establishes an obligation to assist a Member State in such circumstances 'at the request of its political authorities'.

9 Eg on the importance of solidarity and mutual trust for the Schengen area, see Case C-680/17 *Vethanayagam and Others* ECLI:EU:C:2019:278, Opinion of AG Sharpston, para 38. On the different shapes that solidarity takes across the functioning of the AFSJ, see A Meloni, 'EU Visa Policy: What Kind of Solidarity?' (2017) 24 Maastricht Journal of European and Comparative Law 646. However, in common with solidarity and free movement law, the *absence* of (sufficient) solidarity is also problematic in the AFSJ: see eg Case C-213/17 *X* ECLI:EU:C:2018:434, Opinion of AG Bot, paras 99–100.

ity and *fair sharing of responsibility, including its financial implications*, between the Member States' and that, '[w]henever necessary, the Union acts pursuant to this Chapter shall contain appropriate measures to *give effect to* this principle'. While acknowledging that specific expressions of solidarity in cognate policy fields are in some respects distinctive and context-dependent, reading across them does already start to suggest criteria that illuminate solidarity as a more generalised principle of EU law, notably as regards *cooperative responses to challenges* and the *fair sharing of responsibility*, ideas that have strong salience for the free movement of Union citizens too.

Second, the case law of the Court of Justice shows that, alongside its potent rhetorical magnetism, solidarity produces concrete obligations in EU law. The case law history is uneven: solidarity's legal qualities were very clearly articulated in early rulings of the Court yet developed further only much more recently. Those developments are returned to in Section 3 below, but the origins of solidarity's legal qualities are first set out here.

In early case law, in order to embed the distinctive EU system established in *Van Gend en Loos* and *Costa v ENEL*,[10] the Court rejected a decentralised approach to the enforcement of Community obligations, emphasising instead that 'the basic concept of the Treaty requires that the Member States shall not take the law into their own hands'.[11] That idea was further developed in *Commission v Italy*, with explicit categorisation of solidarity as a 'duty':

> In permitting Member States to profit from the advantages of the Community, the Treaty imposes on them also the obligation to respect its rules. For a State *unilaterally* to break, *according to its own conception of national interest,* the *equilibrium between advantages and obligations* flowing from its adherence to the Community brings into question the equality of Member States before Community law and creates discriminations at the expense of their nationals, and above all of the nationals of the State itself which places itself outside the Community rules. This failure in *the duty of solidarity accepted by Member States by the fact of their adherence to the Community* strikes at the fundamental basis of the Community legal order.[12]

In *Eridania zuccherifici nazionali*, the Court extended solidarity as a horizontal obligation, finding that it can justify distribution mechanisms

[10] Case 26/62 *Van Gend en Loos* ECLI:EU:C:1962 :42 (establishing the direct effect of EU law); Case 6/64 *Costa* v *ENEL* ECLI:EU :C :1964 :66 (establishing the primacy of EU law).

[11] Joined Cases 90 and 91/63 *Commission v Luxembourg and Belgium* ECLI:EU:C:1964:80.

[12] Case 39/72 *Commission v Italy* ECLI:EU:C:1973:13, paras 24–25 (emphasis added); confirmed in Case 128/78 *Commission v United Kingdom* ECLI:EU:C:1979:32, para 12.

in EU legal acts addressed to private actors.[13]

It is notable that, in the rulings summarised above, solidarity was conceived not only as a 'duty' under EU law but one that is 'accepted by' the Member States. An important contrast was therefore drawn between a State acting 'unilaterally' based on 'its own conception of national interest', on the one hand, and an 'equilibrium between advantages and obligations flowing from its adherence to the [Union]', on the other. To give effect to that idea, mechanisms that ensured that the Member States did act collectively therefore already suggested a procedural dimension to solidarity: the Court not only 'made it clear that the principle of solidarity necessarily sometimes implies accepting burden-sharing'[14] but also affirmed the validity of Community mechanisms set up to give effect to that obligation. Thus, irrespective of outcome, in other words, the process of collective decision-making is itself solidarity-tuned in more procedural terms.

3 Solidarity as a procedural principle of EU law: recent innovations

The legal nature of solidarity has, more recently, been significantly progressed in two main areas of case law: immigration and energy.[15] As the analysis in this section shows, these developments have also highlighted the procedural aspects of solidarity as a legal obligation by emphasising the significance of processes that ensure collective decision-making and determine the fair sharing of responsibilities, thus consolidating the foundations already introduced in Section 2 above.

First, in case law in the field of *immigration*, the Court affirmed that 'it is not permissible, if the objective of solidarity […] is not to be under-

[13] Case 250/84 *Eridania zuccherifici nazionali and Others* ECLI:EU:C:1986:22, para 20 ('the Council was justified in dividing the quotas between the individual undertakings on the basis of their actual production […] [S]uch a distribution of the burden is […] consistent with the principle of solidarity between producers, since production is a legitimate criterion for assessing the economic strength of producers and the benefits which they derive from the system'). Commenting on that decision, AG Sharpston observed that '[i]n so ruling, the Court made it clear that the principle of solidarity necessarily sometimes implies accepting burden-sharing'.

[14] Opinion of AG Sharpston (n 2) para 251. She also underlined that the significance of solidarity in situations of crisis or emergency, now addressed by Article 222 TFEU, has a similarly long case law history: 'as early as 1983, in the context of steel quotas, the Court explained that "it is in fact impossible to entertain the concept of necessity in relation to the quota system provided for by Article 58 of the ECSC Treaty, which is based on solidarity between all Community steel undertakings in the face of the crisis and seeks an *equitable distribution of the sacrifices arising from unavoidable economic circumstances*"' (para 249 of the Opinion; referring to Case 263/82 *Klöckner-Werke v Commission* ECLI:EU:C:1983:373, para 17, emphasis added).

[15] Anticipating that solidarity implied these legal consequences, see E Küçük, 'Solidarity in EU Law: An Elusive Political Statement or a Legal Principle with Substance?' in Biondi, Dagilyté, and Küçük (eds), *Solidarity in EU Law. Legal Principle in the Making* (Edward Elgar 2018) 38; see, in contrast, in the same volume, E Dagilyté, 'Solidarity: A General Principle of EU Law? Two Variations on the Solidarity Theme' (ibid) 61.

mined, for a Member State to be able to rely […] on its unilateral assessment of the alleged lack of effectiveness, or even the purported malfunctioning' of adopted EU mechanisms.[16] That finding evidences continuity with the foundational solidarity case law in terms of the importance of taking decisions collectively under processes developed through and governed by EU law. To give effect to that requirement in the area of international protection, binding relocation mechanisms were conceived at EU level to address the unequal impact on a minority of Member States, having regard to the commitment in Article 80 TFEU that 'the policies of the Union in the area of border checks, asylum and immigration and their implementation are to be governed by the principle of solidarity and fair sharing of responsibility between the Member States'.

Hungary and Slovakia (unsuccessfully) challenged the legality of Council Decision 2015/1601/EU, which implemented mechanisms to support Italy and Greece.[17] The Court highlighted the 'significant and growing pressure [that] would continue to be put on the Greek and Italian asylum systems' to underline why 'the Council considered it vital to show solidarity towards those two Member States'.[18] Arguments that the Council had made a manifest error of assessment were dismissed, bearing in mind that '[it] was in fact *required*, as is stated in recital 2 of the decision, *to give effect to the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States*, which applies, under Article 80 TFEU, when the EU common policy on asylum is implemented'.[19] Moreover, '[w]hen one or more Member States are faced with an emergency situation within the meaning of Article 78(3) TFEU, the burdens entailed by the provisional measures adopted under that provision for the benefit of that or those Member States must, as a rule, be divided between all the other Member States, in accordance with the principle of solidarity and fair sharing of responsibility between the Member States'.[20]

It might be argued that the concrete findings drawn from the principle of solidarity in *Slovak Republic and Hungary v Council* connect directly – and only – to the statement in Article 80 TFEU that AFSJ policies and their implementation 'shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States'. However, the Court's references to previous rulings such as *Commission v Italy* in a subsequent judgment illustrate the wider reach of solidarity as a legal principle and of its impulse towards tak-

[16] Joined Cases C-715/17, C-718/17 and C-719/17 *Commission v Poland, Czech Republic and Hungary*, ECLI:EU:C:2020:257, para 180.

[17] Council Decision 2015/1601/EU establishing provisional measures in the area of international protection for the benefit of Italy and Greece [2015] OJ L248/80.

[18] Joined Cases C-643/15 and C-647/15 *Slovak Republic and Hungary v Council* ECLI:EU:C:2017:631, para 251.

[19] ibid, para 252 (emphasis added).

[20] ibid, para 291.

ing *collective* action even in situations of *different* impacts for different Member States. In *Commission v Poland, Czech Republic and Hungary*, (successful) infringement proceedings were taken against all three Member States for failures to fulfil obligations under the binding relocation mechanisms adopted to support Italy and Greece.[21] The Court confirmed that 'the burdens entailed by' the contested Decisions 'must, in principle, be divided between all the other Member States, in accordance with the principle of solidarity and fair sharing of responsibility between the Member States'.[22] Once again, the importance of resolving difficulties collectively rather than unilaterally – and moreover, through a mechanism conceived and agreed to under EU law – was highlighted. For example, addressing arguments from the Czech Republic about 'the alleged malfunctioning or ineffectiveness of the relocation mechanism […] as applied in practice',[23] the Court responded that where 'practical difficulties' in implementing the EU mechanism might arise, they must 'be resolved, should they arise, in the spirit of cooperation and mutual trust between the authorities of the Member States that are beneficiaries of relocation and those of the Member States of relocation'.[24] Similarly, Advocate General Sharpston observed that 'other Member States facing problems with their relocation obligations, such as Austria and Sweden, applied for and obtained temporary suspensions of their obligations under those decisions, as provided for by Article 4(5) and (6) thereof' and that '[i]f the three defendant Member States were really confronting significant difficulties, that – rather than deciding unilaterally not to comply with the Relocation Decisions was not necessary – was clearly the appropriate course of action to pursue in order to respect the principle of solidarity'.[25]

The reasoning summarised above illustrates, once again, that solidarity sets procedural as much as substantive obligations in EU law. Reflecting on things more normatively, however, AG Sharpston considered that the infringement proceedings raised 'fundamental questions about the parameters of the EU legal order and the duties incumbent upon Member States'.[26] She issued strong statements on the nature of solidarity in EU law that merit repeating, since both substantive and procedural duties do stem from something deeper in the DNA of the EU:

> Through their participation in that project and their citizenship of European Union, Member States and their nationals have obligations as well as benefits, duties as well as rights. Sharing in the European 'demos' is not a matter of looking through the Treaties

[21] Decision 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece ([2015] OJ L239/146); and Decision 2015/1601 (n 17).

[22] *Commission v Poland, Czech Republic and Hungary* (n 16) para 80.

[23] ibid, para 179.

[24] ibid, para 182.

[25] Opinion of AG Sharpston (n 2), para 235.

[26] ibid, para 238.

> and the secondary legislation to see what one can claim. It also requires one *to shoulder collective responsibilities and (yes) burdens to further the common good*. Respecting the 'rules of the club' and playing one's proper part in solidarity with fellow Europeans cannot be based on a penny-pinching cost-benefit analysis along the lines (familiar, alas, from Brexiteer rhetoric) of 'what precisely does the EU cost me per week and what exactly do I personally get out of it?' Such self-centredness is a betrayal of the founding fathers' vision for a peaceful and prosperous continent. It is the antithesis of being a loyal Member State and being worthy, as an individual, of shared European citizenship. If the European project is to prosper and go forward, we must all do better than that.[27]

Importantly for present purposes, she invoked, *inter alia*, the 'certain degree of financial solidarity' standard developed for EU citizenship law, returned to in Section 4 below, to underpin these idea(l)s.

Second, in the case law on *EU energy policy*, the Court has referred to its classic rulings in *Commission v Italy* and *Commission v UK* and stated that 'the principle of solidarity underpins the entire legal system of the European Union'.[28] It also observed that solidarity is 'closely linked to the principle of sincere cooperation, laid down in Article 4(3) TEU, pursuant to which the European Union and the Member States are, in full mutual respect, to assist each other in carrying out tasks which flow from the Treaties' – a duty that 'not only obliges the Member States to take all the measures necessary to guarantee the application and effectiveness of EU law but also imposes on the EU institutions mutual duties to cooperate in good faith with the Member States'.[29] The 'allegedly abstract nature of the principle of solidarity' was also directly addressed.[30] Recalling its case law on the international protection relocation mechanisms, the Court considered in *Germany v Poland* that 'there is nothing that would permit the inference that the principle of solidarity referred to in Article 194(1) TFEU cannot, as such, produce binding legal effects on the Member States and institutions of the European Union'.[31] Other aspects of the relocation mechanism case law were also applied to energy solidarity, including the fact that where the application of EU energy policy may 'have negative impacts for the *particular interests of a Member State* in that field […] the EU institutions and the Member States are required to take into account,

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[27] ibid, paras 253–254 (emphasis added). See similarly, on the idea of 'European belonging', AG Ruiz-Jarabo Colomer in Case C-228/07 *Petersen* ECLI:EU:C:2019:281; remarking that 'Justice Benjamin Cardozo expressed it superbly in *Baldwin* v *G.A.F. Seelig*, in connection with the Constitution of the United States of America, when he pointed out that the Constitution "was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division"' (Baldwin v GAF Seelig, Inc, 294 US 522, 523 (1935)).

[28] Case C-848/19 P *Germany v Poland* ECLI:EU:C:2021:598, para 41.

[29] ibid.

[30] ibid, para 42.

[31] ibid (emphasis added).

in the context of the implementation of that policy, the interests both of the European Union and of the various Member States that are liable to be affected and to balance those interests where there is a conflict'.[32]

Thus, in developing its conception of energy solidarity under Article 194 TFEU, the Court did draw analogies with Article 80 TFEU and the AFSJ. However, that does not mean that solidarity requires a specific operational provision in the Treaties to produce concrete legal effects, noting again the Court's references also to its 1970s case law in considering the legal qualities of solidarity *per se* and its more generalised finding that 'the principle of solidarity entails rights and obligations both for the European Union and for the Member States, the European Union being bound by an obligation of solidarity towards the Member States and the Member States being bound by an obligation of solidarity between themselves and with regard to the common interest of the European Union and the policies pursued by it'.[33] Thus, even if 'the variety of forms in which the principle of solidarity manifests itself makes it difficult for that principle to be applied in the same way and to the same extent in all areas of EU competence […] there is no reason not to regard solidarity, in some of those areas of competence, as having the capacity to operate as a "guiding principle" for the actions of the European Union in those fields, in which cases this has an impact on its effects in law'.[34]

In *Germany v Poland,* Advocate General Sánchez-Bordona also observed that solidarity 'appears to be linked to relations both horizontal (between Member States, between institutions, between peoples or generations and between Member States and third countries) and vertical (between the European Union and its Member States), in a variety of contexts'.[35] We see the same horizontal dimension of solidarity in the Court's findings four decades ago about private actors sharing burdens within the Community with respect to steel quotas:

> The quota system […] involves heavy sacrifices which must be distributed equitably between all steel undertakings; *those undertakings must strive together in a display of Community solidarity so as to enable the industry as a whole to overcome the crisis and to survive. That being the aim of the system in question*, no necessity consisting in the continued existence and profitability of a particular undertaking can be invoked against the application of the system. In addition it must be emphasized that *if every undertaking could, by pleading necessity on account of serious financial difficulties, exempt itself from the restrictions and exceed at will the production quotas allocated to it*

[32] ibid, para 73.

[33] ibid, para 49. See also, Opinion of AG Campos Sánchez-Bordona (n 1) para 70: 'even though the principle of solidarity is multifaceted and deployed at different levels, its importance in primary law as a value and an objective in the process of European integration is such that it may be regarded as significant enough to create legal consequences'.

[34] Opinion of AG Campos Sánchez-Bordona (n 1) para 72.

[35] ibid, para 60.

> *the quota system would be destroyed*. If the quotas of undertakings pleading necessity were increased — or simply exceeded by the undertakings without any penalty, on grounds of necessity — it would necessarily entail a reduction in the quotas of other undertakings, so that some of them would in turn find themselves in a state of necessity and would be entitled to claim increased quotas or to exceed their quotas without any penalty. *A chain reaction would set in which would lead to the collapse of the system* and thus compromise the purpose of Article 58 of the ECSC Treaty.[36]

The degree to which both the existence and systemic conditions of the Community shaped the Court's reasoning at that time still has remarkable resonance for the strained commitment to free movement as a viable objective today, especially against arguments based on the protection of national public finances. This point is picked up in Section 4 below.

In summary, the Court's reasoning in the areas of immigration law and energy policy confirms that solidarity as a legal principle has procedural as well as normative and substantive dimensions. While obligations for cognate policy areas have been drawn from specific Treaty provisions, more general statements about collective responsibility, cooperation, and fair burden-sharing are evident by reading across them. Solidarity is therefore soaked in the theme of responsibility, which provokes in turn the importance of ensuring accountability not just for decisions taken in the pursuit of EU objectives but also for *how* those decisions were taken – for the procedure. For EU Member States, procedural solidarity represents a continuing commitment to engage with the peoples and the institutions of the Union, which includes those at national level for that purpose. And in that light, the phrasing of Article 2 TEU makes sense: if solidarity prevails in (EU) society, then committing – and sustaining that commitment – to respect for the rule of law or protection of fundamental rights under the system of the EU legal order flows from it.

Importantly for our purposes, however, these ideas also require mechanisms and processes agreed to under EU law for their enforcement, and that is where procedural solidarity again comes to the fore. The procedural dimensions of solidarity guide *how* decisions should be taken – collectively not unilaterally, in expression of sincere cooperation and mutual trust – and *which* interests should be considered in that decision-making process, recognising that the effects of Union law do not always fall evenly across all Member States. Procedural solidarity will not necessarily point to one clear answer. Neither will it necessarily point to the most intensively solidaristic outcome in substantive or normative terms. Rather, it provides a template for how to undertake the process of negotiation that such decisions should entail: to the questions that should be asked, and to the legal parameters within which they should

[36] *Klöckner-Werke v Commission* (n 14) paras 19–20 (emphasis added).

be answered. If solidarity is respected in that sense, then there is at least procedural accountability as regards how certain choices were made.

- Thus, reading across the case law considered so far, both foundational and more recent, I would summarise the main features of procedural solidarity as follows:
- Reflecting the fact that responsibilities flow from privileges in the EU system, solidarity is closely related to the principles of equality, mutual respect, mutual trust, and sincere cooperation – in other words, to the expectation that, as Article 4(3) TEU expresses it, *the Union and the Member States should 'assist each other in carrying out tasks which flow from the Treaties*' – a conception that reflects solidarity as a duty to act *together* from the earliest references to it in the Court's case law.
- Solidarity entails *implementation* in procedural terms as much as representing a commitment to a value or objective more abstractly.
- Determining and implementing *the fair sharing of responsibility, including for financial commitments*, is a first significant expectation in terms of procedural solidarity.
- Solidarity also suggests, second, the fundamental importance of *taking decisions and coordinating action collectively rather than unilaterally*, and of *working within the overall EU system* – even where very specific or individual interests need to be accommodated.

Expressed in that way, what might procedural solidarity offer in terms of advancing some of the more contested questions on the free movement of persons in EU citizenship law?

4 Solidarity as a procedural obligation and the free movement of Union citizens

This part of the paper considers what the procedural understanding and qualities of solidarity presented in Section 3 could contribute to what can seem like intransigent debates about solidarity, Union citizenship, and the free movement of persons. As introduced in Section 1, one of the difficulties about focusing on substantive and/or normative solidarity only is that impasse can quickly be reached: we can assess, empirically, the extent to which solidarity was or was not extended to Union citizens in certain situations; and we can debate, more normatively, whether it should or should not have been. Can we harness procedural solidarity in ways that inject some impetus for change or evolution into these questions?

Following an overview of how solidarity has, more generally, shaped the free movement of Union citizens to date (Section 4.1), two examples of

strained solidarity will then be considered in more detail: situations where entitlement to welfare in host States is ruled out, for both economically inactive and economically active Union citizens respectively (Section 4.2); and the differential impact of free movement for different Member States (Section 4.3). Overall, it is argued that procedural solidarity has concrete contributions to make – that it is legally demanding – in EU citizenship law. Procedural solidarity complements the substantive and normative considerations of solidarity, which focus on what outcomes *are* and on what they *should* be in determining the freeness of movement for Union citizens. Procedural solidarity addresses the frameworks and principles that should be applied for the determination of outcomes, emphasising collective rather than unilateral action that remains sensitive to divergent effects and consequences for different Member States; the fair sharing of responsibility, including financial responsibility, for the agreed-to EU objective freedom of movement; and decision-making processes that are, above all, sited within and therefore governed by the wider system of EU law. In this procedural guise, solidarity induces better accountability for decisions actually taken.

4.1 Solidarity, freedom of movement, and Union citizenship: foundational principles

In both normative and substantive senses, considerations of solidarity are *implicitly* present in EU free movement law: fundamentally, as a benchmark that enables or justifies the extent of equal treatment with host State nationals that will be extended to mobile Union citizens, thereby correcting disincentives or dissolving obstacles to freedom of movement and residence in the first place as well as providing an EU legal safety net when difficulties are experienced afterwards. Conversely, the absence of (sufficient) transnational solidarity is normally invoked to explain why, and where, barriers to welfare entitlement are located.[37] In free movement law, such barriers relate more to the status than the means of the citizen concerned: solidarity is deeper where a link to economic activity can be demonstrated; but dependent on requirements of lawful residence (based largely on financial criteria) and sufficiency of integration in other situations.[38]

At the same time, looking across the development of EU law on the free movement of persons, the role of solidarity is less *explicitly* evident than we might expect. It has been engaged in three main ways to date. First, in adopting and implementing 'such measures in the field of social

[37] See again the references in (n 5) in particular.

[38] Compare especially the requirements for lawful residence in Articles 7(1)(a) (being a worker or self-employed person within the meaning of EU law without further conditions) and 7(1)(b) ('sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State') of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77.

security as are necessary to provide freedom of movement for workers', the objective of coordination set by Article 48 TFEU delimits the reach of EU law to recognise that how a State designs its national welfare system is an expression of solidarity at *national* level.[39] As a result, '[t]he State to whose community of solidarity a person belongs should also bear the responsibility for guaranteeing a minimum means of subsistence'.[40] In that context, Regulation 883/2004 'serves, albeit indirectly, to set limits to the principle of financial solidarity *between* Member States'.[41]

Nevertheless, second, *transnational* solidarity can override national solidarity to ensure equality of treatment in the exercise of free movement. When EU law 'guarantees a natural person the freedom to go to another Member State the protection of that person from harm in the Member State in question, on the same basis as that of nationals and persons residing there, is *a corollary of* that freedom of movement'.[42] On that basis, the Court held in *Cowan* that 'the prohibition of discrimination is applicable to recipients of services within the meaning of the Treaty as regards protection against the risk of assault and the right to obtain financial compensation provided for by national law' and '[t]he fact that the compensation at issue is financed by the Public Treasury cannot alter the rules regarding the protection of the rights guaranteed by the Treaty'.[43] This example illustrates that host States bear certain responsibilities because free movement is workable only if transnational solidarity takes precedence over national solidarity in certain circumstances. Moreover, the latter circumstances are defined by EU, not national, law.

Third, most controversially, case law on Union citizenship later established that 'the principle of a minimum degree of financial solidarity can, in specific, objectively verifiable circumstances, *create a right to equal treatment*'.[44] The contours of that right have changed over time. A 'general' right to move to and reside in another Member State – ie for purposes other than economic activity within the meaning of EU law – was developed before Union citizenship and thus before the adoption of Article 21 TFEU. Building on case law bringing receipt of services within the scope of Article 56 TFEU[45] and extending freedom of movement for cross-border

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[39] Recital 4 of Regulation 883/2004 on the coordination of social security systems [2011] OJ L166/1 affirms that '[i]t is necessary to respect the special characteristics of national social security legislation and to draw up only a system of coordination'. As AG Tanchev has underlined, 'under EU law, as it presently stands, there is no principle of unified supranational social security solidarity' (Case C-866/19 *Zakład Ubezpieczeń Społecznych I Oddział w Warszawie* ECLI:EU:C:2021:301, Opinion of AG Tanchev, para 66).

[40] Case C-287/05 *Hendrix* ECLI:EU:C:2007:196, Opinion of AG Kokott, para 64.

[41] Case C-255/13 *I* ECLI:EU:C:2014:178, Opinion of AG Wahl, para 57 (emphasis added).

[42] Case 186/87 *Cowan* ECLI:EU:C:1989:47, para 17 (emphasis added).

[43] ibid.

[44] Case C-413/01 *Ninni-Orasche* ECLI:EU:C:2003:117 Opinion of AG Geelhoed, para 90 (emphasis added).

[45] See especially Joined Cases 286/82 and 26/83 *Luisi and Carbone* ECLI:EU:C:1984:35; see later eg Case C-274/96 *Bickel and Franz* ECLI:EU:C:1988:563, para 15.

studies,[46] legislative rights to move and reside for purposes other than economic activity were created in three directives: Directive 90/364 on the right of residence generally;[47] Directive 90/365 for retired employees and self-employed persons;[48] and Directive 93/96 for students.[49] The idea of general movement and residence rights was primarily linked to the furthering of the internal market.[50] Importantly, all three Directives set conditions requiring their beneficiaries to have sufficient financial resources to avoid becoming a burden on the social assistance system of the host State and comprehensive sickness insurance cover.[51] The general right to move and reside was therefore decoupled from economic activity but not from conditions of an economic nature.

The creation of Union citizenship elevated general free movement rights from secondary to primary law for EU Member State nationals. To determine welfare entitlement in a host State in that context, EU citizenship law emphasises *lawful residence*. The 1990s Residence Directives did not refer expressly to lawful residence, but they implied it through the conditions on sufficient financial resources and comprehensive sickness insurance. In *Martínez Sala*, the Court of Justice observed that the applicant had 'been *authorised* to reside' in the host State.[52] In consequence, the conditions in Directive 90/364 were not discussed. Instead, the Court held that a Member State national 'lawfully residing in the territory of another Member State [came] within the scope *rationae personae* of the provisions of the Treaty on European citizenship' and could therefore, 'in all situations which fall within the scope *rationae materiae* of [Union] law', rely on the prohibition of nationality discrimination in Article 18

[46] See especially Case 293/83 *Gravier* ECLI:EU:C:1985:69; Case 24/86 *Blaizot* ECLI:EU:C:1988:43; and Case C-47/93 *Commission v Belgium* ECLI:EU:C:1994:181. However, the reach of the Treaty did not, at the time, extend to host State obligations for the payment of maintenance grants, representing a limit to transnational solidarity (Case 39/86 *Lair* ECLI:EU:C:1988:322).

[47] [1990] OJ L180/26.

[48] [1990] OJ L180/28.

[49] [1993] OJ L317/59.

[50] Member State nationals who exercised general rights to move and reside under the Directives were thus described as 'peripheral market actors' (G More, 'The Principle of Equal Treatment: From Market Unifier to Fundamental Right?' in P Craig and G de Búrca (eds), *The Evolution of EU Law* (1st edn, OUP 1999) 517, 540).

[51] Articles 1(1) of Directives 90/364 and 90/365, and Article 1 of Directive 93/96. Article 1 of Directive 93/96 established that 'the Member States shall recognize the right of residence […] *where the student assures the relevant national authority, by means of a declaration or by such alternative means as the student may choose that are at least equivalent, that he has sufficient resources* to avoid becoming a burden on the social assistance system of the host Member State during their period of residence […] and that he is covered by sickness insurance in respect of all risks in the host Member State'. The same language is now in Article 7(1)(c) of Directive 2004/38. Compare eg Article 1(1) of Directive 90/364 '*are covered by sickness insurance* in respect of all risks in the host Member State *and have sufficient resources* to avoid becoming a burden on the social assistance system of the host Member State during their period of residence'. See similarly now, Article 7(1)(b) of Directive 2004/38, which is returned to below.

[52] Case C85/96 *Martínez Sala* ECLI:EU:C:1998:217, para 60 (emphasis added).

TFEU.[53] In subsequent case law, lawful residence remained an essential precondition, but it was generously construed – continuing to include, as in *Martínez Sala*, residence authorised by national law.[54]

Soon after *Martínez Sala*, *Grzelczyk* instituted an explicitly solidarity-based approach to equal treatment claims in EU citizenship law. The preambles to the 1990s Directives had 'envisage[d] that beneficiaries of the right of residence must not become an "unreasonable" burden on the public finances of the host Member State'.[55] For the Court, that explicit reference to *unreasonable* burden implied tolerance of a *reasonable* burden, ie 'accept[ance of] *a certain degree of financial solidarity* between nationals of a host Member State and nationals of other Member States, particularly if the difficulties which a beneficiary of the right of residence encounters are temporary'.[56] Advancing Union citizenship as the 'fundamental status' of Member State nationals,[57] student maintenance grants were subsequently brought within the scope of EU law in *Bidar*.[58] There, the Court indicated that Member States did not just 'accept' (as per *Grzelczyk*) a certain degree of financial solidarity in adopting the 1990s Directives. Rather, they '*must*, in the organisation and application of their social assistance systems, show a certain degree of financial solidarity with nationals of other Member States'.[59] However, the Court also found that it was 'permissible for a Member State to ensure that the grant of assistance to cover the maintenance costs of students from other Member States does not become an unreasonable burden which could have consequences for the overall level of assistance which may be granted by that State' and it was therefore 'legitimate […] to grant such assistance only to students who have demonstrated a certain degree of integration into the society of that State' – which could be established through, for example, proportionate residence conditions.[60]

Replacing the 1990s Directives, Article 6 of Directive 2004/38 now confirms an unconditional right to reside in another Member State for up to three months. For longer periods, Article 7(1)(a) establishes an unconditional right to reside in a host State for workers and self-employed persons. Article 7(1) also addresses rights for economically autonomous persons (Article 7(1)(b)), students (Article 7(1)(c)), and family members

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[53] ibid, paras 61 and 63.

[54] Case C-456/02 *Trojani* ECLI:EU:C:2004:488, especially para 43.

[55] Case C-184/99 *Grzelczyk* ECLI:EU:C:2001:458, para 44.

[56] ibid (emphasis added).

[57] ibid, para 31.

[58] Case C-209/03 *Bidar* ECLI:EU:C:2005:169. Note also the expansion of welfare entitlement to jobseekers: compare the exclusion of equal treatment previously (eg Case 316/85 *Lebon* ECLI:EU:C:1987:302, para 26) with the approach taken in Case C-138/02 *Collins* ECLI:EU:C:2004:172 and Joined Cases C-22/08 and C-23/08 *Vatsouras and Koupatantze* ECLI:EU:C:2009:344.

[59] *Bidar* (n 58) para 56 (emphasis added).

[60] ibid, paras 56–59.

who are themselves Member State nationals (Article 7(1)(d)). Reflecting the 1990s Directives, residence rights based on Articles 7(1)(b) and 7(1)(c) are subject to conditions of sufficient financial resources and comprehensive sickness insurance.[61]

In a general sense, it might be considered that EU law 'is based on values of solidarity *which have been further reinforced since the creation of citizenship* of the Union'.[62] However, Article 24 of Directive 2004/38 restrains the scope of equal treatment with host State nationals, establishing that:

> 1. Subject to such specific provisions as are expressly provided for in the Treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty. The benefit of this right shall be extended to family members who are not nationals of a Member State and who have the right of residence or permanent residence.
>
> 2. By way of derogation from paragraph 1, the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided for in Article 14(4)(b), nor shall it be obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families.[63]

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[61] The Court has confirmed that the requirement to have comprehensive sickness insurance 'would be rendered redundant if it were to be considered that the host Member State *is required* to grant, to an economically inactive Union citizen residing in its territory on the basis of Article 7(1)(b) of Directive 2004/38, affiliation free of charge to its public sickness insurance system': Case C-535/19 *A (Soins de santé publics)* ECLI:EU:C:2021:595, para 56 (emphasis added). However, where 'a Union citizen is affiliated to such a public sickness insurance system in the host Member State, *he or she has comprehensive sickness insurance* within the meaning of Article 7(1)(b)': Case C-247/20 *Commissioners for Her Majesty's Revenue and Customs (Assurance maladie complète)* ECLI:EU:C:2022:177, para 69 (emphasis added).

[62] Case C-535/19 *A (Soins de santé publics)* ECLI:EU:C:2021:114, Opinion of AG Saugmandsgaard Øe, para 153 (emphasis added).

[63] For an early indication that equal treatment claims would be viewed differently following the adoption of the Directive, see Case C-158/07 *Förster* ECLI:EU:C:2008:630; applying previous case law (especially *Bidar*), AG Mazák had reached the opposite view (ECLI:EU:C:2008:399).

Case law has confirmed that the Directive, amid changing economic and political circumstances,[64] unsettled the relationship between equal treatment and the 'certain degree of financial solidarity' that Member States had previously been presumed to accept.[65] In particular, the rulings in *Dano*,[66] *Alimanovic*,[67] *Commission v UK*,[68] and *CG*[69] evolved significant changes in the Court's approach to equal treatment and welfare entitlement. In essence, compliance with the lawful residence conditions in the Directive will now almost always be required.[70] Host States are not obliged to undertake assessments of a citizen's individual circumstances where such conditions are not met,[71] and residence authorised by national law that does not also comply with the Directive's conditions no longer constitutes lawful residence for the purposes of equal treatment.[72]

Recent case law does therefore entail certain conflicts with earlier rulings, which have not been openly confronted by the Court of Justice.[73] Legislative exclusions from entitlement to equal treatment can also seem arbitrary: why sustain equal treatment as regards minimum income support for part-time workers, for example, who reside under Article 7(1)(a) of the Directive, but not for students, who were treated so favourably in that respect in *Grzelczyk*? Reflecting generally on the free movement and associated equal treatment of Union citizens, then, what determinations about solidarity have been made in the Directive and in the case law? In terms of who does and who does not merit host State financial support, these questions are extensively discussed in both normative and

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[64] See eg Case C- 238/15 *Bragança Linares Verruga and Others* ECLI:EU:C:2016:389, Opinion of AG Wathelet, paras 3-5; Case C-140/12 *Brey* ECLI:EU:C:2013:337, Opinion of AG Wahl, para 1; and Case C-181/19 *Jobcenter Krefeld* ECLI:EU:C:2020:377, Opinion of AG Pitruzella, para 1. See further, M Blauberger and others 'ECJ Judges Read the Morning Papers: Explaining the Turnaround of European Citizenship Jurisprudence' (2018) 25 Journal of European Public Policy 1422; G Davies 'Has the Court Changed or Have the Cases? The Deservingness of Litigants as an Element in Court of Justice Citizenship Adjudication' (2018) 25 Journal of European Public Policy 1442; and U Šadl and S Sankari, 'Why Did the Citizenship Jurisprudence Change?' in Thym (ed) (n 5) 89.

[65] See generally K Lenaerts 'European Union Citizenship, National Welfare Systems and Social Solidarity' (2011) 18 Jurisprudencija 397; and D Thym, 'The Elusive Limits of Solidarity: Residence Rights of and Social Benefits for Economically Inactive Union Citizens' (2015) 52 Common Market Law Review 17.

[66] Case C-333/13 *Dano* ECLI:EU:C:2014:2358.

[67] Case C-67/14 *Alimanovic* ECLI:EU:C:2015:597.

[68] Case C-308/14 *Commission v UK* ECLI:EU:C:2016:436.

[69] Case C-709/20 *CG* ECLI:EU:C:2021:602.

[70] See, exceptionally, Case C-181/19 *Jobcenter Krefeld* ECLI:EU:C:2020:794, which confirms equal treatment under EU law for persons residing in the host State as former workers and the primary carers of children who reside there on the basis of Article 10 of Regulation 492/2011 on freedom of movement for workers within the Union [2011] OJ L141/1.

[71] Compare eg Case C-140/12 *Brey* ECLI:EU:C:2013:565 and *Alimanovic* (n 80).

[72] Eg *CG* (n 82).

[73] Eg compare the material significance and non-significance of residence authorised by national law for the purposes of invoking Article 18 TFEU in *Martínez Sala* (n 52) and *CG* (n 69) respectively, which is returned to in Section 4.2.1 below.

substantive terms.[74] However, in more procedural terms, attention has concentrated on how proportionality functions when equal treatment is restricted.[75] Expanding that inquiry, this paper asks us to consider, what, if anything, would assessing EU citizenship law through a wider lens of procedural solidarity add or indeed change. As shown in Sections 2 and 3 above, solidarity entails a set of procedural obligations that should shape how decisions are taken when EU objectives are at stake, ie collective rather than unilateral action, expressed through decision-making that is governed by EU law, confronts the fair sharing of responsibilities, and cultivates better accountability overall for the decisions that are ultimately taken. The extent to which emphasising these obligations more directly in EU citizenship law will now be considered through examples on both welfare entitlement (Section 4.2, to examine the procedural aspects of the fair sharing of responsibility) and uneven mobility (Section 4.3, to examine the procedural aspects of collective rather than unilateral responses where the effects of EU law are differently experienced).

4.2 What happens after welfare entitlement is ruled out? Procedural solidarity and vulnerable free movers

In EU free movement law, determining entitlement to welfare support for Union citizens in host States involves different legal criteria depending on whether the citizen in question is economically inactive (Section 4.2.1) or economically active (4.2.2) there.

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[74] Eg M Cousins, 'The Baseless Fabric of this Vision: EU Citizenship, the Right to Reside and EU Law' (2016) 23 Journal of Social Security Law 89; Editorial comments, 'The Free Movement of Persons in the European Union: Salvaging the Dream while Explaining the Nightmare' (2014) 51 CML Rev 729; A Heindlmaier, 'Mobile EU Citizens and the "Unreasonable Burden": How EU Member States Deal with Residence Rights at the Street Level' in S Mantu, P Minderhoud and E Guild (eds), *EU Citizenship and Free Movement Rights: Taking Supranational Citizenship Seriously* (Brill 2020) 140; K Hailbronner 'Union Citizenship and Access to Social Benefits' (2005) 42 CML Rev 1245; D Kramer, 'Earning Social Citizenship in the European Union: Free Movement and Access to Social Assistance Benefits Reconstructed' (2016) 18 Cambridge Yearbook of European Legal Studies 270; S Mantu and P Minderhoud, 'Exploring the Links Between Residence and Social Rights for Economically Inactive EU Citizens' (2019) European Journal of Migration and Law 313; C O'Brien, '*Civis capitalist sum*: Class as the New Guiding Principle of EU Free Movement Rights' (2016) 53 CML Rev 937; N Rennuy, 'The Trilemma of EU Social Benefits Law: Seeing the Wood and the Trees' (2019) 56 CML Rev 1549; Thym (n 65) and 'When Union Citizens turn into Illegal Migrants: The *Dano* Case' (2015) 40 EL Rev 249; and H Verschueren, 'Free Movement of EU Citizens: Including for the Poor?' (2015b) 22 Maastricht Journal of European and Comparative Law 10.

[75] Eg M Dougan, 'The Constitutional Dimension to the Case Law on Union Citizenship' (2006) 31 EL Rev 613 and 'The Bubble that Burst: Exploring the Legitimacy of the Case Law on the Free Movement of Union Citizens' in Adams, de Waele, Meeusen and Straetmans (eds), *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice* (Hart Publishing 2013) 127; A Iliopoulou-Penot, 'Deconstructing the Former Edifice of Union Citizenship? The *Alimanovic* Judgment' (2016) 53 CML Rev 1007; H Verschueren, 'Preventing "Benefit Tourism" in the EU: A Narrow or Broad Interpretation of the Possibilities Offered by the ECJ in *Dano*?' (2015) 52 CML Rev 363; and F Wollenschläger, 'Consolidating Union Citizenship: Residence and Solidarity Rights for Jobseekers and the Economically Inactive in the post-*Dano* Era' in Thym (ed) (n 5) 171.

4.2.1 Responsibility shared fairly I: welfare entitlement and the economically inactive

As introduced in Section 4.1 above, the 'certain degree of financial solidarity' case law was curtailed by Directive 2004/38 in two important ways: first, by the express derogations from equal treatment in Article 24(2) of the Directive (which mainly rule out social assistance during the first three months of residence only as well as, beyond this, for those seeking work); and second, also by the more open-ended requirement in Article 24(1) that Member State nationals must reside in a host State 'on the basis of' the Directive before being entitled to equal treatment there. That usually requires compliance with the conditions in Article 7(1).[76] These conditions for lawful host State residence govern claims to both social assistance[77] and social security benefits.[78] Only beneficiaries of the right of permanent residence in the host State, as set out in Article 16 of the Directive, benefit from 'full solidarity' there.[79] Conversely, Member State nationals who reside in a host State on other grounds – including residence permits granted under national law – may not now claim to equal treatment unless the conditions in Article 7(1)(b) are also fulfilled. Thus, in *Dano*, the Court held that 'the principle of non-discrimination, laid down generally in Article 18 TFEU, *is given more specific expression in Article 24 of Directive 2004/38* in relation to Union citizens who […] exercise their right to move and reside'.[80] Otherwise, '[t]o accept that persons who do not have a right of residence under Directive 2004/38 may claim entitlement to social benefits under the same conditions as those applicable to nationals of the host Member State would run counter to an objective of the directive, set out in recital 10 in its preamble, namely preventing Union citizens who are nationals of other Member States from becoming an unreasonable burden on the social assistance system of

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[76] In *GMA*, the Court considered that jobseekers reside 'on the basis of' Article 14(4)(b) of the Directive, but their exclusion from entitlement to social assistance is permitted expressly by Article 24(2) (Case C-710/19 *GMA (Demandeur d'emploi)* ECLI:EU:C:2020:1037).

[77] In *Brey*, the Court defined 'social assistance' for the purposes of Directive 2004/38 as 'all assistance introduced by the public authorities, whether at national, regional or local level, that can be claimed by an individual who does not have resources sufficient to meet his own basic needs and the needs of his family and who, by reason of that fact, may become a burden on the public finances of the host Member State during his period of residence which could have consequences for the overall level of assistance which may be granted by that State' (*Brey* (n 71) para 61. In *Alimanovic*, the Court also introduced a 'predominant function' approach to characterising benefits: ie if 'the predominant function of the benefits at issue […] is in fact to cover the minimum subsistence costs necessary to lead a life in keeping with human dignity', then such benefits 'cannot be characterised as benefits of a financial nature which are intended to facilitate access to the labour market of a Member State' (*Alimanovic* (n 67) paras 45–46).

[78] *Commission v UK* (n 68) para 68. However, national processes for verifying lawful residence in such circumstances must be proportionate (para 78 ff; see also Article 14(2) of Directive 2004/38, which precludes systematic verification of residence rights).

[79] Case C-456/12 *O and B* and Case C-457/12 *S and G* ECLI:EU:C:2013:837, Opinion of AG Sharpston, para 104.

[80] *Dano* (n 66) para 61 (emphasis added).

the host Member State'.[81] In that light, Article 7(1)(b) 'seeks to prevent economically inactive Union citizens from using the host Member State's welfare system to fund their means of subsistence'.[82]

The Court has still not addressed a logical gap in that reasoning: if Article 24 of the Directive is the 'specific expression' of equal treatment for citizens residing in the host State *on the basis of the Directive*, why is it relevant at all to the equal treatment claims of citizens who are *not* residing in the host State on that basis?[83] That is just one of the many issues debated following the rulings in *Dano* and *Alimanovic*.[84] Some important clarifications and adjustments were made in subsequent case law, which has confirmed, for example, that only the express derogations in Article 24(2) of the Directive restrict equal treatment when lawful residence *is* established;[85] and that, for workers (including former workers), the guarantee of equal treatment with host State workers as regards social and tax advantages (which includes income support where relevant) in Article 7(2) of Regulation 492/2011 continues to apply in parallel to, rather than having being absorbed by, the Directive.[86] For present purposes, however, it is the Court's finding that the Charter of Fundamental Rights functions as a safeguard to ensure (at least in certain circumstances) residence in a host State under conditions of dignity even where that residence does not comply with the conditions of the Directive that raises traces of procedural solidarity – of a framework to guide the taking of a fair share of responsibility for the reality of free movement's consequences.

Several provisions of the Charter of Fundamental Rights could be applied in the context of freedom of movement for Union citizens: the law has engaged mainly to date with Articles 7 (respect for family life) and 24 (children's rights) CFR; but we could also consider Articles 1 (human dignity), 14 (education), 20 (equality before the law), 21 (non-discrimination), 25 (rights of the elderly), 26 (integration of persons with disabilities), 34 (social security and social assistance) and 35 (health care) CFR.[87] However, Article 51(1) CFR provides that the Charter is 'addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law'. To establish when national authorities are bound by the Charter, the Court has determined that Member States are 'implementing Union law' when national legislation 'falls

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[81] ibid, para 74.

[82] ibid, para 76.

[83] See further, M Haag, 'The *coup de grâce* to the Union Citizen's Right to Equal Treatment: *CG v The Department for Communities in Northern Ireland*' (2022) 59 CML Rev 1081.

[84] See again, the references in (n 74) and (n 75).

[85] Case C-411/20 *Familienkasse Niedersachsen-Bremen* ECLI:EU:C:2022:602.

[86] *Jobcenter Krefeld* (n 70). See further, F Ristiuccia, 'The Right to Social Assistance of Children in Education and Their Primary Carers: *Jobcenter Krefeld*' (2021) 58 CML Rev 877.

[87] See further, Verschueren (n 75) 384 and 389–390.

within the scope' of EU law.[88] The referring court had therefore asked in *Dano* 'whether Articles 1, 20 and 51 of the Charter [require] the Member States to grant Union citizens non-contributory cash benefits by way of basic provision such as to enable permanent residence or whether those States may limit their grant to the provision of funds necessary for return to the home State'.[89] In response, the Court of Justice held:

> [Regulation 883/2004] is not intended to lay down the conditions creating the right to those benefits. It is thus for the legislature of each Member State to lay down those conditions. Accordingly, since those conditions result neither from Regulation No 883/2004 nor from Directive 2004/38 or other secondary EU legislation, and the Member States thus have competence to determine the conditions for the grant of such benefits, they also have competence […] to define the extent of the social cover provided by that type of benefit. Consequently, when the Member States lay down the conditions for the grant of special non-contributory cash benefits and the extent of such benefits, they are not implementing EU law.[90]

Yet very differently, before *Dano*, the Court found in *Commission v Austria* that while 'it is for [the Member States] to determine the conditions concerning the right or duty to be insured with a social security scheme as well as the conditions for entitlement to benefits, *in exercising those powers, they must none the less comply with the law of the European Union and, in particular*, with the provisions of the FEU Treaty [on the right to move and reside]'.[91]

Applying the Charter might not have changed the outcome in *Dano*.[92] Nevertheless, the narrow interpretation given to national measures that come within the scope of EU law did not fit with the Court's approach to Charter scope more generally. It thus revisited its position on the Charter and free movement law in *CG*. The claimant could not establish equal treatment with host State nationals as regards entitlement to social assistance because she did not reside in the host State (the UK) on the basis of Directive 2004/38. However, her residence was authorised under the UK's pre-settled status scheme, introduced to implement the Withdrawal

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88 Case C-617/10 *Åkerberg Fransson* ECLI:EU:C:2013:105, para 19.

89 *Dano* (n 66) para 85.

90 ibid, paras 89–91.

91 Case C-75/11 *Commission v Austria* ECLI:EU:C:2012:605, para 47 (emphasis added); referring to Case C-503/09 *Stewart* ECLI:EU:C:2011:500, paras 75–77.

92 Though in the context of Directive 2003/109 concerning the status of third-country nationals who are long-term residents [2003] OJ L16/44, the Court has found that 'according to Article 34 of the Charter, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources' (Case C-571/10 *Kamberaj* ECLI:EU:C:2012:233, para 92).

Agreement concluded between the EU and the UK.[93] On the grounds that she had exercised free movement rights under Article 21 TFEU and that 'the fundamental rights guaranteed in the legal order of the European Union are applicable *in all situations governed by EU law*',[94] the Court concluded that while the granting of her right to reside did not constitute implementation of the Directive since its conditions were not met,[95] host State authorities were nonetheless 'implement[ing] the provisions of the FEU Treaty on Union citizenship' and 'they are accordingly obliged to comply with the provisions of the Charter'.[96]

Recognising that the Charter applies where residence is unlawful under EU law but authorised under national law is an important case law adjustment in terms of the solidarity that Member States should extend in situations produced by free movement. In a substantive sense, the Court engaged Article 1 CFR, obliging the host State 'to ensure that a Union citizen who has made use of his or her freedom to move and to reside within the territory of the Member States, who has a right of residence on the basis of national law, *and who is in a vulnerable situation*, may nevertheless live *in dignified conditions*'.[97] To give effect to that idea, however, the Court then issued a set of questions that national authorities must consider, reflecting procedural solidarity. In substantive terms, the guidance issued to the referring court in *CG* was very much framed around the specific facts of the case.[98] How far the Charter's protection, and thus obligations of solidarity, extend is therefore not clear: indeed, both in factual terms and through the focus on Article 1 CFR and human dignity rather than the more general social protections provided for in the

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[93] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2019] OJ C384I/01. Citizen's rights are provided for in Part 2 of the Agreement: see generally, E Spaventa 'The Rights of Citizens under the Withdrawal Agreement: A Critical Analysis' (2020) 45 European Law Review 193.

[94] *CG* (n 69) para 86 (emphasis added).

[95] ibid, para 87.

[96] ibid, para 88.

[97] ibid, para 89 (emphasis added).

[98] 'CG is a mother of two young children, with no resources to provide for her own and her children's needs, who is isolated on account of having fled a violent partner' and, '*[i]n such a situation*, the competent national authorities may refuse an application for social assistance […] only after ascertaining that that refusal does not expose the citizen concerned and the children for which he or she is responsible to an actual and current risk of violation of their fundamental rights, as enshrined in Articles 1, 7 and 24 of the Charter' (ibid, para 92, emphasis added). O'Brien therefore asks: [c]an national authorities refuse benefits to EU nationals, even those with a right to reside, without considering fundamental rights, if there is no evidence of domestic abuse? Or if they are not similarly isolated? Or do not have young children? Or have some meagre resources? Should other vulnerabilities be taken into account—long term illnesses, or being disabled, for instance?' (C O'Brien, 'The Great EU Citizenship Illusion Exposed: Equal Treatment Rights Evaporate for the Vulnerable (*CG v The Department for Communities in Northern Ireland)*' (2021) 46 European Law Review 801, 812).

Charter, the substantive impact of the ruling could be relatively limited.[99] Moreover, even though any Member State national who is refused social assistance in a host State could be vulnerable to living in non-dignified conditions, CG's authorised residence was legally significant to trigger the Charter in the first place. Thus, EU law itself permits a sphere of vulnerability for mobile Union citizens,[100] and for the purposes of reflecting on the 'rightness' of that outcome, solidarity is a vital benchmark in normative and substantive terms. Directive 2004/38 reflects the view that citizens integrate more deeply in the host State over time and can therefore claim stronger protection from expulsion and greater access to equal treatment – that they have a stronger claim to solidarity – as a result.[101] To put it another way, for the first five years of residence, Article 24 of the Directive '*authorises* differences in treatment between Union citizens and the nationals of the host Member State',[102] representing legislatively agreed and legislatively articulated limits to freedom of movement and residence and thus also to transnational solidarity.

Nevertheless, *CG* also illustrates how solidarity is enhanced in a procedural sense – as underlined by the contrast with the dismissal of the Charter's relevance in *Dano*. It represents an obligation that could be framed as the fair sharing of responsibility to ensure the dignity of Union citizens who do not enjoy equal treatment with host State nationals. Before *CG*, the rejection of a claim to financial assistance by Union citizens who did not reside in the host State under Directive 2004/38 was effectively the end of the EU-based legal obligation. However, that cut-off point did not taken into account that, in factual terms, the extent to which someone is integrated in a host State 'does not depend on [their] material circumstances […], that is whether they are secure or insecure, as those circumstances have been taken into account and managed by the host Member State for a period of time'.[103] Recall, for example, that Ms Dano's son was born in the host State (where she also had a sister) and that State also paid family benefits to her; or that all three of Ms Alimanovic's children were born in the host State, to which the family returned after a

[99] For example, Haag notes that '[t]he Court omitted Article 21(2) CFREU which also provides for the right to non-discrimination on the basis of nationality. It also did not refer to Article 34(2) CFREU on the entitlement to social security benefits and social advantages. This suggests that the protection of fundamental rights in this context is not about equal access to social assistance as compared to the nationals of the State, but rather it is about ensuring that the Union citizen is granted basic subsistence to uphold their human dignity' (Haag (n 83) 1102). See further, C O'Brien, '*Acte cryptique*? *Zambrano*, Welfare Rights, and Underclass Citizenship in the Tale of the Missing Preliminary Reference' (2019) 56 CML Rev 1697; and AG Richard de la Tour in *CG* (ECLI:EU:C:2021:515) para 103 of the Opinion.

[100] As O'Brien expresses it, '[w]hy are Member States that permit EU migrants to reside in their territories without sufficient resources, without granting access to social assistance, not also in effect recognising those migrants' art.21 TFEU rights?' (O'Brien (n 99) 812).

[101] Eg *Familienkasse Niedersachsen-Bremen* (n 85) para 78.

[102] Case C-299/14 *García-Nieto* ECLI:EU:C:2015:366, Opinion of AG Wathelet, para 65 (emphasis added).

[103] Joined Cases C-424/10 and C-425/10 *Ziolkowski and Szeja* ECLI:EU:C:2011:575, Opinion of AG Bot, para 55.

decade spent in another Member State, ie having taken advantage of the EU's free movement space.

These examples illustrate that, in reality, Member State nationals who are either unlawfully resident or lawfully resident yet excluded from equal treatment in host States under the express derogations in Article 24 of the Directive are often still, 'as it were, "tolerated"' there.[104] That host States should bear a 'certain degree' of responsibility in such circumstances fits with solidarity's procedural obligations.[105] Before the *CG* case, there were few signals in EU law about how responsibility for tolerated citizens should be *fairly shared* (to recall the test that procedural solidarity prescribes), even when a Union citizen's residence has been tolerated though not formally authorised by a host State for some time. Importantly for our purposes, though, where that situation has been confronted rather than overlooked by EU law, host States have been asked to confront the consequences of their own inaction.[106] The family ties built in the host State in *Dano* and *Alimanovic* as well as the facts in *CG* demonstrate that attributing responsibility only to the citizen concerned – obliging them, in effect, to leave the host State if they cannot support themselves there, as well as assuming that they can easily do so – can be too simplistic.

When the Court conceived its 'certain degree of financial solidarity' case law, it also underlined that 'it remains open to the host Member State to take the view that a national of another Member State who has recourse to social assistance no longer fulfils the conditions of his right of residence' and, in such circumstances, the host State 'may […] take a measure to remove [them]' but only 'within the limits imposed by [Union] law'.[107] Thus, we see from the Court an accepted limit on substantive and normative solidarity, but a safeguard of procedural solidarity put in place. Directive 2004/38 now sets out the basic 'limits imposed by EU law' in such situations – it places EU-set, collectively agreed processual steps around the actions that national authorities can take, reflecting the fair sharing of responsibility under procedural solidarity. Article 14(3) of the Directive underlines that 'recourse to the social assistance

[104] Case C-331/16 *K and HF* ECLI:EU:C:2017:973, Opinion of AG Saugmandsgaard Øe, para 125.

[105] At a basic level, tolerated citizens are protected by the procedural safeguards provided for in Articles 8, 14, 15, 30 and 31 of the Directive should the host State reach the point of *intolerance* of their presence, returned to below. Case law also suggests that even unlawfully resident Union citizens can claim protection from extradition outside the territory of the Union in certain circumstances (see especially Case C-182/15 *Petruhhin*, ECLI:EU:C:2016:630). In *Singh II*, AG Kokott referred to ECtHR case law establishing that 'in so far as a family has […] lawfully established its residence in a particular State, withdrawal of the right of residence may amount to an infringement' (Case C-218/14 *Singh II* ECLI:EU:C:2015:306, Opinion of AG Kokott, para 47).

[106] See eg on the sufficient resources condition in Article 7(1)(b) of the Directive, Case C-93/18 *Bajratari* ECLI:EU:C:2019:809; and on the requirement of comprehensive sickness insurance in the same provision, *A (Soins de santé publics)* (n 74).

[107] *Trojani* (n 54) para 45.

system by a citizen of the Union may not automatically entail such a measure'.[108] However, Article 15(1) implicitly enables host States to expel Member State nationals who are unlawfully resident within the meaning of EU law, ie who do not comply with the conditions in Articles 6, 7, 12, 13 or 14(4)(b) of the Directive before rights of permanent residence are acquired.[109] For expulsion decisions based on Article 15(1), the host State must first, having regard to recital 16 of the Directive, 'examine whether it is a case of temporary difficulties and take into account the duration of residence, the personal circumstances and the amount of aid granted in order to consider whether the beneficiary has become an unreasonable burden on its social assistance system and to proceed to his expulsion'.[110] Where it is decided to proceed to expulsion, Article 15(1) requires the host State to comply with the procedural safeguards in Articles 30 and 31 of the Directive.[111] Indeed, Advocate General Villalón has suggested that host States 'may not confine themselves simply to refusing to grant the benefit claimed' but should inform citizens found not to have a right to reside in the host State of that fact, observing the procedural safeguards in Articles 30 and 31.[112]

The most detailed reflection on such responsibility to date came in *FS*, which required the Court to consider whether a person expelled from the host State under Article 15(1) could immediately re-enter under Article 6 of the Directive, ie restarting a new residence period without any conditions for up to three months. The Court held that if 'mere physical departure' from the host State was accepted as sufficient to comply with an Article 15(1) expulsion decision, a Union citizen 'would only have to cross the border of the host Member State in order to be able to return immediately to the territory of that Member State and to rely on a new right of residence under Article 6' and by '[a]cting repeatedly in that way', they 'could be granted numerous rights of residence successively in the territory of a single Member State' under Article 6 ('even though, in reality, those various rights would be granted for the purposes of the same single actual residence').[113] That scenario 'would be tantamount to rendering redundant the possibility for the host Member State to terminate the residence of a Union citizen, ignoring the 'actual temporal limit' of periods up to three months around which Article 6 is designed.[114] The

[108] ibid.

[109] Article 15(1) of Directive 2004/38 provides that '[t]he procedures provided for by Articles 30 and 31 shall apply by analogy to all decisions restricting free movement of Union citizens and their family members on grounds *other than* public policy, public security or public health' (emphasis added, thereby confirming that expulsion is possible on other grounds).

[110] Confirmed in eg *Alimanovic* (n 67) para 59.

[111] Except for the guarantees specifically addressing public policy, public security or public health (Case C-94/18 *Chenchooliah* ECLI:EU:C:2019:693).

[112] Case C-308/14 *Commission v UK* ECLI:EU:C:2015:666, Opinion of AG Cruz Villalón, para 96.

[113] Case C-719/19 *FS* ECLI:EU:C:2021:506, para 73.

[114] ibid, para 74.

Court therefore established procedural criteria that permit a host State to determine if the person has 'genuinely and effectively terminate[d]' their residence in the host State.[115] Thus, to claim a new right of residence in a host State under Article 6(1) of the Directive, someone who has already been expelled on the basis of Article 15 'must not only physically leave that territory, but also have genuinely and effectively terminated his or her residence on that territory, with the result that, upon his or her return to the territory of the host Member State, his or her residence cannot be regarded as constituting in fact a continuation of his or her preceding residence'.[116]

Between the extremes of passive tolerance of residence that is unlawful under EU free movement law and proceeding actively to expulsion in such situations, procedural solidarity provides a way not only to frame and understand the limited obligations that have already been determined in the Directive and in the case law, but also to develop these obligations further. For example, the fair sharing of responsibility could be invoked to mandate better, more proactive support for Union citizens to transition to more secure residence statuses in a host State: for example, to guide the economically inactive citizen who is refused social assistance towards opportunities for changing their situation there. If the citizen concerned can commence economic activity within the meaning of EU law or otherwise acquire sufficient resources (for example, from a family member), their residence status is entirely transformed. Similarly, even limited levels of work can, as noted above and retuned to in Section 4.2.2 below, generate full entitlement to equal treatment with host State nationals as regards social assistance. But it is not always easy or even possible for citizens to change their situations by themselves. Previous case law that established host State obligations in situations of temporary difficulty, notably *Grzelczyk*, perhaps better reflected a framework – concrete mechanisms and processes – that encourages *fairly* shared responsibility: for citizens themselves to transition towards self-sufficiency; but also, for host States to facilitate that transition, within reason.

Difficulties around the administrative burden and legal uncertainty that a very diffuse case-by-case assessment obligation would reinstate have to be acknowledged. Yet it is important that EU free movement law continues to articulate how responsibility for situations produced by that very privilege can be shared fairly.[117] Conversely, the fact that free move-

[115] ibid, para 75.

[116] ibid, para 81.

[117] On the less developed but potentially very significant responsibilities of home States in this regard, see M Haag, 'A Sense of Responsibility: The Shifting Roles of the Member States for the Union Citizen' (PhD thesis, European University Institute, Florence, 2019); F Strumia, 'Supranational Citizenship Enablers: Free Movement from the Perspective of Home Member States' (2020) 45 EL Rev 507; and I Goldner Lang and M Lang, 'The Dark Side of Free Movement: When Individual and Social Interests Clash' in S Mantu, P Minderhoud and E Guild (eds), *EU Citizenship and Free Movement: Taking Supranational Citizenship Seriously* (Brill 2020) 382.

ment does not very comprehensively address these responsibilities at present is a significant gap with respect to the fair sharing of responsibility that procedural solidarity compels. In situations where welfare entitlement in host States is denied under EU law, addressing equal treatment anomalies where residence is not based on Directive 2004/38 and progressing beyond passive tolerance of Union citizens towards more actively supporting them to transition to more secure residence statuses would fit well with procedural solidarity's emphasis on cooperatively carrying out of tasks that flow from the Treaties in ways that are, in particular, reflective of the fair sharing of responsibility.

Debates about whether EU citizenship law exhibits substantive and normative solidarity gaps when equal treatment does not apply will not, and should not, be displaced by Charter safety nets or expulsion safeguards: we will still disagree about whether the claimants in *Dano* and *Alimanovic* should have won their cases or not. But even where equal treatment with host State nationals does not apply, procedural solidarity's requirement that responsibility for resulting situations is acknowledged and *fairly* shared signals that equal treatment is not the end of the legal duties that EU law imposes. The Directive and the case law do establish some basic criteria for such situations already, but there is undoubtedly scope for conceiving more imaginative, more proactive mechanisms of support and fair responsibility sharing too.

4.2.2 Responsibility shared fairly II: welfare entitlement and the economically active

As noted in Section 4.1, Article 48 TFEU establishes EU competence for social security coordination. Equal treatment is a critical objective,[118] and entitlement to welfare for workers and self-employed persons who are not host State nationals draws added bite from Articles 45 and 49 TFEU respectively and from Regulation 492/2011 for workers specifically. Article 7(2) of that Regulation establishes that workers who are nationals of other Member States 'shall enjoy the same social and tax advantages as national workers'. The Court of Justice considers that such advantages are not confined to the context of work itself. Rather, 'in view of the equality of treatment which the provision seeks to achieve, the substantive area of application must be delineated so as to include all social and tax advantages, *whether or not attached to the contract of employment*'.[119] Thus, social and tax advantages 'are generally granted to national workers primarily because of their objective status as workers or by virtue of the mere fact of their residence on the national territory,[120] promoting the

[118] See especially Article 4 of Regulation 883/2004 ('[u]nless otherwise provided for by this Regulation, persons to whom this Regulation applies shall enjoy the same benefits and be subject to the same obligations under the legislation of any Member State as the nationals thereof').

[119] Case 32/75 *Cristini* ECLI:EU:C:1975:120, para 13 (emphasis added).

[120] Case 65/81 *Reina* ECLI:EU:C:1982:6, para 12.

'social advancement' of workers in a host State.[121] The definition of work in free movement law requires that activities must be 'real and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary' to trigger equal treatment with host State nationals.[122] In contrast, work that fails to meet that definition would not establish, 'in principle, a *sufficient* link of integration with the society of the host State'.[123]

Neither the EU legislator nor the Court of Justice has expressed these principles in the language of solidarity explicitly. Nevertheless, solidarity is a useful way to frame the understanding that work evidences sufficient integration in the host State to generate related entitlement to equal treatment there. Moreover, the nature of the benefit being claimed does not impact on equal treatment in situations of economic activity. In other words, even 'a benefit guaranteeing a minimum means of subsistence constitutes a social advantage, within the meaning of [Article 7(2) of] Regulation [492/2011], which may not be denied to a migrant worker who is a national of another Member State and is resident within the territory of the State paying the benefit, nor to his family'.[124] In such circumstances, '[t]he link of integration arises from, *inter alia*, the fact that, through the taxes which he pays in the host Member State by virtue of his employment, the migrant worker also contributes to the financing of the social policies of that State and should profit from them under the same conditions as national workers'.[125] Equal treatment for minimum income benefits is extended to self-employed workers through the direct application of Articles 18 and 49 TFEU.[126] The entitlement that results, for both workers and self-employed persons, is also reflected in Directive 2004/38. As noted in Section 4.1 above, for residence beyond three months, Article 7(1)(a) of the Directive confers unconditional rights on Member State nationals who either work or are self-employed in the host State. In other words, once the *status* of worker or self-employed person is held, the Directive imposes no further requirements as regards their *means*. Article 7(3) of the Directive further ensures that, in certain circumstances, Member State nationals retain the status of worker or

[121] *Lair* (n 46) para 22 (emphasis added). See also, recital 3 of Regulation 1612/68 ([1968] OJ L257/13); now reflected in recital 4 of Regulation 492/2011.

[122] Case C-345/09 *van Delft* ECLI:EU:C:2010:610, para 89. See earlier, Case 53/81 *Levin* ECLI:EU:C:1982:105 and Case 66/85 *Lawrie-Blum* ECLI:EU:C:1986:284.

[123] Case C-542/09 *Commission v Netherlands* ECLI:EU:C:2012:346, para 65 (emphasis added).

[124] Case 249/83 *Hoeckx* ECLI:EU:C:1985:139, para 22.

[125] *Commission v Netherlands* (n 123) para 66. See similarly, Case C-410/18 *Aubriet* ECLI:EU:C:2019:582, para 33 and Case C-328/20 *Commission v Austria* ECLI:EU:C:2022:468, para 51.

[126] Eg Case C-299/01 *Commission v Luxembourg* ECLI:EU:C:2002:394, para 12; Case C-168/20 *BJ and OV* ECLI:EU:C:2021:907, para 85.

self-employed person after economic activity has ceased.[127]

Historically, the most volatile line of case law on welfare entitlement in situations of economic activity concerned frontier workers, requiring determination of the respective integration values of economic activity and place of residence.[128] However, more general fractures in the equal treatment of workers and self-employed persons have recently emerged too.[129] As noted in Section 4.1 above, the protection of national public finances can justify restrictions on equal treatment in EU citizenship law in the absence of economic activity in the host State. In free movement law more generally, 'national legislation may […] constitute a justified restriction on a fundamental freedom when it is dictated by reasons of an economic nature in the pursuit of an objective in the public interest'.[130] More specifically, 'the risk of seriously undermining the financial balance of the social security system may constitute an overriding reason in the public interest capable of justifying the undermining of the provisions of the Treaty concerning the right of freedom of movement for workers'.[131]

In *Commission v Netherlands*, the Court adopted a narrow understanding of that position in the context of workers, finding that 'budgetary considerations may underlie a Member State's choice of social policy and influence the nature or scope of the social protection measures which it wishes to adopt' but that 'they do not in themselves constitute

[127] 'For the purposes of paragraph 1(a), a Union citizen who is no longer a worker or self-employed person shall retain the status of worker or self-employed person in the following circumstances: (a) he/she is temporarily unable to work as the result of an illness or accident; (b) he/she is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a job-seeker with the relevant employment office; (c) he/she is in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first twelve months and has registered as a job-seeker with the relevant employment office. In this case, the status of worker shall be retained for no less than six months; (d) he/she embarks on vocational training. Unless he/she is involuntarily unemployed, the retention of the status of worker shall require the training to be related to the previous employment'.

[128] As AG Kokott put it, 'whether place of residence alone constitutes a suitable criterion to establish membership of a community of solidarity' (Case C-287/05 *Hendrix* ECLI:EU:C:2007:196, Opinion of AG Kokott, para 68). See especially Case C-212/05 *Hartmann* ECLI:EU:C:2007:437; Case C-213/05 *Geven* ECLI:EU:C:2007:438; and Case C-287/05 *Hendrix* ECLI:EU:C:2007:494; and in the specific context of eligibility for study finance, Case C-20/12 *Giersch and Others* ECLI:EU:C:2013:411; Case C-238/15 *Bragança Linares Verruga and Others* ECLI:EU:C:2016:949; and *Aubriet* (n 125). See further, C Jacqueson 'Any News from Luxembourg? On Student Aid, Frontier Workers and Stepchildren: *Bragança Linares Verruga* and *Depesme*' (2018) 54 Common Market Law Review 901; and J Silga 'Luxembourg Financial Aid for Higher Studies and Children of Frontier Workers: Evolution and Challenges in Light of the Case-law of the Court of Justice' (2019) 19 European Public Law 13.

[129] The points summarised here are examined in more detail in N Nic Shuibhne 'Economic Activity and EU Citizenship Law: Seeding Means-based Logic in a Status-based Freedom' in N Nic Shuibhne (ed), *Revisiting the Fundamentals of EU Law on the Free Movement of Persons* (OUP 2023) 87.

[130] Case C-515/14 *Commission v Cyprus* ECLI:EU:C:2016:30, para 53.

[131] ibid.

an aim pursued by that policy and cannot therefore justify discrimination against migrant workers'.[132] However, in *Tarola* – for the first time in a case on Article 45 TFEU – the Court characterised the aim of 'striking a fair balance between safeguarding the free movement of workers, on the one hand, and ensuring that the social security systems of the host Member State *are not placed under an unreasonable burden*, on the other' as one of the objectives of Directive 2004/38.[133]

Defending free movement restrictions on the basis of 'reasons of an economic nature' had been a significant discussion point in pre-Brexit negotiations between the EU and the UK. It directly informed compromises reached by the EU and the UK that would have taken effect in the event of a 'remain' vote in the UK referendum in June 2016: proposals that would have placed discriminatory restrictions on newly arrived EU workers in certain circumstances where a Member State could demonstrate that it was supporting, in effect, a disproportionately high number of workers from other Member States.[134] Of course, given the outcome of the 2016 referendum in the UK, that did not happen, and it might be assumed that the degree of equal treatment from which EU workers benefit is therefore no longer a significant concern. The outcome of infringement proceedings against Austria, which had unilaterally introduced one of the restrictions proposed in 2016 (indexing exported family benefits to the family's State of residence rather than the worker's State of employment), seems to support that position at first glance. There, Advocate General Richard de la Tour emphasised the 'fundamental importance' of the fact that 'migrant workers contribute to the financing of the social policies of the host Member State through the taxes and social contributions which they pay by virtue of their employment there, which justifies the equality of the benefits or advantages granted'.[135] That point was reinforced by the Court, which explained that Austria's indirectly discriminatory restriction of the free movement of workers was not, therefore, defensible on public interest grounds because migrant workers 'must […] be able to profit from [their tax and social security contributions] under the same conditions as national workers'.[136]

However, economic activity only 'establishes, *in principle*, a sufficient

[132] *Commission v Netherlands* (n 123) para 57: '[t]o accept that budgetary concerns may justify a difference in treatment between migrant workers and national workers would imply that the application and the scope of a rule of EU law as fundamental as non-discrimination on grounds of nationality might vary in time and place according to the state of the public finances of Member States' (para 58).

[133] Case C-483/17 *Tarola* ECLI:EU:C:2019:309, para 50 (emphasis added).

[134] See further, Section D, Decision of the Heads of State or Government, meeting within the European Council, concerning a new settlement for the United Kingdom within the European Union [2016] OJ C691/1.

[135] Case C-328/20 *Commission v Austria* ECLI:EU:C:2022:45, Opinion of AG Richard de la Tour, para 143.

[136] *Commission v Austria* (n 125) para 109. Most remarkably, the Court even indicated that it would have found the 2016 Decision invalid on this point had it come into effect (para 57).

link of integration with the society of that Member State, allowing [workers] to benefit from the principle of equal treatment, as compared with national workers, as regards social advantages'.[137] In that light, another statement in *Commission v Austria* is striking: that 'the risk of jeopardising the financial balance of the social security system does not result from the payment of benefits to workers whose children reside outside Austria, *since those payments are estimated to represent only around 6% of expenditure* in respect of family benefits'.[138] Does that mean that the justification would be accepted under different conditions? Similarly, the Court held that 'the family benefits and social advantages at issue *are not subject to the adjustment mechanism where the children reside in Austria,* even though it is common ground that there are, between the regions of that Member State, differences in price levels comparable in scale to those which may exist between the Republic of Austria and other Member States. *That lack of consistency in the application of the mechanism* confirms that the justification put forward by the Republic of Austria cannot be accepted'.[139]

Thus, in both *Tarola* and *Commission v Austria*, the Court of Justice alluded to circumstances in which the economically active could become an 'unreasonable burden' on host State social security systems, notwithstanding the fact that the persons concerned 'are acknowledged to contribute to the financing of the social policies of the host Member State through the taxes and social contributions which they pay by virtue of their employment there'.[140] These rulings therefore suggest limits to previously assumed understandings of solidarity in free movement law, reflecting instead 'a more contractual approach to claims of social benefits'.[141] The motivation for these subtle case law statements is fairly evident: 'to somewhat soothe Member States' concerns of opening up their welfare systems too much'.[142] It is difficult to reconcile these trends in recent case law with the Court's philosophy in the case law on international protection considered in Section 3 above: that even '[w]hen one or more Member States are faced with an emergency situation within the meaning of Article 78(3) TFEU, the burdens entailed by the provisional measures adopted under that provision for the benefit of that or those Member States must, as a rule, be divided between all the other Member States, in accordance with the principle of solidarity and fair sharing of responsibility between the Member States'.[143]

Simply put, Brexit catalysed deeper scrutiny of the extent to which

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[137] *Commission v Netherlands* (n 123) para 65 (emphasis added).

[138] *Commission v Austria* (n 125) para 107 (emphasis added).

[139] ibid, para 105 (emphasis added).

[140] *Commission v Austria*, Opinion of AG Richard de la Tour (n 135) para 143.

[141] Jacqueson (n 128) 921.

[142] Ristiuccia (n 186) 893.

[143] *Slovak Republic and Hungary v Council* (n 18) para 291.

equal treatment should be extended in free movement law,[144] and the UK's withdrawal from the Union did not end that debate.[145] Displacing the status of the person as a worker or self-employed person in formal terms and basing welfare solidarity on their financial means instead is out of step with decades of case law. Article 21(1) TFEU makes the right of '[e]very citizen of the Union' to move and reside freely within the territory of the Member States 'subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect'. But rights based on Articles 45 and 49 TFEU 'are not so conditional – the only limitations are those "justified on grounds of public policy, public security or public health", giving narrower scope for rights negation'.[146] The shift from status to means is also out of step with EU initiatives that recognise the changing and often precarious dimensions of economic activity more generally.[147]

The gradually stronger accommodation of public finance defences to justify restrictions of even economic free movement rights raises serious questions about solidarity – and, once again, not only as a substantive or normative basis for equal treatment of economically active Union citizens in host States but also, more procedurally, as a legal principle for determining the reach of free movement responsibility of both the Member States and the Union institutions. The emphasis that procedural solidarity places on the fair sharing of responsibility seems entirely missing from changing case law as well as political agreements in terms of how the contribution of economic activity to the host State, and thus to the citizen's claims to equal treatment there, is assessed – and therefore, how it is valued. These shifts erode the Treaty-based commitment to free movement principles by incorporating increasingly economically oriented justification grounds without sufficiently considering the competing obligations set by primary EU law. Additionally in terms of the requirements set by procedural solidarity specifically, these trends in EU free movement law also encourage the seeking of 'solutions' outside rather than within the established system of EU law itself. They thus unsettle the assumed idea that EU law entails a balance between advantages *and* obligations. They loosen the criteria, the processes, and the boundaries developed at EU level and suggest, instead, an extension of national discretion that veers from considerations of collective interest to unilateral interest. Once

[144] Eg C Barnard and S Fraser Butlin, 'Free Movement vs Fair Movement: Brexit and Managed Migration' (2018) 55 Common Market Law Review 203; C Barnard and E Leinarte, 'The Creation of European Citizenship: Constitutional Miracle or Myopia?' (2023) 24 Cambridge Yearbook of European Legal Studies 24.

[145] As anticipated by Mantu a decade ago: 'work operates as an instant integrative force, although the quality of this integration is somewhat less reliable than one is first tempted to think' (S Mantu, 'Concepts of Time and European Citizenship' (2013) 15 European Journal of Migration and Law 447, 458).

[146] C O'Brien, 'Social Blind Spots and Monocular Policy Making: The ECJ's Migrant Worker Model' (2009) 46 Common Market Law Review 1107 at 1110.

[147] Eg Proposal for a directive on improving conditions in platform work, COM(2021) 762 final (the process of adopting this measure was still underway at the time of writing).

again, highlighting these issues in procedural solidarity language is intended to complement rather than subsume necessary substantive and normative debates about the sustainability in EU free movement law of its traditionally binary approach to economically active/inactive free movers. Illustrating the complexity of free movement challenges, however, the next section considers, in a sense, the opposite problem: where collective solutions might undermine genuine even if more individual concerns.

4.3 Solidarity and uneven freedom of movement

Could procedural solidarity play a part in resolving challenges that relate to the fact that freedom of movement is experienced unevenly by different Member States? This is an extremely difficult question both conceptually and practically because it challenges the fundamental connection between equality and uniformity in EU free movement law, an approach that is entrenched by the development of autonomous concepts of EU law to smooth divergences across national law – including the definition of work, for example. It also raises the difficulty of reconciling national and transnational understandings of solidarity. So far, we have managed these questions spectacularly badly since, as shown in Sections 4.1 and 4.2 above, developments on freedom of movement have gradually enabled unilateral conceptions of a State's national interest to rationalise restrictions of free movement; sown welfare tourism language into rulings of the Court; and accepted, in principle at least,[148] discriminatory restrictions on workers as part the agreement reached between the EU and the UK before Brexit – largely, moreover, without robust supporting evidence.

In contrast, as emphasised in Sections 2 and 3 above, decisions taken on the basis of a procedural understanding of solidarity require open acknowledgement and consideration not only of the different *interests* of Member States but also of different *impacts* of EU policies upon them. Thus, for demonstrated instances of uneven migration, might compensatory mechanisms coordinated at EU level, and possibly also entailing more responsibility on the part of home States, be appropriate?[149] Such mechanisms could draw from the established EU approach to regional or structural funds, or the coordination framework already well embedded in free movement law for navigating differences across national social security systems.

As a procedural obligation, solidarity will not provide definitive answers to these questions. However, it does require that they are asked and addressed. In the process of doing so, it mandates that the States who *agree* to construct the EU's free movement space must take responsibility and be accountable for sustaining it through a collective way of being. It

[148] See the unusually strong statement of the Court of Justice in *Commission v Austria* (n 125) para 57.

[149] Not to mention responsibility *to* home States: on the challenges faced by States that experience significant movement of their nationals to other Member States, see Goldner Lang and Lang (n 117).

might be argued that the accommodation of national public finance protection as a public interest argument in free movement law does, in fact, represent the collective response of the Member States and Union institutions. However, that argument overlooks the imperfections and inconsistencies – the 'internal discrepancies'[150] – of Directive 2004/38. It also overlooks the lack of appropriate evidence to support such developments. And it does not truly confront the *reality* of differential impact.

There are very few instances in free movement case law that we can point to for discussion of uneven free movement. Advocate General Sharpston's Opinion in *Bressol* still provides the best example, and it exemplifies the procedural as much as substantive and normative dimensions of solidarity. The case concerned whether restrictive Belgian rules on access to certain university courses could be justified, given their purpose of limiting the free movement of students from France.[151] Because of the impact on medical and paramedical university courses in particular, the Court of Justice accepted a public health justification defence in principle and, in notable contrast to recent welfare entitlement case law, emphasised the importance of appropriate evidence and provided detailed guidance for national authorities in that respect: in essence, 'it is for the competent national authorities to show that such risks *actually exist*'.[152] In her Opinion, Advocate General Sharpston directly addressed the geographically specific nature of the contested national response. Referring to what is now Article 2 TEU and the objective of promoting solidarity among the Member States as well as the 'mutual duty of loyal cooperation' under Article 4(3) TEU, she argued that '[w]here linguistic patterns and differing national policies on access to higher education encourage particularly high volumes of student mobility [...] cause real difficulties for the host Member State, it is surely incumbent on both the host Member State and the home Member State actively to seek a negotiated solution that complies with the Treaty'.[153]

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[150] Thym (n 65) 49, who highlights that [p]ersisting uncertainties can be traced back to the indecisiveness of the legislature, which failed to establish clear standards for the free movement of the economically inactive'.

[151] As summarised in the ruling, '[t]he system of higher education of the French Community is based on free access to education, without restriction on the registration of students. However, for some years, that Community has noted a significant increase in the number of students from Member States other than the Kingdom of Belgium enrolling in its institutions of higher education, in particular in nine medical or paramedical courses. According to the order for reference, that increase was due, *inter alia*, to the influx of French students who turn to the French Community, because higher education there shares the same language of instruction as France and because the French Republic has restricted access to the studies concerned' (Case C-73/08 *Bressol and Others* ECLI:EU:C:2010:181, paras 17–18).

[152] ibid, para 71 (emphasis added).

[153] Case C-73/08 *Bressol and Others* ECLI:EU:C:2009:396, Opinion of AG Sharpston, para 154.

Thus, she acknowledged the bilateral context of the free movement pressure.[154] Importantly, though, she underlined the obligation to resolve it within the system and thus the standards of EU law at the same time. Linking back, once again, to the case law on relocation mechanisms in EU immigration law, discussed in Section 3 above, we saw similar instances of uneven impacts on different Member States, with Advocate General Bot, for example, acknowledging the '*de facto* inequality between Member States because of their geographic situation and their vulnerability in the face of massive migration flows'.[155] To underline (yet again): little if any evidence of 'massive migration flows' has ever been established in EU free movement law. But we can point to instances of differential impact on Member States for geographic and/or linguistic reasons – Luxembourg providing the archetypal example. Could the solidarity-based 'adjustment mechanisms' adopted in EU immigration law, which aim at 'the attainment of a balance of effort between Member States', also be useful in free movement law?[156]

Advocate General Bot also suggested that, in immigration law, 'the Council has succeeded in reconciling the principle of solidarity with the taking into account of the particular needs that some Member States may have owing to the evolution of migratory flows. Such a reconciliation seems to me, moreover, to be perfectly consistent with Article 80 TFEU, which, as will be seen on a careful reading, provides for the "fair sharing of responsibility […] between Member States"'.[157] The Court's approach to steel quotas in much earlier case law, considered in Section 2 above, demonstrates that these ideas have salience beyond the specific circumstances of policies adopted under Article 80 TFEU. Confronting similar questions in free movement law might make us feel uncomfortable. But not confronting them brings higher risk for both the sustainability of EU free movement law and, more importantly, for the security and rights of Union citizens who move.

5 Conclusion

Determining the normative and substantive meanings of, and degrees of commitment to, solidarity in the objectives and practice of EU freedom of movement will and should continue. Adding to that debate, this paper has highlighted that solidarity as a legal principle also imposes procedural obligations. These are premised on the fair sharing of responsibility and the taking of more collective than unilateral approaches when addressing the consequences of freedom of movement. They require that related mechanisms, principles, and processes should be developed, and

[154] '[T]he EU must not ignore the very real problems that may arise for Member States that host many students from other Member States' (ibid, para 151).

[155] Cases C-643/15 and C-647/15 *Slovak Republic and Hungary v Council* ECLI:EU:C:2017:618, Opinion of AG Bot, para 22.

[156] ibid, para 257.

[157] ibid, para 311.

that they should function within rather than outside the wider system of EU law. At the same time, solidarity as a procedural obligation also entails that complicated questions about uneven impacts should not be glossed over in ways that might, in fact, end up being more systemically damaging in the longer term. Again, however, collective solutions to these challenges are required over allowing or enabling Member States to shape their responses unilaterally.

The fact that Union citizens who move can encounter and experience vulnerabilities is not something that those who have created the system of free movement can overlook. Fundamentally, the procedural dimension of solidarity is more about *how* to resolve questions than the answers that might be reached. However, the difficult questions that we must confront are indeed created by the practice, the system, and the objectives of Union citizenship and free movement: which, as emphasised at the outset of this paper, are objectives agreed to by the European Union and the Member States, not somehow inflicted upon them. Procedural solidarity generates a template for the implementation of responsibility (and the fair sharing of it more specifically) for that system and for ensuring coordinated as opposed to unilateral responses when challenges are faced. That template supports the taking of difficult decisions that must somehow bring about 'substantive legal concepts of equality and solidarity that recognize the need *for both* collective endeavours *and non-reciprocal efforts* to address particular situations of unfairness'.[158] Thus, procedural solidarity encourages open discussion of the complexity of free movement rather than a dismissal of that complexity.

But procedural solidarity also illustrates that, at the end of the day, solidarity is, in any understanding, about being in something together. Ups, downs, benefits, and burdens are a part of the EU as a collective endeavour. In a case on the EU's Staff Regulations, the Court of Justice stated that '[m]arriage is characterised by rigorous formalism and creates reciprocal rights and obligations between the spouses, of a high degree, including the duties of assistance and solidarity'.[159] That idea perfectly captures the essence of what solidarity asks of those who commit to a common project to realise common objectives. Both in creating a status of Union citizenship and a system that facilitates the free movement of persons, that is what the EU and its Member States have done. Procedural responsibility better equips them to take responsibility for and thus be more accountable for it.

[158] Editorial comments, 'A Jurisprudence of Distribution for the EU' (2022) 59 Common Market Law Review 957, 968 (emphasis added).

[159] Case C-460/18 P *HK v Commission* ECLI:EU:C:2019:1119, para 73.

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REARRANGING THE PUZZLE: HOW TREATY CHANGE CAN STRENGTHEN THE PROTECTION OF EU VALUES

Inken Böttge*

Abstract: This paper strives to answer the research question of whether Treaty change is necessary to build stronger mechanisms of EU values protection. It analyses the current toolkit of available values protection mechanisms, demonstrates that those mechanisms have not proven to be very effective, and concludes that the EU is ill equipped to find convincing responses. Following on from this, it reflects on the key proposals made in the academic and institutional debate to improve the current values protection framework. Nevertheless, the paper concludes that these proposals merely represent individual puzzle pieces unlikely to change the course of backsliding if taken in isolation and not providing for a comprehensive and concerted strategy. The paper therefore opts for a broader perspective, relying on the idea of reconceptualising the framework of EU values protection pursuing the path of Treaty change. This path rests on three different dimensions: structural, institutional, and substantive reforms.

Keywords: EU values, constitutional crises, EU values protection toolkit, Treaty change, Conference on the Future of Europe.

1 Introduction

Article 2 TEU asserts that the European Union (EU) is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law, and respect for human rights, including the rights of persons belonging to minorities, and declares that 'these values are common to the Member States'. Beyond that, numerous references to the fundamental values elsewhere in the Treaties demonstrate the constitutional significance of EU values and their position at the very apex of the EU legal order.[1] More recently, also the Court of Justice of the European Union (CJEU) has clarified the constitutional relevance of Article 2 TEU by holding that the values enshrined therein 'define the very identity of the European Union as a common legal order'.[2] In other words, the constitutional relevance of the values referred to in Article 2 TEU lies in its foundational nature establishing the fundamental pillars and aspirations

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1 See Articles 3(1), 3(5), 6(1), 7, 8, 13(1), 21 and 49 TEU.

2 Case C-156/21 *Hungary v European Parliament and Council* ECLI:EU:C:2022:97, para 127; Case C-157/21 *Poland v European Parliament and Council* ECLI:EU:C:2022:98, para 145.

of the EU as a common legal order.

However, democratic and rule of law backsliding within the EU,[3] challenges to primacy,[4] as well as other national threats to EU values, demonstrate that not all Member States are able and willing to uphold the high prerequisites of Article 2 TEU. For more than a decade now, the EU has faced systemic threats to its fundamental values in its own Member States, most prominently Poland and Hungary.[5]

In all these cases, EU institutions intervened by continuously using available mechanisms or creating new instruments aimed at strengthening the existing toolkit. However, the results have been rather unsuccessful, and, until today, the EU is still struggling to find adequate responses to bring recalcitrant States back in line with its core values.

While these concerns are mounting, *inter alia*, among EU institutions, this sentiment of upholding EU values has also reached the Conference on the Future of Europe. The Conference was a citizen-led series of debates set up by EU institutions that ran from April 2021 to May 2022 enabling citizens to share their ideas and help shape the future of Europe.[6] On 9 May 2022, the Conference finally adopted its conclusions and made 49 proposals to the Presidents of the European Parliament, the Council, and the Commission.[7] In this context, Proposal No 25 explicitly addresses the rule of law, democratic values, and European identity by aiming at systematically upholding the rule of law across all Member States. The results of the Conference eventually cumulated in the adoption of a European Parliament resolution in June 2022 calling for a revision of the EU Treaties as 'several of the Conference proposals require amendments to the Treaties'.[8]

Against this backdrop, given the report of the Conference, the European Parliament resolution, as well as the on-going crisis on EU values, one core question in particular is to be raised: *Is Treaty change necessary to build stronger mechanisms of EU values protection?* This also emerges as the main research question to be examined in this paper.

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[3] See Laurent Pech and Kim Lane Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) 19 Cambridge Yearbook of European Legal Studies 5.

[4] See Beatrice Monciunskaite and Niels Kirst, 'The Rule of Law Crisis and the Supremacy of EU Law' (*Bridge Network*, 30 June 2022) <https://bridgenetwork.eu/2022/06/30/the-rule-of-law-crisis-supremacy-eu-law/> accessed 23 January 2023.

[5] Thomas Conzelmann, 'Peer Reviewing the Rule of Law? A New Mechanism to Safeguard EU Values' (2022) 7(2) European Papers 678.

[6] Council of the European Union and the European Council, 'Conference on the Future of Europe' <www.consilium.europa.eu/en/policies/conference-on-the-future-of-europe/> accessed 23 January 2023.

[7] Conference on the Future of Europe, 'Report on the Final Outcome' (2022), <www.europarl.europa.eu/resources/library/media/20220509RES29121/20220509RES29121.pdf> accessed 4 November 2022.

[8] European Parliament, 'Resolution of 9 June 2022 on the call for a Convention for the revision of the Treaties' (2022/2705(RSP)) <www.europarl.europa.eu/doceo/document/TA-9-2022-0244_EN.pdf> accessed 4 November 2022.

Hereafter, Section 2 provides an analysis of the current EU toolkit, focusing on the main mechanisms available to protect EU values. Based on concrete instances, this section addresses the Union's struggle to protect its fundamental values by reflecting on how the various instruments have been used and why they have or have not been adequate mechanisms for the protection of EU values. Following on from this, Section 3 examines potential measures to strengthen the procedure to protect EU values. As evidenced by the variety of contributions in academic and institutional debate, a great deal has already been proposed in this context. Section 3 therefore reflects on the key proposals, although without being exhaustive, and eventually shows that the proposed options do not provide for a concerted and comprehensive strategy of EU values protection either. Based on these findings, Section 4 offers a different stance by taking a broader perspective, relying on the idea of reconceptualising the framework of EU values protection pursuing Treaty change. This path rests on three different dimensions: structural, institutional, and substantive reforms. Firstly, the dimension of structural reforms is based on the idea of re-striking an adequate constitutional balance between Member States' sovereignty and supranational competences held at EU level. This aims to forcefully equip the EU with values protection competences that correspond to the constitutional relevance of Article 2 TEU. Secondly, the dimension of institutional reforms seeks to pave the way for a comprehensive and concerted response architecture that aims at clarifying the primary responsibilities of relevant actors and establishing legal obligations determining when those actors are required to act. Lastly, the dimension of substantive reforms complements the comprehensive strategy by proposing the creation of a *Charter of EU Fundamental Values* that could serve as a universal framework of EU fundamental values to clearly define and articulate their content.

Nevertheless, it should be anticipated here that there is no 'silver bullet', ie no comprehensive 'solution' to the current problem.[9] It is multifaceted, as are the necessary responses to it, comprising, *inter alia*, legal, political, cultural, social, and economic means.

2 Overview of EU values protection mechanisms and the EU's struggle to safeguard those values

Before engaging with potential improvements, it is necessary to look at the existing toolkit of available EU values protection mechanisms. Most notably, they comprise a variety of tools all differing in their legal nature (political, judicial, financial and both hard law and soft law) and each to be applied by different institutional actors. This section, by channelling

[9] Matteo Bonelli and others, 'Usual and Unusual Suspect in Protecting EU Values: An Introduction' (2022) 7(2) European Papers 641, 646; Matteo Bonelli, 'Infringement Actions 2.0: How to Protect EU Values before the Court of Justice' (2022) 18(1) European Constitutional Law Review 30, 45; Martina Di Gaetano and Matteo Bonelli, 'EU Democracy and the Rule of Law' (2021, June) 4th Jean Monnet NOVA EU Workshop, Policy Brief 11.

individual mechanisms into political, judicial, and financial tools, briefly describes the existing instruments, demonstrates how and why these tools have been used, and narrows down the reasons for the Union's struggle to bring recalcitrant Member States back in line with its fundamental values.

2.1 Political tools

In 1993, the Copenhagen Council established the 'political Copenhagen criteria' setting up the prerequisite for accession by demanding that any candidate state 'has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities'.[10] Since then, it has become a condition for accession to the Union that is enshrined in the EU Treaties, namely Article 49 TEU. As a prerequisite for accession, candidate states must respect 'the values referred to in Article 2'. Nevertheless, referred to as the 'Copenhagen Dilemma', ie the EU's inability to uphold and enforce its fundamental values post-accession,[11]the pre-accession conditionality of Article 49 TEU did not manage to prevent constitutional backsliding.[12]

The most significant progress since 1993 has been the adoption of the EU Charter of Fundamental Rights (CFR) which was initially developed in 2000 and later established as a legally binding instrument of EU primary law through the Lisbon Treaty. In that regard, Member States were obliged to respect the values of Article 2 TEU when they implement EU law and they can face legal actions for non-compliance. However, there was a general recognition that adherence to Article 2 values should also be guaranteed when Member States act autonomously, ie outside the scope of EU law.[13]

Following on from this, eventually introduced in 1999 by the Amsterdam Treaty, Article 7 TEU endowed the EU with a horizontal protection mechanism applicable to *all* national measures irrespective of whether

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[10] European Council, Conclusions of the Presidency, Copenhagen 21-22 June 1993, SN 180/1/93 REV 1, 13.

[11] Mathieu Leloup, Dimitry Kochenov and Aleksejs Dimitrovs, 'Non-Regression: Opening the Door to Solving the "Copenhagen Dilemma"? All the Eyes on Case C-896/19 Repubblika v Il-Prim Ministru', RECONNECT Working Paper (Leuven) No 15, 2021, 3, 11; Viviane Reding, 'Safeguarding the Rule of Law and Solving the "Copenhagen Dilemma": Towards a New EU-Mechanism' (Speech, General Affairs Council, 22 April 2013) <http://cursdeguvernare.ro/wp-content/uploads/2013/04/SPEECH-13-348_EN1.pdf> accessed 30 January 2023; Kaarlo Tuori, 'From Copenhagen to Venice' in Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016) 225.

[12] Leloup, Kochenov and Dimitrovs (n 11) 17.

[13] Bruno de Witte, 'Constitutional Challenges of the Enlargement: Is Further Enlargement Feasible without Constitutional Changes?' (2019) PE 608.872, <https://www.europarl.europa.eu/RegData/etudes/IDAN/2019/608872/IPOL_IDA(2019)608872_EN.pdf> accessed 24 January 2023, 14.

they fall inside or outside the scope of EU law.[14] According to Article 7(1) TEU, on a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four-fifths of its members after obtaining the consent of the European Parliament, may determine the existence of a *clear risk of a serious breach* of EU values by a Member State of the EU. Following the determination of such a breach, the procedure may, in a second step, result in a unanimous decision to suspend certain of the rights deriving from the application of the Treaties. This may include suspension of voting rights, limiting other political rights at EU level, or suspending payments from EU funds.[15]

Article 7 TEU was complemented in 2014 by a 'new EU Framework to strengthen the Rule of Law'[16] (Rule of Law Framework) presented by the Commission. This instrument aimed at 'resolv[ing] future threats to the rule of law in Member States before the conditions for activating the mechanisms foreseen in Article 7 TEU would be met'.[17] It provides for a three-step approach[18] by mainly focusing on 'Rule of Law Opinions' and 'Rule of Law Recommendations' which may finally result in the possibility of activating the Article 7 TEU procedure.[19] Being faced with constitutional backsliding, the European Commission formally activated the Rule of Law Framework for the first time against Poland in 2016.[20] Yet, going ahead with the undermining of the independence of the judiciary in Poland by constantly ignoring and dismissing all recommendations, this finally culminated in the Commission's activation of Article 7 TEU in 2017.[21] Shortly afterwards, the European Parliament also formally

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[14] Commission, 'Communication from the Commission to the Council and the European Parliament on Article 7 on the Treaty on European Union. Respect for and promotion of the values on which the Union is based' COM (2003) 606 final, 5; Matteo Bonelli, 'From Sanctions to Prevention, and Now Back to Sanctions? Article 7 TEU and the Protection of the EU Founding Values', in Stefano Montaldo, Francesco Costamagna and Alberto Miglio (eds), *The Evolution of Sanctioning Powers* (Routledge 2021) 50; Christophe Hillion, 'Overseeing the Rule of Law in the EU: Legal Mandate and Means' in Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (CUP 2016) 65 ff.

[15] Tomas Dumbrovsky, 'Beyond Voting Rights Suspension: Tailored Sanctions as Democracy Catalyst under Article 7 TEU', EUI Working Papers RSCAS 2018/12, 15 ff; Bonelli (n 14) 51 ff.

[16] Commission, 'A New EU Framework to strengthen the Rule of Law' COM (2014) 158 final.

[17] ibid 6 ff.

[18] ibid 7.

[19] ibid 7 ff.

[20] Commission, 'Readout by First Vice-President Timmermans of the College Meeting of 13 January 2016' (2016), <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_16_71> accessed 22 June 2023.

[21] Commission, 'Reasoned proposal in accordance with Article 7(1) of the Treaty on European Union regarding the Rule of Law in Poland. Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law' COM (2017) 835; Pech and Scheppele (n 3) 3.

opened the Article 7 TEU procedure, this time against Hungary.[22] However, no formal decision has been adopted under Article 7(1) TEU so far, and the sanctioning mechanism under Article 7(2) and (3) TEU has also not been imposed until now.[23]

Relying on the mere existence of Article 7 TEU as a sufficient deterrent[24] and referring to it as the 'nuclear option'[25] eventually discouraged EU institutions from using the mechanism. Besides, recognising that Article 7 TEU requires unanimity which is unlikely to be achieved when two backsliding Member States back each other[26] already demonstrates its shortcomings. Conclusively, Article 7 TEU constitutes a 'dead end' in so far as the mechanism can be activated first, but its repressive consequences fail due to the high voting requirements.

In addition to the Article 7 TEU mechanisms, EU institutions have continuously come up with more and more soft-law mechanisms. This approach, however, has followed merely a 'naming and shaming strategy'[27] by providing for further information and monitoring performances in specific areas, but not resulting in any real enforcement consequences.[28]

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[22] European Parliament, 'Resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on the European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded' (P8_TA(2018)0340).

[23] ibid.

[24] Pech and Scheppele (n 3) 3.

[25] Pech and Scheppele (n 3) 2; Leonard Besselink, 'The Bite, the Bark, and the Howl: Article 7 TEU and the Rule of Law Initiatives' in András Jakab and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford Academic 2017) 134; Dimitry Kochenov, 'Busting the Myths Nuclear: A Commentary on Article 7 TEU' (EUI Working Paper LAW 2017/10); Venetia Argyropoulou, 'Enforcing Rule of Law in the EU' (2019) Harvard Journal of Human Rights; Dimitry Kochenov and Laurent Pech, 'Better Late than Never? On the Commission's Rule of Law Framework and Its First Activation' (2016) 54 Journal of Common Market Studies 1062, 1065.

[26] Kim Lane Scheppele, Dimitry Kochenov and Barbara Grabowska-Moroz, 'EU Values Are Law, After All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union' (2020) 39(1) Yearbook of European Law 3, 10; Steve Peers, 'Can a Member State Be Expelled or Suspended from the EU? Updated Overview of Article 7 TEU' (EU Law Analysis 2022), <http://eulawanalysis.blogspot.com/2022/04/can-member-state-be-expelled-or.html> accessed 30 January 2023; Gráinne de Búrca, 'Poland and Hungary's EU Membership: On Not Confronting Authoritarian Governments' (2022) 20(1) International Journal of Constitutional Law 13, 23; Digdem Soyaltin-Colella, 'The EU's "Actions-without-sanctions"? The Politics of the Rule of Law Crisis in Many Europes'(2022) 23(1) European Politics and Society 25, 34 affirming that Hungary and Poland back each other with their votes and fellow Member States show their support in opposing the activation of Article 7 TEU.

[27] Tore Vincents Olsen, 'Why and How Should the European Union Defend Its Values?' (2023) 29 Res Publica, 69, 81.

[28] Monica Claes and Matteo Bonelli, 'The Rule of Law and the Constitutionalisation of the European Union' in Werner Schroeder (ed), *Strengthening the Rule of Law in Europe: From a Common Concept to Mechanisms of Implementation* (Hart Publishing. Modern Studies in European Law 2016) 281.

The 'EU Justice Scoreboard' launched in 2013 by the Commission allows for rating the independence and efficiency of national justice systems on an annual basis[29] and is linked to the 'European Semester' introduced in 2010[30] which provides for the adoption of country-specific recommendations (CSRs), *inter alia* connected to rule-of-law-related issues.[31] The 2014 Rule of Law Framework was met with criticism by the Council,[32] leading to its own initiative – the 'Rule of Law Dialogue'.[33] This instrument provides for an annual dialogue between all Member States within the Council.[34] However, it is not explicitly related to Article 7 TEU, is not meant to address specific crises, and ultimately does not foresee any enforcement consequences.[35] In 2019, the Commission put forward a proposal to establish an annual Rule of Law Review Cycle,[36] which has already led to the publication of three annual rule-of-law reports covering

[29] Commission, 'The EU Justice Scoreboard A tool to promote effective justice and growth' COM (2013) 160 final; Eric Maurice, 'Protecting the Checks and Balances to Save the Rule of Law' (2021) <https://www.robert-schuman.eu/en/european-issues/0590-protecting-the-checks-and-balances-to-save-the-rule-of-law> accessed 24 January 2023; Justina Łacny, 'The Rule of Law Conditionality Under Regulation No 2092/2020: Is It All About the Money?' (2021) 13 Hague Journal on the Rule of Law 79, 82.

[30] Laurent Pech, 'The Rule of Law in the EU: The Evolution of the Treaty Framework and Rule of Law Toolbox' (RECONNECT Working Paper no 7, 2020) <https://reconnect-europe.eu/wp-content/uploads/2020/03/RECONNECT-WP7-2.pdf> accessed 24 January 2023, 20; Claes and Bonelli (n 28) 278.

[31] See for more detailed information on the European Semester European Commission, 'The European Semester Explained, An explanation of the EU's Economic Governance' (2023) <https://commission.europa.eu/business-economy-euro/economic-and-fiscal-policy-coordination/european-semester/framework/european-semester-explained_en> accessed 18 February 2023.

[32] See the Council's Legal Service concluding the incompatibility of the new instrument with the EU Treaties, Council of the European Union, 'Opinion of the Legal Service, Commission's Communication on a New EU Framework to Strengthen the Rule of Law: Compatibility with the Treaties' (2014) <https://data.consilium.europa.eu/doc/document/ST-10296-2014-INIT/en/pdf> accessed 22 June 2023, para 24, 28. The Opinion asserts that 'there is no legal basis in the Treaties empowering the institutions to create a new supervision mechanism of the respect of the rule of law by the Member States, additional to what is laid down in Article 7 TEU, neither to amend, modify or supplement the procedure laid down in this Article'.

[33] Council of the European Union, 'Note, Ensuring Respect for the Rule of Law' (2014) <http://data.consilium.europa.eu/doc/document/ST-16862-2014-INIT/en/pdf> accessed 22 June 2023.

[34] ibid 21.

[35] Bonelli (n 14) 61; Carlos Closa, 'Reinforcing EU Monitoring of the Rule of Law: Normative Arguments, Institutional Proposals and the Procedural Limitations' in Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (CUP 2016) 32 ff.

[36] Commission, 'Strengthening the Rule of Law within the Union: A Blueprint for Action' COM (2019) 343 final, 11.

all Member States.[37] Regrettably, however, the reports do not refer to all core values, and their effectiveness is also limited by the lack of enforcement consequences.[38]

As evidenced by the number of soft-law mechanisms all somehow similar, EU institutions acting in parallel ultimately did not adequately coordinate their initiatives, thus often resulting in overlapping mechanisms without a concerted strategy.[39] Most crucially, this also resulted in the application of diverging standards[40] by referring to very different sources of law, namely to CJEU and ECtHR case law interpreting EU's fundamental values, the CFR[41] and advice of the European Union Agency for Fundamental Rights (FRA), acts developed by the Council of Europe[42] drawing on the expertise of the European Commission for Democracy through Law (Venice Commission),[43] or by building their own understanding within the arsenal of rule-of-law initiatives. This clearly demonstrates the shortcomings of the various soft-law mechanisms.

2.2 Judicial tools

Judicial proceedings, such as infringement actions according to Articles 258-259 TFEU, preliminary references pursuant to Article 267 TFEU, follow-up infringement procedures based on Article 260 TFEU, as well as interim measures pursuant to Article 279 TFEU, generally equip

[37] Commission, '2022 Rule of Law Report – Communication and Country Chapters' (2022), <https://commission.europa.eu/publications/2022-rule-law-report-communication-and-country-chapters_en> accessed 28 January 2023; '2021 Rule of Law Report – Communication and Country Chapters' (2021), <https://commission.europa.eu/publications/2021-rule-law-report-communication-and-country-chapters_en> accessed 28 January 2023; '2020 Rule of Law Report – Communication and Country Chapters' (2020), <https://commission.europa.eu/publications/2020-rule-law-report-communication-and-country-chapters_en> accessed 28 January 2023.

[38] European Parliament, 'The Commission's Rule of Law Report and the EU Monitoring and Enforcement of Article 2 TEU Values' PE 727.551 (2022), <https://www.europarl.europa.eu/RegData/etudes/STUD/2022/727551/IPOL_STU(2022)727551_EN.pdf> accessed 5 March 2023, 25.

[39] Claes and Bonelli (n 28) 282.

[40] De Witte (n 13) 25.

[41] Deriving elements, *inter alia*, from the ECHR and the national bill of rights.

[42] See for the relation between the Council of Europe and the European Union Council of Europe, 'Compendium of Texts governing the relations between the Council of Europe and the European Union' <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168064c45d> accessed 20 February 2023. Even though the Council of Europe is not part of the EU, the EU builds upon Council of Europe standards.

[43] Commission, 'A New EU Framework to Strengthen the Rule of Law'(n 32) para 9. The Venice Commission is composed of independent law experts appointed by its member states but acting autonomously within their capacities. It provides legal advice to the Council of Europe in the areas of democratic institutions, fundamental rights, constitutional and ordinary justice, and elections, referendums, and political parties. In 2016, the Venice Commission, *inter alia*, adopted a 'Rule of Law Checklist'. See Council of Europe, 'Rule of Law Checklist,' CDL-AD (2016) 007 <https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)007-e> accessed 21 February 2023.

the EU institutions, most prominently the Commission backed by the CJEU, with instruments complementing the EU's toolkit of EU values protection mechanisms.[44] This subsection, however, primarily focuses on infringement procedures as a key component of EU law enforcement.

Turning to the responses to the Polish and Hungarian crises, the Commission has brought various infringement actions before the CJEU. In 2012, for example, right after Orbán's Hungarian constitutional reforms entered into force, the Commission launched a series of infringement proceedings meant to target specific aspects of the Hungarian constitutional amendments.[45] Even though the Commission was successful in all its actions, the numerous infringement actions ultimately led to minor changes only.[46] This is mainly due to the Commission's indirect way of addressing the protection of EU values: namely, instead of taking a broader perspective on EU values more generally, the Commission merely focused on technical and narrow requirements such as age discrimination or the independence of the data protection authorities.[47] Yet, due to the narrow achievements reached after those infringement actions, both the Commission and the Court started to base infringement actions on, for example, Article 19 TEU concerning judicial independence,[48] or on the CFR,[49] which enabled them to focus on the relevant breaches of EU values in a more direct way.

The most recent and innovative approach, however, is the Commission's infringement action which has been based directly on Article 2 TEU as a standalone provision.[50] The case is an innovative approach, as

[44] In this manner, see Bonelli (n 14) 65; Bonelli, 'Infringement Actions 2.0' (n 9) 31; Matthias Schmidt and Piotr Bogdanowicz, 'The Infringement Procedure in the Rule of Law Crisis: How to Make Effective Use of Article 258 TFEU' (2018) 55(4) Common Market Law Review.

[45] Commission, 'European Commission launches accelerated infringement proceedings against Hungary over the independence of its central bank and data protection authorities as well as over measures affecting the judiciary' (Press release, 2012), <https://ec.europa.eu/economy_finance/articles/governance/2012-01-18-hungary_en.htm> accessed 22 June 2023; Case C-286/12 *Commission v. Hungary* ECLI:EU:C:2012:687.

[46] For example, as a reaction to the infringement action brought by the Commission addressing the lowering of the retirement age of judges and prosecutors, Hungary simply resolved the detected breach of EU law by offering monetary compensation to those judges that have been retired, or by granting reinstatement, without, however, guaranteeing to return to the same position.

[47] See in detail on this matter Bonelli (n 44) 31, 35.

[48] See for example Case C-619/18 *Commission v Poland* ECLI:EU:C:2019:531.

[49] See for example Case C-235/17 *Commission v Hungary* ECLI:EU:C:2019:432; Case C-78/18 *Commission v Hungary* ECLI:EU:C:2020:476; and Case C-66/18 *Commission v Hungary* ECLI:EU:C:2020:792.

[50] See Case C-769/22: Action brought on 19 December 2022 — *European Commission v Hungary* [2023] OJ C54/16: '*(2) by adopting the legislation cited in the first paragraph, Hungary has infringed Article 2 TEU*'. This plea concerns a new law introduced by the Hungarian government in 2021 discriminating LGBTIQ people by which, among other things, the access of children to content and advertisements that promote or portray gender identities so-called 'diverging' from the sex assigned at birth, sex change, or homosexuality is limited. See Commission, 'Commission refers Hungary to the Court of Justice of the EU over Violation of LGBTIQ rights' (Press release, 2022) <https://ec.europa.eu/commission/presscorner/detail/en/IP_22_2689> accessed 10 March 2023.

the CJEU and the Commission have so far refrained from relying directly on Article 2 TEU and pursued a combined approach of linking it to more specific Treaty provisions that turn the values into concrete legal obligations.[51] Since Article 2 TEU entails an unrestricted scope[52] and applies generally even when Member States act outside the scope of other EU law,[53] by relying uniquely on Article 2 TEU as a plea for infringement actions, EU institutions may thus be enabled to tackle Member States' internal changes to those structures that may go against EU values.[54] However, this approach has already been met with great criticism as regards the institutional set-up, the CJEU's legitimacy and authority, matters of competence, as well as Member States' diversity.[55]

Despite the threat of a possible initiation of infringement actions setting high incentives for Member States to commit themselves to greater compliance with EU values, the effectiveness of the tool, however, is called into question if the Commission constantly intervenes in a 'too little too late fashion'.[56] Additionally, even though approaching deterioration through the lens of Article 19 TEU and the CFR has proven to be more effective, for upholding EU values in their entirety, a broader approach covering *all* values is of fundamental importance, as not all in-

[51] Luke Dimitrios Spieker, 'Op-Ed: "Berlaymont is Back: The Commission Invokes Article 2 TEU as Self-standing Plea in Infringement Proceedings over Hungarian LGBTIQ Rights Violations"' (EU Law Live 2023) <https://eulawlive.com/op-ed-berlaymont-is-back-the-commission-invokes-article-2-teu-as-self-standing-plea-in-infringement-proceedings-over-hungarian-lgbtiq-rights-violations-by-luke-dimitrios-spieker/> accessed 27 February 2023.

[52] See Tom Boekestein, 'Making Do With What We Have: On the Interpretation and Enforcement of the EU's Founding Values' (2022) 23 German Law Journal 431, 439; Luke Dimitrios Spieker, 'Defending Union Values in Judicial Proceedings. On How to Turn Article 2 TEU into a Judicially Applicable Provision' in Armin von Bogdandy and others (eds), *Defending Checks and Balances in EU Member States. Taking Stock of Europe's Actions* (Springer 2021) 247.

[53] Claes and Bonelli (n 28) 281.

[54] Spieker (n 51).

[55] ibid; Bonelli (n 44) 49 ff; Lena Kaiser, 'On the European Commission's Attempt to Mobilise Art 2 TEU as a Stand-alone Provision' (*Verfassungsblog*, 4 March 2023) <https://verfassungsblog.de/a-new-chapter-in-the-european-rule-of-law-saga/> accessed 7 March 2023.

[56] Dariusz Adamski, 'The Social Contract of Democratic Backsliding in the "New EU" Countries' (2019) 56(3) Common Market Law Review 623, 659; Laurent Pech, Patryk Wachowiec and Dariusz Mazur, 'Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In) Action' (2021) 13 Hague Journal on the Rule of Law 1, 22, also with reference to Laurent Pech, Kim Lane Scheppele and Wojciech Sadurski, 'Before It's Too Late: Open Letter to the President of the European Commission Regarding the Rule of Law Breakdown in Poland' (*Verfassungsblog*, 28 September 2020) <https://verfassungsblog.de/before-its-too-late> accessed 31 January 2023; for an extensive overview of how the instruments have been used, see Bonelli (n 44); Schmidt and Bogdanowicz (n 44); and also see, by way of example, Commission, 'European Commission Launches Accelerated Infringement Proceedings against Hungary Over the Independence of Its Central Bank and Data Protection Authorities as well as Over Measures Affecting the Judiciary' (n 45); Case C-286/12 *Commission v Hungary* ECLI:EU:C:2012:687; Case C-288/12 *Commission v Hungary* ECLI:EU:C:2014:237; Case C-619/18 *Commission v Poland* ECLI:EU:C:2019:531; Case C-192/18 *Commission v Poland* ECLI:EU:C:2019:924; Case C-66/18 *Commission v Hungary* ECLI:EU:C:2020:792; Case C-204/21 R *Commission v Poland* ECLI:EU:C:2021:593.

fringements are necessarily linked to judicial independence.[57] Moreover, time-consuming infringement actions with their average duration of 40 months also help backsliding regimes to further undermine EU values.[58] Finally, the root causes of constitutional backsliding stemming from Member States' internal legal-political developments may eventually not be resolved by a single judgment,[59] as compliance with EU law ultimately rests on the premise that Member States are also willing to abide by CJEU judgments.[60] It can thus be concluded that although infringement actions play a significant role in the EU values toolkit and may leverage Member States' compliance, a top-down approach in that regard cannot be considered 'the final step of the story'.[61]

Additionally, also preliminary procedures pursued by national courts of the Member States contribute to upholding the EU's fundamental values by bringing matters on those to the attention of the CJEU.[62] Thus, the CJEU has, *inter alia*, ruled on requests for preliminary rulings brought by Maltese, Polish, Dutch and Romanian national courts which particularly concerned value relevant questions on judicial appointment procedures, the execution of European arrest warrants in the case of persistent deficiencies as regards judicial independence, the disciplinary regime for judges, the personal liability of judges, the creation of a special prosecution section dealing with judges, and the principle of the primacy of EU law.[63]

Through the preliminary reference procedure, national courts may refer questions to the CJEU on the interpretation or validity of EU law where they need assistance to decide on an actual case. Although it has been clarified that the parties to the main proceedings do not have the

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[57] See in this manner also Scheppele and others (n 26) 46.

[58] Petra Bárd and Anna Śledzińska-Simon, 'Rule of Law Infringement Procedures: A Proposal to Extend the EU's Rule of Law Toolbox' (CEPS Paper 2019) 10 <https://www.ceps.eu/wp-content/uploads/2019/05/LSE-2019-09_ENGAGE-II-Rule-of-Law-infringement-procedures.pdf> accessed 20 February 2023.

[59] Bonelli (n 14) 50 with reference to Adamski (n 56) 659; see also Linda Schneider, 'Responses by the CJEU to the European Crisis of Democracy and the Rule of Law' (Working Papers, Forum Transregionale Studien 2/2020) 5 <https://www.forum-transregionale-studien.de/fileadmin/pdf/SCHNEIDER_rec_WP_2_2020.pdf> accessed 7 March 2023.

[60] Bonelli (n 14) 50.

[61] ibid 40.

[62] See Commission, '2021 Rule of Law Report: Communication and Country Chapters' <https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism/2021-rule-law-report/2021-rule-law-report-communication-and-country-chapters_en>, accessed 26 January 2023.

[63] Case C-66/18 *Commission v Hungary (Enseignement supérieur)* ECLI:EU:C:2020:792; Case C-510/19 *Openbaar Ministerie (Faux en écritures)* ECLI:EU:C:2020:953; Case C-354/20 PPU and C-412/20 PPU *Openbaar Ministerie (Indépendance de l'autorité judiciaire d'émission)* ECLI:EU:C:2020:1033; Case C-824/18 *AB and Others* ECLI:EU:C:2021:153; Case C-896/19 *Repubblika v Il-Prim Ministru* ECLI:EU:C:2021:311; Case C-83/19, C-127/19, C-195/19, C-291/19, C-397/19 *Asociația 'Forumul Judecătorilor Din România' v Inspecția Judiciară and others* ECLI:EU:C:2021:393; Case C-791/19 *Commission v Poland* ECLI:EU:C:2021:596.

right to have a preliminary question referred[64] as its activation fully depends on national judges,[65] in practice the procedure has become highly important as a bottom-up approach[66] enabling private parties to review and contest the legitimacy of national law vis-à-vis EU law.[67] Seeking to guarantee the uniform application of EU law within the EU,[68] what makes the procedure so powerful and of utmost importance is the fact that the CJEU's preliminary rulings provide for an *erga omnes* effect, ie that they are binding for *all* national courts and in all respects.[69] In this way, a preliminary ruling of the CJEU may incite public debate on an issue,[70] exert political pressure on the respective Member State, and might ultimately also require national legal reforms.[71] However, the procedure also presents some risks, as access to the court might involve extreme difficulties in terms of litigation costs[72] and the national court's discretion to refer the case, or when the national measure simply falls out of the scope of EU law. In the case of a negative outcome of the preliminary ruling, the preliminary reference procedure may eventually result in a backlash, meaning that where the CJEU did not find a violation of EU law, the decision on the legality of the measure is solely left to the national judges. This is particularly crucial when national courts have been politically captured by the Member State and do not provide for judicial independence.[73] However, once it is found that the national law is incompatible with EU law, the preliminary ruling might ultimately form a potential basis for an infringement action.[74] Regardless of the outcome of the preliminary reference procedure, the Commission may in any case be alerted to potential infringements in the application of EU law by upcoming ques-

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[64] Virginia Passalacqua, 'Who Mobilizes the Court? Migrant Rights Defenders Before the Court of Justice of the EU'(2021) 15(2) Law and Development Review 381, 388.

[65] Case C-210/06 *Cartesio* ECLI:EU:C:2008:723, para 91.

[66] See for bottom-up enforcement, Passalacqua (n 64) 382, with further references: 'reactive' institutions that cannot 'acquire cases of their own motion, but only upon the initiative of one of the disputants'; the contrary part being the 'top-down approach' referring to monitoring and enforcement by EU institutions.

[67] Morten Broberg, 'Preliminary References as a Means for Enforcing EU Law' in András Jakab, Dimitry Kochenov (eds), *The Enforcement of EU Law and Values, Ensuring Member States' Compliance* (OUP 2017) 99.

[68] ibid 100.

[69] ibid 107.

[70] Thus, *inter alia*, creating awareness and mobilisation for a cause or giving a voice to minority groups.

[71] Commission, 'Strategic Litigation in EU Gender Equality Law' (2020) <http://publications.europa.eu/resource/cellar/beaa7c36-90d1-11ea-aac4-01aa75ed71a1.0001.02/DOC_1> accessed 18 February 2023.

[72] European Union Agency for Fundamental Rights, 'Access to Justice in Europe: An Overview of Challenges and Opportunities (2010) <https://fra.europa.eu/sites/default/files/fra_uploads/1520-report-access-to-justice_EN.pdf > accessed 18 February 2023.

[73] See, for example, in the case of Poland, Case C-619/18 *Commission v Poland (Independence of the Supreme Court)* ECLI:EU:C:2019:531.

[74] The preliminary ruling of the CJEU becomes binding EU law and is to be implemented by the Member States thus constituting an 'obligation under the Treaties'.

tions of the procedure. This can ultimately empower the Commission to take up its role as 'guardian of the Treaties' and enforce the ruling vis-à-vis the respective Member State via infringement actions. In this way, the preliminary reference procedure plays a key role in upholding the EU's fundamental values. Yet, the average duration of 15-16 months for the procedure again represents significant obstacles.[75]

On some occasions, the Commission has also asked the CJEU to order interim measures to prevent irremediable harm,[76] thus complementing the EU's toolkit to protect its fundamental values. In this way, interim measures serve as an effective mechanism that does not suffer from the same shortcoming as the infringement action in terms of duration of proceedings and immediate effect.

2.3 Financial tools

Finally, connecting money to EU values and the 'spending conditionality'[77] resulting in the suspension of EU funds has proven to be an important tool. The European Structural Investment Funds[78] aiming at a 'more values-based use of EU financial resources'[79] and the Justice, Rights and Values Fund[80] aimed at fostering NGOs and civil society to potentially create significant resistance against constitutional backsliding are just two of the financial tools to be mentioned.[81]

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[75] Petra Bárd and Anna Śledzińska-Simon, 'Rule of Law Infringement Procedures: A Proposal to Extend the EU's Rule of Law Toolbox' (CEPS Paper 2019) 10 <https://www.ceps.eu/wp-content/uploads/2019/05/LSE-2019-09_ENGAGE-II-Rule-of-Law-infringement-procedures.pdf> accessed 20 February 2023.

[76] Case C-619/18 R *Commission v Poland* ECLI:EU:C:2018:1021; European Commission, 'Rule of Law: European Commission Refers Poland to the European Court of Justice to Protect Independence of Polish Judges and Asks for Interim Measures' (Press release 2021) IP/21/1524.

[77] 'Spending conditionality' is generally referred to as 'a mechanism that links the disbursement of EU funds to the fulfilment of conditions aimed at pursuing horizontal policy goals'. Marco Fisicaro, 'Rule of Law Conditionality in EU Funds: The Value of Money in the Crisis of European Values' (2019) 4(3) European Papers 695, 705; see also Antonia Baraggia and Matteo Bonelli, 'Linking Money to Values: The New Rule of Law Conditionality Regulation and Its Constitutional Challenges' (2022) 23 German Law Journal 131, 141, for a general definition of the term 'conditionality'.

[78] Regulation (EU) 2021/1060 of the European Parliament and of the Council of 24 June 2021 laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy [2021] OJ L 231/159.

[79] Marco Fisicaro, 'Beyond the Rule of Law Conditionality: Exploiting the EU Spending Power to Foster the Union's Values' (2022) 7(2) European Papers 697, 700.

[80] Regulation (EU) 2021/692 of the European Parliament and of the Council of 28 April 2021 establishing the Citizens, Equality, Rights and Values Programme and repealing Regulation (EU) No 1381/2013 of the European Parliament and of the Council and Council Regulation (EU) No 390/2014 [2021] OJ L 156/1.

[81] For further detail on these two mechanisms, see Fisicaro (n 79).

Most importantly, in December 2020, the EU institutions also adopted the Rule of Law Conditionality Regulation linking the receipt of EU funds to respect for the rule of law.[82] The Regulation, *inter alia*, allows the Commission and the Council to suspend EU funds in the case of Member States' breaches of the rule of law affecting or posing a serious risk of affecting the financial management of the EU budget.[83]

Following an action for annulment brought by Hungary and Poland under Article 263 TFEU, the Court eventually declared the Regulation to be valid.[84] However, restraint on the part of the EU institutions can be demonstrated. After a long legislative process over three years,[85] first presented as an instrument aimed at the protection of the rule of law, the Regulation has been increasingly tempered following a negative Opinion of the Council's Legal Service[86] which predominantly required a direct link between rule-of-law breaches and negative budgetary consequences to be regarded as independent from the procedure of Article 7 TEU.[87] This clearly demonstrates that the current Regulation is not to be considered as a 'general rule of law oversight tool', but a 'true budgetary instrument'.[88] Regrettably, it is also associated with breaches of the rule of law only and does not take into consideration the remaining values.

From a purview of how this mechanism has been used so far, there is yet another sign of reluctance. At least, following the Commission's constant delay to apply the Regulation,[89] the European Parliament has

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[82] Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget [2020] OJ LI 433/1, and European Council, 'European Council meeting (10 and 11 December 2020) Conclusions' EUCO 22/20 <https://www.consilium.europa.eu/media/47296/1011-12-20-euco-conclusions-en.pdf> accessed 22 June 2023.

[83] Article 1 and 3 of Regulation 2020/2092.

[84] Case C-156/21 *Hungary v European Parliament and Council* ECLI:EU:C:2022:97; Case C-157/21 *Poland v European Parliament and Council* ECLI:EU:C:2022:98; on this matter see also Matteo Bonelli, 'Constitutional Language and Constitutional Limits: The Court of Justice Dismisses the Challenges to the Budgetary Conditionality Regulation' (2022) 7(2) European Papers.

[85] See in detail, for the controversies in the course of the adoption, Baraggia and Bonelli (n 77); Sébastien Platon, 'Bringing a Knife to a Gunfight: The European Parliament, the Rule of Law Conditionality, and the Action for Failure to Act' (*Verfassungsblog*, 11 June 2021) <https://verfassungsblog.de/bringing-a-knife-to-a-gunfight/> accessed 19 January 2023.

[86] Council of the European Union, 'Proposal for a Regulation of the European Parliament and of the Council on the Protection of the Union´s budget in case of generalised deficiencies as regards the rule of law in the Member States – Compatibility with the EU Treaties' (13593/18) <https://data.consilium.europa.eu/doc/document/ST-13593-2018-INIT/en/pdf> accessed 22 June 2023.

[87] ibid, para 34. This has also been reaffirmed by the European Council, Conclusions EUCO 22/20 at point 2(e).

[88] Baraggia and Bonelli (n 77) 140; see also Bonelli (n 84) 507.

[89] Although the Commission identified many concerns about the breaches of the rule of law in its 2020 Rule of Law Report.

persistently called on the Commission to trigger it.[90] On 27 April 2022, shortly after the Hungarian elections, the Commission finally activated the conditionality mechanism against Hungary for the first time.[91] After an intensive dialogue, the Commission eventually considered that a risk to the budget remained and proposed measures to the Council, leading to a suspension of funds.[92] On 15 December 2022, the Council finally adopted its implementing decision suspending Hungary from receiving EU funds.[93] According to that decision, 55% of the budgetary commitments under the Cohesion Policy programmes were to be suspended,[94] amounting to EUR 6.3 billion.[95]

In addition to the Rule of Law Conditionality Regulation, there is yet another mechanism worth mentioning: the Recovery and Resilience Facility (RRF). Under the RRF, an instrument primarily aimed at mitigating the impacts of the Covid-19 pandemic,[96] to be eligible to receive financial contributions, Member States are required to prepare national recovery and resilience plans (RRPs) setting out a reform and investment agenda and detailing a set of measures to be financed.[97] Payments of financial contributions and loans are conditional on the previous 'satisfactorily fulfilment of the relevant milestones and targets' set forth in the RRPs.[98] Most importantly, the RRF is fully embedded in the European Semester.[99]

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[90] European Parliament, 'Resolution of 25 March 2021 on the application of Regulation (EU, Euratom) 2020/2092, the rule-of-law conditionality mechanism (2021/2582(RSP))' (P9_TA (2021) 0103). The European Parliament even initiated the procedure under Article 265 TFEU against the Commission for a failure to act, although the case was withdrawn in the meantime.

[91] Thomas Wahl, 'Commission Triggers Conditionality Mechanism against Hungary' (eucrim 2/2022) <https://eucrim.eu/news/commission-triggers-conditionality-mechanism-against-hungary/> accessed 20 February 2023.

[92] See Article 6(9) of Regulation 2020/2092; Commission, 'EU budget: Commission proposes measures to the Council under the conditionality regulation' (Press release 2022), <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_5623> accessed 20 February 2023.

[93] Council Implementing Decision (EU) 2022/2506 of 15 December 2022 on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary [2022] OJ L 325/94.

[94] Article 2(1) of the Council Implementing Decision (EU) 2022/2506; the Commission initially proposed 65% though. See Commission, 'EU Budget: Commission Proposes Measures to the Council under the Conditionality Regulation' (Press release 2022) <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_5623> accessed 20 February 2023.

[95] Sigrid Melchior, 'Explainer: Europe Cuts Off Funds for Hungary: What Is at Stake?' (2022) <https://www.investigate-europe.eu/en/2022/explainer-europe-cuts-off-funds-for-hungary-what-is-at-stake/> accessed 20 February 2023.

[96] ie the Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility [2021] OJ L 57/17; for further information on the RRF, see Commission, 'Recovery and Resilience Facility' <https://commission.europa.eu/business-economy-euro/economic-recovery/recovery-and-resilience-facility_en> accessed 18 February 2018.

[97] Articles 17-18 of Regulation (EU) 2021/241.

[98] Article 24 of Regulation (EU) 2021/241.

[99] Articles 4, 17 and 18 of Regulation (EU) 2021/241; Fisicaro (n 77) 713.

To establish the necessary link to EU values, it is to be recalled that the annual CSRs issued within the European Semester cover rule-of-law related issues whose implementation in the respective Member State will eventually be subject to the Commission's assessment under the RRF.[100]

By way of example, in June 2022, the Council adopted its implementing decision[101] and approved the Commission's positive assessment[102] of the Polish RRP and the future disbursement of EUR 35.4 billion in grants and loans under the RRF, conditional upon the achievement of the milestones set out in its RRP.[103] The RRP particularly sets out two important 'super milestones' related to the independence of the judiciary.[104] As regards Hungary, the Council approved the Hungarian RRP and the future disbursement of EUR 5.8 billion in December 2022 also conditional upon the achievement of the set milestones.[105] The Hungarian RRP, *inter alia*, establishes 27 'super milestones' related to corruption, public procurement, judicial independence, and decision making.[106] However, no disbursement will be made until Poland and Hungary ultimately achieve all the milestones, and the Commission has not yet considered that they meet this condition. With respect to Poland, there are currently ongoing discussions as to whether the latest Polish legislative reforms meet the requirements set out in the milestones. Hungary, on the other hand, is far from reaching the large number of super milestones, and EU funding appears to be frozen as for now.[107]

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[100] Fisicaro (n 77) 714; in this context, the Commission particularly asserts that 'reforms linked to […] the effectiveness of justice systems, and in a broader sense respect of the Rule of Law are essential elements of the Member States' overall recovery strategy'. See Commission, 'Commission Staff Working Document Guidance to Member States Recovery and Resilience Plans' SWD (2021) 12 final, Part I, 9 <https://data.consilium.europa.eu/doc/document/ST-5538-2021-INIT/en/pdf> accessed 18 February 2023.

[101] Council Implementing Decision on the approval of the assessment of the recovery and resilience plan for Poland, 2022/0181 (NLE).

[102] See Commission, 'NextGenerationEU: European Commission Endorses Poland's €35.4 Billion Recovery and Resilience Plan' (Press release 2022) <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_3375> accessed 23 April 2023.

[103] See Council of the European Union, 'NextGenerationEU: Ministers Approve the Assessment of Poland's National Plan by the European Commission' (Press release 2022) <https://www.consilium.europa.eu/en/press/press-releases/2022/06/17/recovery-fund-ministers-welcome-assessment-of-poland-s-national-plan/> accessed 23 April 2023.

[104] European Parliament, 'Rule of Law-related "Super Milestones" in the Recovery and Resilience Plans of Hungary and Poland' (2023) (PE 741.581) 2 <https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/741581/IPOL_BRI(2023)741581_EN.pdf> accessed 22 June 2023.

[105] See Council of the European Union, 'NextGenerationEU: Member States Approve National Plan of Hungary' (Press release 2022) <https://www.consilium.europa.eu/en/press/press-releases/2022/12/12/nextgenerationeu-member-states-approve-national-plan-of-hungary/> accessed 23 April 2023; Council Implementing Decision on the approval of the assessment of the recovery and resilience plan for Hungary 2022/0414 (NLE).

[106] European Parliament, 'Rule of Law-related "Super Milestones" in the Recovery and Resilience Plans of Hungary and Poland' (2023), (PE 741.581) 2.

[107] Commission, 'Commission Finds that Hungary Has Not Progressed Enough in Its Reforms and Must Meet Essential Milestones for Its Recovery and Resilience Funds' (Press release 2022), <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7273> accessed 8 April 2023.

3 Strengthening the procedure to protect EU values

The previous discussion of available EU values protection mechanisms and their shortcomings already demonstrates that the Treaties are cumbersome in tackling constitutional and democratic backsliding,[108] even though it is to be acknowledged that Article 2 TEU has been triggered in judicial proceedings and that there has been financial conditionality based on Treaty provisions.

Yet any path for shifting from unanimity to qualified majority voting within the Article 7 TEU procedure, or even any other Treaty change in that context, seems to be inconceivable given that the authoritarian states would potentially veto any of those proposals.[109] Since Treaty change eventually requires a unanimous vote by all 27 EU Member States, such a shift under current political circumstances is most certainly only a political illusion.[110] Nevertheless, following the conclusions of the Conference on the Future of Europe and the Parliament's resolution calling for major Treaty changes, the EU is currently faced with a decision on whether to initiate reforms of the Treaties, also in matters of EU values. Even if it is said that authoritarian states, such as Poland and Hungary, would possibly veto any of those proposals, such reforms do not necessarily mean that they are inconceivable in the long run. The topic of Treaty revision is still on the agenda, and considering that so far every single act of further EU enlargement has been accompanied by Treaty changes,[111] it does not seem entirely farfetched that those reforms could become reality with the accession of further Member States.

This section therefore identifies possible ways for improvement to build stronger mechanisms of EU values protection. As evidenced by the variety of contributions in the academic and institutional debate, a lot

[108] See in this manner Argyropoulou (n 25).

[109] Scheppele and others (n 26) 10; see Stefan Lehne, 'Does the EU Need Treaty Change?' (2022) <https://carnegieeurope.eu/2022/06/16/does-eu-need-treaty-change-pub-87330> accessed 22 February 2023, stating that most notably, thirteen Member States have already declared themselves opposed to Treaty changes, including Bulgaria, Croatia, Czech Republic, Denmark, Estonia, Finland, Latvia, Lithuania, Malta, Poland, Romania, Slovenia and Sweden; see also Viktor Orbán, 'Speech at the 28th Bálványos Summer Open University' (2017) <https://abouthungary.hu/speeches-and-remarks/viktor-orbans-speech-at-the-28th-balvanyos-summer-open-university-and-student-camp> accessed 23 February 2023, declaring that 'a campaign of inquisition against Poland will never succeed, because Hungary will resort to all the legal mechanisms offered by the European Union in order to show its solidarity with the Polish people'.

[110] For example, after the Hungarian elections in April 2022, Viktor Orbán won another four-year term as Hungarian prime minister, proving that a return from electoral autocracy to full democracy is not in sight in the near future.

[111] The Single European Act 1987, preparing for Portugal's and Spain's membership, the Maastricht Treaty 1993 followed by the accession of Austria, Finland and Sweden in 1995, the Treaty of Amsterdam 1999 to prepare for the Central and Eastern European enlargement, as well as the Treaty of Nice 2003 and the Treaty of Lisbon 2009 to provide for the functioning of the EU in a Union of 25+ Member States.

has already been proposed in this context.[112] Some of the proposals mentioned here can be advanced without Treaty amendment, and some require Treaty change instead. Regrettably, however, these proposals mostly offer only individual 'pieces of the puzzle' of possible different options, and are therefore unlikely to change the course of backsliding if taken in isolation, and without providing for a comprehensive and concerted strategy to protect EU values.[113] This section briefly discusses the key proposals and demonstrates why they do not provide for a comprehensive solution either. Based on these findings, Section 4 offers a different stance by taking a broader perspective, relying on the idea of reconceptualising the framework of EU values protection by arguing for structural, institutional, and substantive reforms.

3.1 Making use of judicial proceedings

The first proposals concern the use of judicial proceedings in which legal mechanisms, particularly those related to judicial processes, are strategically and purposefully used as a means of safeguarding and upholding core values. The key aspects involve the addressing of violations through 'systemic infringement actions' as well as creative interpretations of existing Treaty provisions, all seeking to greatly leverage the system of EU values protection.

The proposal of 'systemic infringement actions' delivered by Scheppele[114] aims at bundling several violations of EU law for joint treatment in one systemic infringement procedure before the CJEU rather than pursuing a series of single infringements on a case-by-case basis.[115] It therefore seeks to give the Commission the chance to construe a way to present a full picture of national legal-political developments demonstrating systemic non-compliance with EU fundamental values. This could be seen as a response by the Commission to force recalcitrant Member States to abide by EU values without enabling them to make merely minor corrections but to initiate broader reforms.[116]

Another proposal concerns the creative use of Treaty provisions to further judicial proceedings, building on the idea of re-interpreting specific Treaty norms dealing with EU values protection. In the vast array of

[112] See, for a good overview of the core proposals, Dimitry Kochenov, 'The Acquis and Its Principles: The Enforcement of the "Law" versus the Enforcement of "Values" in the EU' in András Jakab and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values, Ensuring Member States' Compliance* (OUP 2017).

[113] Bonelli (n 9) 647; Elise Muir, Piet van Nuffel and Geert de Baere, 'The EU as a Guardian of the Rule of Law within Its Member States' (2023) 29(2) The Columbia Journal of European Law.

[114] Kim Lane Scheppele, 'The Case for Systemic Infringement Actions' in Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (CUP 2016); see also Scheppele and others (n 26).

[115] Kochenov (n 112) 18; Schneider (n 59) 17.

[116] Schneider (n 59) 18.

such provisions, Article 51(1) CFR and Article 2 TEU stand out in particular.

Firstly, Article 51(1) CFR could be re-interpreted in such a way as to make the Charter applicable also in purely domestic cases. Article 51(1) CFR in its current state stipulates that the CFR only applies when Member States are implementing EU law, ie when they act within its scope.[117] In order to make the provision also applicable in purely domestic cases, Jakab and Kirchmair argue that, in the case of undermining Article 2 TEU values, the application of the *clausula rebus sic stantibus* would be justified.[118] This doctrine entails that a promise made under a treaty becomes unenforceable due to fundamentally changed circumstances.[119] In this sense, they argue that both sides must keep their original promise under the Treaty in order to continue to ensure the balance of comprehensive fundamental rights protection.[120] Based on the *clausula rebus sic stantibus* doctrine, it is to be concluded that in the case of a fundamental rights violation, EU intervention would be justified to 'close the *lacunae*' and 'ensure the fundamental rights union in Europe'.[121]

A creative use of Article 51(1) CFR is also foreseen under von Bogdandy's 'Reverse Solange doctrine'[122] that again builds on the idea of allowing the Court to review internal constitutional structures when Article 2 TEU values are in dispute. According to this interpretation, 'beyond the scope of Article 51(1) of the Charter, Member States remain autonomous in fundamental rights protection as long as it can be presumed that they ensure the essence of fundamental rights enshrined in Article 2 TEU'.[123]

Secondly, Article 2 TEU could be mobilised as a standalone yardstick in judicial proceedings as already happened in the recent case of *Commis-*

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[117] See Case C-260/89 *ERT* ECLI:EU:C:1991:254, para 42.

[118] András Jakab and Lando Kirchmair, 'Two Ways of Completing the European Fundamental Rights Union: Amendment to vs Reinterpretation of Article 51 of the EU Charter of Fundamental Rights'(2022) 24 Cambridge Yearbook of European Legal Studies 239, 243.

[119] See Article 62 of the Vienna Convention.

[120] Jakab and Kirchmair (n 118) 243.

[121] ibid.

[122] Armin von Bogdandy and others, 'Reverse Solange: Protecting the Essence of Fundamental Rights against EU Member States' (2012) 49(2) Common Market Law Review 489, 489; Armin von Bogdandy, Carlino Antpöhler, Michael Ioannidis, 'Protecting EU Values: Reverse Solange and the Rule of Law Framework' in András Jakab and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values, Ensuring Member States' Compliance* (OUP 2017) 218-233; Armin von Bogdandy and Luke Dimitrios Spieker, 'Countering the Judicial Silencing of Critics: Article 2 TEU Values, Reverse Solange, and the Responsibilities of National Judges' (2019) 15(3) European Constitutional Law Review 391, 391; Armin von Bogdandy and Luke Dimitrios Spieker, 'Protecting Fundamental Rights Beyond the Charter: Repositioning the Reverse Solange Doctrine in Light of the CJEU's Article 2 TEU Case Law' in Michal Bobek and Jeremias Adams-Prassl (eds), *The EU Charter of Fundamental Rights in the Member States* (Hart 2020) 525 ff.

[123] Armin von Bogdandy and others (n 122) 514; see also Dora Kostakopoulou, 'Justice, Individual Empowerment, and the Principle of Non-regression in the European Union' (2021) 46(1) European Law Review 92, 102.

sion v Hungary in which the Commission invoked Article 2 as an autonomous ground for its action. In that vein, the direct applicability of Article 2 TEU as an autonomous provision would certainly allow the CJEU to review compliance with all EU fundamental values inherent in Article 2 TEU and thus tackle Member States' regimes undermining those values in judicial proceedings. Thus, the Court would be able to rule on the incompatibility of a single national law with EU values from Article 2 TEU.

However, irrespective of the criticism voiced against the legal soundness or the desirability of the mentioned use of judicial proceedings,[124] those key proposals represent just one component among several concepts that are necessary to address effectively the multifaceted challenges of EU values backsliding. They merely concentrate on judicial proceedings which are extremely time consuming and certainly unable to eliminate the root causes of undermining EU values. While these actions can potentially target systemic violations of EU values, they may, however, not cover all aspects of protecting and promoting EU values comprehensively. Instead, safeguarding these values requires a holistic approach that goes beyond legal actions alone, including, among other things, political dialogue, monitoring mechanisms, cooperation with national authorities, support for civil society, and public awareness campaigns. The broader dimensions of these aspects related to EU values violations therefore cannot be adequately addressed solely through judicial proceedings.

3.2 Remedying the 'dead end' of Article 7 TEU: Article 354(1) TFEU by analogy

Besides using judicial proceedings, to turn Article 7 TEU into a credible provision, Article 354(1) TFEU could be applied by analogy to the extent that *any* Member State truly intentionally and systematically violating EU values will be precluded from a vote under the Article 7 TEU procedure. Article 354(1) TFEU asserts that for the purposes of Article 7 TEU on the suspension of certain rights resulting from Union membership, 'the member of the European Council or of the Council representing the Member State in question shall not take part in the vote'. Although the explicit wording refers to *one* Member State only, this provision could be interpreted as to preclude *any* Member State undermining EU fundamental values against which a procedure under Article 7 TEU could be initiated simultaneously.[125]

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[124] For example, concerning the potential overstretching of CJEU competences, putting its legitimacy to a great test, and questioning its judicial activism, emerging criticism as regards the institutional set-up, matters of EU competence as well as Member States' diversity and pluralism, see Schneider (n 59) 17 ff; Kaiser (n 55); Spieker (n 51); Spieker *(*n 52*)* 244; Kim Lane Scheppele, 'Enforcing the Basic Principles of EU Law through Systemic Infringement Actions' in Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (CUP 2016) 114 ff.

[125] See in that manner Pech and Scheppele (n 3) 24; Iuliana-Mădălina Larion, 'Protecting EU Values. A Juridical Look at Article 7 TEU' (2018) Challenges of Knowledge Society 539, 543.

Nevertheless, this interpretation neglects the current 'alliance' of Member States: Poland and Hungary, for example, agreed to support each other in opposing the activation of Article 7 TEU.[126] Bulgaria also confirmed that it would side with the Hungarian government against Article 7 TEU.[127] Moreover, the Visegrád Cooperation, an alliance between Poland, Czech Republic, Slovakia, and Hungary that aims at cooperating in terms of national policies, diplomatic efforts, and engagement within the European Union, strongly implies that these 'V4-States' would possibly also assure their assistance in opposing activation of Article 7 TEU.[128] Since it will be difficult to prove a serious violation of EU values for each of these supporters, the analogous application of Article 354(1) TFEU might not lead to an effective outcome.

Eventually, irrespective of the ineffectiveness of such an analogous application, given its political nature, the current 'dead-end status', and the 'alliance' of opposing Member States, Article 7 TEU as it currently stands does not fully provide for all the dimensions necessary to address situations in which EU values are at risk. Nevertheless, if Article 7 TEU is successful, it would clearly not be just 'one drop in the vast sea of available measures' but would suspend the most important Member States' rights politically and financially.

3.3 A 'Copenhagen Commission'

Another key proposal concerns the establishment of a 'Copenhagen Commission' as a new EU body entrusted with the regular monitoring and enforcement of the compliance of EU Member States with Article 2 TEU.[129] This new body would be able to initiate investigations on its own motion, build on any sources and materials available, draw its information from any person or institution it considers useful, and eventually issue legally binding determinations such as recommendations but also sanctions.[130] However, such an envisaged concept of entrusting the 'Co-

[126] Viktor Orbán, 'Speech at the 28th Bálványos Summer Open University' declaring that 'a campaign of inquisition against Poland will never succeed, because Hungary will resort to all the legal mechanisms offered by the European Union in order to show its solidarity with the Polish people'; see A Rettmann, 'Poland to Veto EU Sanctions on Hungary' (euobserver 2018) <https://euobserver.com/rule-of-law/142825> accessed 24 May 2023 quoting the Polish foreign ministry statement of 12 September 2018 saying that 'Poland will vote against any sanctions on Hungary in the forum of European institutions'.

[127] Georgi Gotev, 'Bulgarian Government Sides with Orban Against Article 7' (euractiv 2018) <https://www.euractiv.com/section/eu-elections-2019/news/bulgarian-government-sides-with-orban-against-article-7/> accessed 24 May 2023.

[128] Soyaltin-Colella (n 26) 34.

[129] Jan-Werner Müller, 'A Democracy Commission of One's Own, or What It Would Take for the EU to Safeguard Liberal Democracy in Its Member States' in András Jakab and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values, Ensuring Member States' Compliance (*OUP 2017) 234 ff; Jan-Werner Müller, 'Protecting the Rule of Law (and Democracy!) in the EU. The Idea of a Copenhagen Commission' in Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (CUP 2016) 206–224.

[130] ibid 213.

penhagen Commission' to adopt legally binding acts in matters of EU values will certainly conflict with the principle of institutional balance, 'according to which the EU institutions have to act within the limits of their respective powers as provided for by the Treaty'.[131] As under the Treaties the enforcement of EU values is currently only conferred on the European Commission, the European Parliament, and the (European) Council,[132] it can be drawn from that principle that the creation of additional organs with such wide discretionary competences is generally prohibited and only allowed following a Treaty revision.[133] As the previously mentioned proposals concern possible changes within the existing Treaty framework, the idea of a 'Copenhagen Commission' would be already disqualified solely because of there being no convincing argument that it could be established under the contemporary constitutional framework.

Anyway, the proposal of a 'Copenhagen Commission' is also to be considered as a mere 'piece of the puzzle' of the broader framework, as additional steps are still necessary to ensure effective protection of EU fundamental values. As there are already existing mechanisms and institutions in place to protect EU values, the creation of a 'Copenhagen Commission' would need to work in synergy with these existing structures, ensuring coordination and avoiding a duplication of efforts. The upholding of EU values is also a collaborative task in which action by multiple actors, including EU institutions, Member States, as well as civil society becomes necessary. The mere creation of a new body will therefore not provide for a comprehensive strategy.

3.4 'Emergency exits'

In the academic debate concerning the key proposals for EU values protection, recourse has also been made to 'emergency exits',[134] *inter alia*,

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[131] Ben Smulders and Katharina Eisele, 'Reflections on the Institutional Balance, the Community Method and the Interplay between Jurisdictions after Lisbon' (2012) 31(1) Yearbook of European Law 112, 114; see also Merijn Chamon, 'Institutional Balance and Community Method in the Implementation of EU Legislation Following the Lisbon Treaty' (2016) Common Market Law Review 1501, 1502–1503.

[132] See for example Article 7 TEU.

[133] Michelle Everson, 'Independent Agencies: Hierarch Beaters?' (1995) 1(2) European Law Journal 180, 192.

[134] See in this manner Gráinne de Búrca, 'Poland and Hungary's EU Membership: On Not Confronting Authoritarian Governments' (2022) 20(1) International Journal of Constitutional Law 13, 21 speaking of 'last resort' measures, 'rarely to be used'.

to an expulsion procedure and the creation of an 'EU 2.0'.[135]

The concept of creating an 'EU 2.0' entails the abandonment of the EU in its current form with a mass withdrawal of EU-values-compliant Member States, creating a re-founded 'EU 2.0' without the backsliding, non-compliant Member States.[136] This will be realised by all compliant Member States signing an international treaty outside the current EU legal framework, thereby committing to trigger Article 50 TEU if one Member State exercises its veto option more than a certain number of times within a certain period.[137] Next to this treaty, a second international treaty will be signed whose content reproduces the current EU legal framework, thereby creating an 'EU 2.0'.[138] This mechanism will enter into force as soon as all its signatories leave the initial EU.[139]

As regards the expulsion procedure, this instrument merely entails compelling the recalcitrant Member States to leave the EU. However, the Treaties do not provide for a procedure of expulsion.[140] In this context, some scholars have even inferred that Article 50 TEU can be utilised effectively to expel recalcitrant Member States from the EU.[141] Crucially, this would yet lead to the conceptualising of an implicit power of expulsion which is to be argued against for three particular reasons: first, it

[135] See for the discussion, among others, Christophe Hillion, 'Poland and Hungary Are Withdrawing from the EU' (*Verfassungsblog*, 27 April 2020) <https://verfassungsblog.de/poland-and-hungary-are-withdrawing-from-the-eu/> accessed 5 March 2023; Guido Bellenghi, 'EU 2.0 Revisited: Between Vetocracy and Rule of Law Concerns' (*European Law Blog*, 15 November 2022) <https://europeanlawblog.eu/2022/11/15/eu-2-0-revisited-between-vetocracy-and-rule-of-law-concerns/#comments> accessed 5 March 2023; de Búrca (n 134) 20 ff; John Cotter, 'Why Article 50 TEU Is Not the Solution to the EU's Rule of Law Crisis' (*European Law Blog*, 30 April 2020), <https://europeanlawblog.eu/2020/04/30/why-article-50-teu-is-not-the-solution-to-the-eus-rule-of-law-crisis/> accessed 5 March 2023; Tomasz Tadeusz Koncewicz, 'Polexit – Quo vadis, Polonia?'(*Verfassungsblog*, 3 August 2020) <https://verfassungsblog.de/polexit-quo-vadis-polonia/> accessed 5 March 2023; Oliver Mader, 'Polexit? Hungarexit? Quo vadis EU? Reflexions on the Latest Solutions Provided by EU Constitutional Law in the Face of a Persistent Rule of Law Misery' (2022) Austrian Law Journal 2022 47, 47 ff; Larion (n 125) 547; Tom Theuns, 'The Need for an EU Expulsion Mechanism: Democratic Backsliding and the Failure of Article 7' (2022) 28 Res Publica 693, 693 ff.

[136] Bellenghi (n 135), with reference to Merijn Chamon, 'Re-establishing the EU, Dissolution, Withdrawal or Succession?' (EU Law Live 2020) <https://eulawlive.com/weekend-edition/weekend-edition-no32/> accessed 5 March 2023, and Tom Theuns, 'Could We Found a New EU without Hungary and Poland?' (euobserver 2020) <https://euobserver.com/opinion/149470> accessed 5 March 2023.

[137] ibid.

[138] ibid.

[139] ibid.

[140] De Búrca (n 134) 21; Larion (n 125) 547; Matteo Bonelli, 'Symposium — Part III — Let's Take a Deep Breath: On the EU (and Academic) Reaction to the Polish Constitutional Tribunal's Ruling' (Int'l J Const L Blog 2021) <http://www.iconnectblog.com/2021/10/symposium-part-iii-lets-take-a-deep-breath-on-the-eu-and-academic-reaction-to-the-polish-constitutional-tribunals-ruling/> accessed 5 March 2023.

[141] In this vein, Hillion has argued that both Hungary's and Poland's persistent undermining of the EU's fundamental values could be considered as a notification of an intention to withdraw within the meaning of Article 50 TEU, Hillion (n 135).

would render Article 7 TEU meaningless;[142] second, from a historical purview, a similar power of expulsion under Article 50 TEU such as the one in Article 8 of the Statute of the Council of Europe[143] has been expressly rejected;[144] and third, the CJEU reaffirmed in its *Wightman* case that there is no such power to expel a Member State from the EU and that a Member State cannot be forced to leave the EU against its will.[145]

Irrespective of the central objections concerning the desirability and legal soundness of such approaches, eg, criticism concerning contradictions with the concept of creating an 'ever closer union' proclaimed in Article 1 TEU, as the EU would become even more fragmented in retrospect, contradictions with Article 50 TEU and the CJEU's *Wightman* ruling, violations of the '*pacta sunt servanda*' principle, and challenges to the political concept of the EU as an endless process of European integration, as well as enormous political, economic, and legal consequences that such a mechanism would entail for the EU, its Member States, and its citizens,[146] expulsion or a complete start from scratch certainly does not provide for a comprehensive solution. It is debatable whether the idea of a 'piece of the puzzle' fits into the idea of an expulsion procedure or the creation of an 'EU 2.0', as they are certainly not a single piece but a 'nuclear option'. Furthermore, potential contestations of EU values also emanate from generally compliant Member States with which the EU will still be faced after making use of such 'emergency exists'. In fact, these mechanisms will ultimately not solve the crisis by just circumventing the actual reasons for the crisis. Instead, 'upholding the EU's fundamental values and ensuring the functioning of the Union while, where possible, keeping all Member States on board' appears to be the most desirable

[142] De Búrca (n 134) 21; Article 7 TEU merely includes a suspension power but not an expulsion power. If such a power could be inferred from Article 50 TEU, Article 7 TEU would be *de facto* circumvented and undermined.

[143] Article 8 of the Statute of the Council of Europe explicitly stipulates that 'any member of the Council of Europe which has seriously violated Article 3 [referring to the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms] may be suspended from its rights of representation and requested by the Committee of Ministers to withdraw under Article 7. If such member does not comply with this request, the Committee may decide that it has ceased to be a member of the Council as from such date as the Committee may determine'. In that vein, Russia, for example, was expelled from the Council of Europe on 16 March 2022.

[144] De Búrca (n 134) 21.

[145] Case C-621/18 *Wightman and others* ECLI:EU:C:2018:999, paras 65, 67, 69, 72.

[146] See for further discussion, among others, Cotter (n 135); Maximilian Steinbeis, 'The Exit Door' (*Verfassungsblog* 8 October 2021) <https://verfassungsblog.de/the-exit-door/> accessed 5 March 2023; John A Hill, 'The European Economic Community: The Right of Member State Withdrawal' (1982) 12(3) Georgia Journal of International and Comparative Law 335, 356; De Búrca (n 134) 21.

option.[147] Again, a more comprehensive approach is needed that combines multiple strategies, mechanisms, collaboration between different stakeholders, including EU institutions, Member States, and civil society, to address the complex and evolving challenges related to upholding EU values more effectively.

4 Rearranging the puzzle: reconceptualising the framework of EU values protection

Given the points of criticism on the key proposals and their focus only on individual pieces of the big picture, this clearly offers sufficient reason to assume that they do not represent a comprehensive strategy in EU values protection either. Overstretching competences not provided for in the Treaties, conflicts with the principle of conferral and institutional balance, the discretion of institutional actors, politicising the enforcement of EU values, and the application of diverging standards do raise questions as to whether the framework of EU values protection needs to be reconceptualised pursuing Treaty revisions. Looking beyond the mere 'pieces of the puzzle', there is a need for a much broader conceptualisation of the EU's role in the protection of the common values by equipping it with a more comprehensive and concerted response framework.[148] Such a strategy – as proposed hereafter – rests on three different dimensions: structural, institutional, and substantive reforms concerning the EU values protection framework.

4.1 Structural reforms

The first concept of the comprehensive strategy builds on the idea of structural reforms. As the overstretching of competences and conflicts with the principle of conferral have all challenged the idea of the constitutional balance between Member States' sovereignty and supranational competences held at EU level that underpins the Treaties,[149] these reforms become necessary to re-strike the right constitutional balance. Most im-

[147] Guido Bellenghi, 'EU 2.0 Revisited: Between Vetocracy and Rule of Law Concerns' (*European Law Blog*, 15 November 2022) <https://europeanlawblog.eu/2022/11/15/eu-2-0-revisited-between-vetocracy-and-rule-of-law-concerns/#comments> accessed 5 March 2023 with reference also to Matteo Bonelli, 'Symposium — Part III — Let's Take a Deep Breath: On the EU (and Academic) Reaction to the Polish Constitutional Tribunal's Ruling'(Blog of the International Journal of Constitutional Law 2021) <http://www.iconnectblog.com/2021/10/symposium-part-iii-lets-take-a-deep-breath-on-the-eu-and-academic-reaction-to-the-polish-constitutional-tribunals-ruling/> accessed 5 March 2023.

[148] See eg, arguing in the same manner, Monica Claes, 'Safeguarding a Rule of Law Culture in the Member States: Engaging National Actors' (2023) 29(2) The Columbia Journal of European Law 214, 223 ff.

[149] See eg Article 5 TEU enshrining the principle of conferral according to which the EU acts only within the limits of the competences that the Member States have conferred on it in the Treaties, and competences not conferred on the EU by the Treaties remain with the Member States.

portantly, Member States, first and foremost Poland and Hungary,[150] keep rejecting the authority of the CJEU or the EU in general and refuse to give full effect to EU law, *inter alia*, grounded on arguments of the EU's lack of competence, Member States' sovereignty, national (constitutional) identity under Article 4(2) TEU, essential state functions, or the supremacy of their Constitution.[151] Such arguments are thereby contended as constituting absolute 'no-go areas' by which the respective Member States attempt to deviate at whim from EU law, including EU values, thereby favouring those areas over the primacy of EU law.[152]

The constitutional balance between national sovereignty of the Member States and supranational competences held at EU level in this context needs to be rethought. On the one hand, the concept of Member States' sovereignty should not be understood as an absolute one, but in the sense that in the absence of EU law Member States are autonomous and free to determine their national (constitutional) identities as long as they do not undermine the functioning of the entire EU legal order founded on the common values of Article 2 TEU.[153] In the course of rethinking constitutional balance, it should be stressed that Article 2 TEU values are pre-eminent on national sovereignty and that the latter cannot be operationalised as a yardstick to derogate from EU law,[154] because Article 2 TEU values derive from and are commonly shared among Member States, and their definition is not left to a single Member State, but a 'common enterprise in the EU composite system'.[155] On the other hand, Article 2 TEU cannot be invoked as authorisation to allow the EU to defend its values in any case[156] since this would potentially undermine Member States' diversity and pluralism that need to be safeguarded.[157]

However, as has been convincingly pointed out, there is considerable discrepancy between the constitutional relevance of EU values enshrined in Article 2 TEU and the competences assigned to the EU institutions

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[150] See eg Case C-156/21 *Hungary v European Parliament and Council* ECLI:EU:C:2022:97, para 202; Case C-157/21 *Republic of Poland v European Parliament and Council* ECLI:EU:C:2022:98, paras 273 ff.

[151] See Claes (n 148) 222; see also Monica Claes, 'How Common Are the Values of the European Union?' (2019) 15 Croatian Yearbook of European Law & Policy VII, XIV.

[152] Anita Schnettger, 'Article 4(2) TEU as a Vehicle for National Constitutional Identity in the Shared European Legal System' in Christian Calliess and Gerhard van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (CUP 2019) 35.

[153] See also European Parliament, 'European Parliament resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary', P7_TA (2013) 0315 <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P7-TA-2013-0315+0+DOC+PDF+V0//EN> accessed 15 April 2023, recitals K and M.

[154] See Matteo Bonelli, 'Has the Court of Justice Embraced the Language of Constitutional Identity?' (2022) Diritti Comparati, Comparare i diritti fondamentali in Europa' 1, 5.

[155] ibid 7; see also the CJEU arguing in a similar manner in Case C-156/21 *Hungary v European Parliament and Council* ECLI:EU:C:2022:97, para 237.

[156] Bonelli (n 84) 520.

[157] This can be drawn, for example, from the Union's obligation to respect the equality of Member States and their national identities as stipulated under Article 4(2) TEU.

to protect those values.[158] The constitutional balance between Member States' sovereignty and supranational competences in the light of Article 2 TEU therefore needs to be reconceptualised in the sense that the EU would acquire competences that correspond to the constitutional relevance of EU values. Such a reconceptualisation certainly necessitates Treaty change extending the scope and reach of EU law, and broadening the competences for relevant actors in the EU values protection framework.

First of all, written affirmation of the principle of primacy within the Treaties could prove helpful in balancing between the need for differentiation within the framework of Member States' sovereignty and the need for unity of the common EU legal system. Recourse could be made to the already existing Declaration No 18 on primacy. In this sense, a new provision could provide for a general rule that all validly adopted EU law takes precedence over national law, including national constitutional law,[159] and that all national courts are obliged to set aside or disapply any conflicting measures of national law, including national constitutional law.[160] Such an explicit affirmation ensures the uniform interpretation and application of EU law throughout the Member States by simultaneously promoting legal certainty and consistency. It could help to solve tensions between unity and diversity as it provides for a clear reference point, further strengthens the commitment of Member States being bound to comply with EU law, and can help to deter potential challenges to the primacy of EU law, including EU values. Nevertheless, some doubts remain as to whether such a declaration of unconditional primacy will ultimately change the current course of constitutional backsliding. The German, Italian, Hungarian, and Polish constitutional courts will potentially still assert that there are limits to this at the level of the Member States' constitution. Without any possibility to find political will to implement such a change, Member States – let alone the 'illiberal' ones – will certainly not agree to such a Treaty revision.

Secondly, the envisaged reconceptualisation could be accomplished by a re-formulation of Article 4(2) TEU. This could potentially look as follows:

> *The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order, and safeguarding national security. This paragraph shall not constitute grounds to disrespect the values referred to in Article 2.*

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[158] Bonelli (n 84) 507, 509, 525 speaking of a current 'mismatch' and Jan Wouters, 'Revisiting Art 2 TEU: A True Union of Values?' (2020) 5(1) European Papers 255, 257, 260, speaking of 'asymmetry'.

[159] Case C-11/70 *Internationale Handelsgesellschaft* ECLI:EU:C:1970:114.

[160] Case C-6/64 *Costa v ENEL* ECLI:EU:C:1964:66; Case C-106/77 *Simmenthal* ECLI:EU:C:1978:49.

In practical terms, this amendment clarifies that 'national specifics, safeguarded under Article 4(2) TEU, cannot permit a member's disrespect of the values of Article 2 TEU'.[161] It shows, as also found by the CJEU in the *RS* case, that Article 4(2) TEU in any case has 'neither the object nor the effect' of authorising a Member State to disregard EU values on the ground that a rule of EU law undermines the national identity of the Member State concerned.[162] In the same vein, such a reformulation also clarifies that Article 4(2) TEU does not constitute an exception to the primacy of EU law.[163] Otherwise it would create the wrongful impression of allowing Member States to invoke national sovereignty as a trump card to derogate from EU values at whim, thereby also compromising the primacy, unity, and effectiveness of EU law.[164] Nevertheless, such a proposal – again – seems to be unviable due to potential vetoes and contestations of Member States. As there is already a prevalent interpretation of the meaning of Article 4(2) TEU, the added value of such a reformulation would probably be of only minor importance.

Finally, Article 2 TEU should be supplemented by the following clarification: '*The Union shall be competent as far as necessary for the enforcement of the values referred to in Article 2 TEU and with due regard for the principle of subsidiarity*'. This amendment will eventually provide for EU competences that correspond to the constitutional relevance of the EU's fundamental values by simultaneously respecting the principle of subsidiarity and proportionality. Enforcement will be directed to EU institutions but also to Member States. The element of 'necessity' will be read in the light of subsidiarity and proportionality. According to the principle of subsidiarity, the EU can act only 'if and in so far as the objectives of the proposed action cannot be sufficiently achieved by Member States' but can rather be better achieved at Union level.[165] This principle is further complemented by the principle of proportionality, meaning that the content and form of Union action do not exceed what is necessary to achieve the objectives of the Treaties.[166] This means that EU action, thereby including the enforcement of EU values, is delimited by those principles beyond which the EU cannot go. Whether EU institutions exceed these limits is to be assessed by the CJEU. Simultaneously, Article 4(2) TEU could also serve as a legal basis for adopting secondary legislation. However, the proposed clarification could be perceived as providing 'carte blanche' for the EU to act whenever it feels compelled to and whenever EU values are in dispute. This likewise sounds like something not many Member States would agree to.

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[161] Hillion (n 14) 63.

[162] Case C-430/21 *RS* ECLI:EU:C:2022:99, para 70.

[163] Schnettger (n 152) 34.

[164] Case C-399/11 *Melloni* ECLI:EU:C:2013:107, para 60; Case C-617/10 *Åkerberg Fransson* ECLI:EU:C:2013:280, para 29.

[165] Article 5(3) TEU.

[166] Article 5(4) TEU.

4.2 Institutional reforms

The second dimension of the reconceptualisation strategy rests on the idea of institutional reforms. With most of the values protection mechanisms subjected to the discretion of political actors, leaving enforcement where it currently stands will potentially not solve the political determination of values enforcement. By way of example, even though the Commission,[167] followed by the European Parliament,[168] activated Article 7 TEU, enforcement action was eventually blocked by the Council or the European Council,[169] thus demonstrating the struggle between the EU intergovernmental (Council[170] and European Council) and supranational (European Parliament and Commission) set-up failing to sanction backsliding regimes.[171] This is further intensified by the political determination of values enforcement and the majority of mechanisms involving political actors showing constant reluctance to tackle the values crisis. With regard to national sovereignty and shown by its Legal Service Opinion of 2014, the Council as an intergovernmental institution has been the most reluctant institution.[172] The solidarity among Member States stemming from fears of spillover may reasonably explain its unwillingness.[173] Likewise, the European Parliament has also shown its constraints[174] instigated by the strong support and party loyalty of the EPP, for which Orbán's Hungarian Fidesz party originally made strong gains in seats.[175] Backed

[167] Commission, 'Reasoned proposal in accordance with Article 7(1) of the Treaty on European Union regarding the Rule of Law in Poland' (n 21).

[168] European Parliament, 'Rule of Law in Hungary: Parliament Calls on the EU to Act' (Press release 2018), <https://www.europarl.europa.eu/news/en/press-room/20180906IPR12104/rule-of-law-in-hungary-parliament-calls-on-the-eu-to-act> accessed 31 January 2023.

[169] Soyaltin-Colella (n 26) 37.

[170] Since it has full competence in certain policy fields, one could argue that the Council is supranational. However, it also represents and follows the interests of the Member States. Therefore, the Council is predominantly an intergovernmental institution with some elements, however, of a supranational nature.

[171] Soyaltin-Colella (n 26) 37; Joseph HH Weiler, 'Epilogue: Living in a Glass House: Europe, Democracy and the Rule of Law' in Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (CUP 2016) 322; Roger Daniel Kelemen, 'Europe's Other Democratic Deficit: National Authoritarianism in Europe's Democratic Union' (2017) 52(2) Government and Opposition 211, 226; Dimitry Kochenov and Petra Bárd, 'Rule of Law Crisis in the New Member States of the EU: The Pitfalls of Overemphasising Enforcement' (RECONNECT Working Paper no 1, 2018) <https://reconnect-europe.eu/wp-content/uploads/2018/07/RECONNECT-KochenovBard-WP_27072018b.pdf> accessed 22 June 2023.

[172] Soyaltin-Colella (n 26) 33; de Búrca (n 134) 25.

[173] Soyaltin-Colella (n 26) 34; Carlos Closa, 'Reinforcing EU Monitoring of the Rule of Law: Normative Arguments, Institutional Proposals and the Procedural Limitations' in Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (CUP 2016) 4; Peter Oliver and Justine Stefanelli, 'Strengthening the Rule of Law in the EU: The Council's Inaction' (2016) 54(5) Journal of Common Market Studies 1075, 1081; de Búrca (n 134) 29.

[174] At least until 2018, when it activated the mechanisms under Article 7 TEU against Hungary.

[175] Soyaltin-Colella (n 26) 34; Kelemen (n 171) 226.

by the partisan influence of the EPP, even the Commission remained unwilling to address the illiberal developments of backsliders in the European Union during the Juncker-Commission of 2014-2019.[176] Besides, the current von-der-Leyen-Commission was decisively backed by Fidesz MEPs, confirming von der Leyen's candidacy in the European Parliament by the EPP.[177] Even if the Fidesz party has been excluded and MEPs have left the EPP in the meantime,[178] it clearly shows that EU institutions act in a decisively politically motivated way that is prone to arbitrariness and political preferences. With a view to further enlargement, this situation will even intensify as new States will be represented in each of the ever-growing institutions.[179] Due to the involvement of several actors,[180] criticism has also been raised as to who bears the primary responsibility for initiating and assessing the situation.[181]

In order to gain distance from political motivated actors and to clarify and substantiate obligations for safeguarding EU values, the institutional set-up of EU values protection clearly needs to be reformed. These reforms necessarily rest on two premises: first, clarifying the responsibilities of institutional actors and, second, turning the mere discretionary scope for manoeuvre into legal obligations. Simultaneously, it should be clarified that there is not one single mechanism to solve the crisis, but the solution lies in the combined application of *all* political, judicial, and financial strands distributing values protection to different actors, all needing to pursue a concerted and common strategy of EU values protection.[182] In the same vein, it should also be considered that EU law and judicial protection alone cannot and will not solve the crisis. As Claes has pointed out, for the safeguarding of EU values, a 'shared commitment […] of all actors involved – political and judicial institutions, executive and administrative bodies, civil servants, civil society organizations and the citizenry at large – who each in their own role have the responsibility to give effect to it' is needed.[183]

Such a reconceptualised strategy could, for example, be designed as an '*EU values traffic light system*' which could potentially look as follows: in the first stage, under the green-light mode, the response architecture

[176] Soyaltin-Colella (n 26) 34; Even if the Juncker Commission was not totally inactive but triggered Article 7 TEU and launched infringement proceedings, the challenge was particularly new and nobody knew the possible responses.

[177] Roger Daniel Kelemen, 'The European Union's authoritarian equilibrium' (2020) 27(3) Journal of European Public Policy 481, 488 ff.

[178] Fidesz was suspended from membership of the EPP in 2019 and its MEPs resigned their membership in the EPP in 2021. See Martin Dunai and Gabriela Baczynska, 'Hungary's Fidesz Party Leaves Largest EU Parliamentary Group' (*Reuters*, 2021) <https://www.reuters.com/article/uk-eu-hungary-idUKKBN2AV132> accessed 9 April 2023.

[179] De Witte (n 13) 9.

[180] Particularly with respect to Article 7 TEU.

[181] Larion (n 125) 547; Müller (n 129) 212.

[182] In this manner, see also Bonelli et al (n 9) 649.

[183] Claes (n 148) 220.

could allow for an advisory group, an institutionally and politically independent body to constantly monitor all Member States' internal legal-political developments and advise on appropriate measures for anticipating, preventing, and addressing the impact of potentially emerging decays of EU values. The advisory group should particularly be composed of third-party experts, the FRA being one example. In order to strengthen the legitimacy of the EU, expertise from both within and outside the EU, including also NGOs and civil society could prove helpful in this sense.[184] In the second stage, under the amber-light mode, if there is a serious risk of a breach of EU values by a Member State, the strategy could provide for the obligation to activate the process for the Commission to enter into dialogue with the respective Member State focused on finding a solution to bring it back in line with EU values. This could be accompanied by opinions, advice, and recommendations. For the dialogue process, recourse could be made, for example, to the existing 2014 Rule of Law Framework which, however, must be re-designed in the sense that it will cover *all* EU values, and not just the rule of law. If this stage fails to resolve the situation or the serious risk emerges into a systemic and persistent breach of EU values, the red-light mode could lead to mandatory follow-up procedures, including the activation of sanctions, initiating judicial proceedings as well as financial response mechanisms. All EU institutions and Member States would be in charge of these procedures. The stages, however, should be able to be activated independently, depending on the degree and gravity of potential threats to, or breaches of, EU values, although monitoring should occur constantly in any case. In the same vein, notions such as 'serious risk of a breach' and 'systemic and persistent breaches' should be clarified and clearly articulated, eg by the CJEU or through legislative acts by the EU legislature. Finally, the individual colour of the traffic light should be decided by a proposal of the independent advisory group, followed by a final decision of the Commission guided by discretion but limited by the principle of subsidiarity and proportionality. Nevertheless, it should be noted that it is debatable what distinguishes an independent 'advisory body' from a 'Copenhagen Commission'. All in all, such a creation would potentially lead to even more technocratic institutions at EU level with the EU already being accused of having a democratic deficit and consisting of too many independent agencies and bodies with little democratic accountability.

Each institution in the above-mentioned values-crisis-response architecture should be assigned clear responsibilities to determine when it is required to act. However, the current EU Treaty framework is extremely limited when it comes to the protection and enforcement of the values enshrined in Article 2 TEU.[185] In view of the identified discrepancy between the constitutional significance of EU values and the competences assigned to the EU institutions to protect these values, it is therefore im-

[184] See also Claes and Bonelli (n 28) 289.

[185] Bonelli (n 84) 521.

perative to expand legislative, executive (eg, financial response, activation of sanctions) and judicial (eg, the initiation of judicial proceedings and the possibility to review national internal developments) competences in the area of EU values.

As a first step, the proposed amendment to Article 2 TEU above will open the door for EU institutions to acquire competences that correspond to the constitutional relevance of EU values. This could entail, for example, competences concerning the positive determination of the substantial content of EU values, further monitoring, or reactive enforcement powers, including positive actions to be undertaken by non-compliant Member States or even possible sanctions. In practical terms, the expanding of legislative competences in the area of EU values could be made more explicit, for example by adding the area of EU values as referred to in Article 2 TEU to the catalogue of the EU's shared competences under Article 4 TFEU. Such an amendment should fall into the area of shared competences, as those are also limited by the principle of proportionality and subsidiarity.

In a second step, however, the role of individual actors also needs to be clarified. The positive task of fleshing out EU fundamental values could be assigned to the legislative triangle in which the Commission proposes, and the Council and the European Parliament co-decide. The reactive enforcement competences comprising political and legal responses could then be shared among the EU legislature on the one hand, as in a co-decision procedure, and an institutionally and politically independent body, from which consent is required, on the other.[186] This role of an independent body could be taken by the advisory body described above. Following the proposed Treaty changes and the rethinking of the currently existing institutional balance, the role of the advisory body could be designed so as to be entrusted with valuable monitoring and enforcement powers, for example by allowing it to adopt legally binding acts which must then be enforced by EU institutions, most particularly the Commission, or allowing for the possibility to initiate judicial proceedings. Resort to the advisory body is, *inter alia*, preferable as it is institutionally separate from the EU institutions and, if it consists of members of the FRA, comprises a high level of expertise in providing assistance by simultaneously relieving the legislature.[187] This would not only 'depoliticise' the protection and enforcement of EU values but also make it more impartial.[188] However, as already mentioned, the EU is already accused of having a democratic deficit and of consisting of too many independent agencies and bodies with little democratic accountability, so that the creation of such an advisory body remains questionable and subject to Member States' contestations and doubts.

[186] See also Olsen (n 27) 83 ff.

[187] European Parliament, 'European Agencies, Common Approach and Parliamentary Scrutiny' (EPRS 2018) 5 <https://www.europarl.europa.eu/RegData/etudes/STUD/2018/627131/EPRS_STU(2018)627131_EN.pdf> accessed 6 March 2023.

[188] See also Olsen (n 27) 83.

At the same time, the strategy described above with a clear focus on response measures should also be accompanied by positive instruments adopted by the EU legislature under the newly added competence as previously proposed, fostering the activities of NGOs, equality bodies, public administrations, judicial networks or universities,[189] promoting civil society organisations which are active at local, regional, national, or transnational levels in protecting and promoting the EU's fundamental values,[190] and focusing essentially on facilitating and supporting judicial cooperation, promoting judicial training, as well as safeguarding effective and non-discriminatory access to justice and effective remedy.[191] In a more decentralised form, such a strategy potentially generates great leverage for bottom-up enforcement of EU values in order to potentially create significant resistance against 'democratic decline'.[192]

With a particular view to decision-making, institutional reforms should also bear in mind that a shift from unanimity to qualified majority voting in the (European) Council is inevitable.[193] In a Union of 27 Member States (or more in the case of further enlargement),[194] all sharing different political interests, unanimity is inconceivable in certain policy fields,[195] as can be drawn from the current Article 7 TEU, thus fragmenting the EU's capacity to act.[196] Therefore, a shift from unanimity to qualified majority voting should be made at least in the new area in which the EU could legislate on its values, but may also be considered within the realm of broader reforms of the EU framework.

In the same vein, the EU should also reflect on how fundamental and crucially important Article 2 TEU values are for the functioning of the entire EU legal order that is based on credibility towards external parties, mutual trust between Member States, the area of freedom, security and justice, and the administration of EU funds and democratic institutions. Since the undermining of these fundamental values would fragment the functioning of the entire EU legal order, the current discretionary scope

[189] European Economic and Social Committee, Justice, Rights and Values Fund (2018) <www.eesc.europa.eu/en/agenda/our-events/events/justice-rights-and-values-fund/> accessed 28 January 2023.

[190] Article 2 of Regulation 2021/692.

[191] Article 3 of Regulation 2021/693.

[192] Fisicaro (n 79) 712.

[193] See in this manner also de Witte (n 13) 6, 9.

[194] In this vein, de Witte for example proposed that the European Parliament should link its consent to a candidate State's accession which is required under Article 49 TEU to the negotiation of a Treaty revision leading to a shift from unanimity to qualified majority voting, as well as for future Treaty revisions themselves. See de Witte (n 13) 9.

[195] This includes CFSP matters, citizenship (the granting of new rights to EU citizens), EU membership, harmonisation of national legislation on indirect taxation, EU finances (own resources, the multiannual financial framework), certain provisions in the field of justice and home affairs (the European prosecutor, family law, operational police cooperation, etc), and the harmonisation of national legislation in the field of social security and social protection.

[196] De Witte (n 13) 9.

of manoeuvre to act upon the protection and enforcement of EU values should therefore be turned into legal obligations for all responsible actors. Consequently, these actors will ultimately feel compelled to use the existing mechanisms more forcefully than subjecting them to mere political discretion.

4.3 Substantive reforms

The last concept builds on the idea of further constitutionalising EU values, in the sense that it would strengthen the EU's legitimacy by contractually enshrining the constitutional and non-negotiable mandate of the EU's core values in the Treaties in order to preclude policy changes necessitated by 'the circumstances or a shift of political preferences'.[197] Even though EU fundamental values are to be considered of paramount importance, there is still no universal standard framework to refer to. Instead, EU institutions keep applying double standards[198] by turning to very different sources of law such as CJEU and ECtHR case law, the CFR,[199] and the advice of the FRA, drawing on the expertise of the Venice Commission.[200] Further, even soft-law or Commission interpretation guidelines would add another non-binding source for an unconcerted strategy of values protection and enforcement. This clearly demonstrates that with respect to the principle of legal certainty, according to which the laws must be clear, predictable, and prospective,[201] there is an urgent need to merge all these approaches into a single universal standard framework of EU fundamental values. Legal decisions based on EU values must be sufficiently predictable and need to allow for judicial review. This is necessary, most importantly, since far-reaching sanctions, for example under financial tools, not only hit Member States but ultimately also lead

[197] Dieter Grimm, 'The Democratic Costs of Constitutionalization: The European Case' in Dieter Grimm (ed), *Constitutionalism: Past, Present, and Future* (OUP 2016) 300 and 310.

[198] De Witte (n 13) 25.

[199] Deriving elements *inter alia* from the ECHR and national bill of rights.

[200] Commission, 'A New EU Framework to Strengthen the Rule of Law' (n 32) para 9. The Venice Commission is composed of independent law experts appointed by its member States but acting autonomously within their capacities. It provides legal advice to the Council of Europe in the areas of democratic institutions, fundamental rights, constitutional and ordinary justice, and elections, referendums and political parties. In 2016, the Venice Commission, *inter alia*, adopted a 'Rule of Law Checklist'. See Council of Europe, 'Rule of Law Checklist' CDL-AD (2016) 007 <https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)007-e> accessed 21 February 2023.

[201] Case C-17/03 *VEMW and others* ECLI:EU:C:2005:362, para 80; Case C-325/85 *Ireland v Commission* ECLI:EU:C:1987:546, para 18; Case C-143/93 *Gebroeders van Es Douane Agenten*, ECLI:EU:C:1996:45, para 27; Case C-63/93 *Duff and Others* ECLI:EU:C:1996:51, para 20.

to private parties such as citizens being deeply affected.[202] Indeed, it is also not always clear or precise what is behind the values contained in Article 2 TEU.

In this context, de Witte proposed establishing a 'uniform […] framework in which the content of the fundamental values is clearly listed'.[203] Following up on this proposal, a Convention composed of representatives of the Heads of State and Government, national parliaments, the European Parliament, and the Commission could be set up to draft a *Charter of EU Fundamental Values*.[204] The arsenal of recourse options mentioned above could serve as useful guidance in drafting such a text. As the CFR already contains elements of the fundamental values,[205] the proposal comprising all EU values enshrined in Article 2 TEU could be realised by merging and adapting the existing CFR with the new text to be drafted. In this sense, the *Charter of EU Fundamental Values* could be designed as a catalogue in which each individual value will be given its own particular section. This new *Charter* would not be a self-standing document but an amended version of the CFR. This is mainly because if the CFR existed in parallel there could be a significant overlap between the two which would further complicate existing matters. To transform such a *Charter* into a legally binding source of EU law, Article 6(1) TEU should be amended in so far as the provision refers to the CFR which is predominantly to be replaced by the wording *Charter of EU Fundamental Values*.[206] The *Charter*, however, without prior provision for more legislative competences in matters of EU values, can only be adopted via Treaty change as there is currently no legal basis providing for the adoption of such a legally binding source of EU law.[207]

As has been stated by the CJEU, Articles 6, 10 to 13, 15, 16, 20, 21 and 23 of the CFR already 'define' the scope of the values of human dignity, freedom, equality, respect for human rights, non-discrimination and

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[202] Funding cuts considerably hit citizens as the bulk of the EU budget is *inter alia* spent on research and innovation, infrastructure projects, support for SMEs to thrive, and aims at securing working places and building prosperity. See for some examples on spending categories, Commission, 'Headings: Spending Categories' <https://commission.europa.eu/strategy-and-policy/eu-budget/long-term-eu-budget/2021-2027/spending/headings_en > accessed 19 January 2023.

[203] De Witte (n 13) 25.

[204] Since the draft of the Charter would be linked to Treaty change, Article 48(3) TEU requires (after the European Council has adopted a decision in favour) in any case the set-up of a Convention composed of representatives of the national Parliaments, of the Heads of State or Government of the Member States, of the European Parliament and of the Commission.

[205] Alessandra Facchi and Nicola Riva, 'European Values in the Charter of Fundamental Rights: An Introduction' (2021) 34(1) Ratio Juris 3–5.

[206] The same applies, of course, to further Articles that refer to the Charter of Fundamental Rights.

[207] Bonelli (n 84) 521; Wouters (n 158) 260.

equality between women and men, contained in Article 2 TEU.[208] With regard to the value of the rule of law, the CJEU referred to Articles 47 to 50 of the Charter.[209] The value of democracy is, *inter alia*, substantiated in Article 39, 40 and 44.[210] However, the CFR in its current state not only contains six different chapters (dignity, freedoms, equality, solidarity, citizens' rights and justice), it also differs in its terminology by referring to 'values', 'principles', 'freedoms' and 'rights', leaving out any conceptualisation of these terms.[211] Even though the CJEU assumes that the CFR already 'defines' the values contained in Article 2 TEU, a concrete definition of each particular value cannot be drawn from reading the provisions. Instead, recourse is to be made to value-based interpretation guides drawn from the sources mentioned above to give life to the abstract values. Additionally, the FRA concluded in one of its reports that not all Article 2 TEU values have a corresponding right in the CFR; instead, they only partially overlap but are not congruent.[212] With a view to the double-standards criticism, this even more demonstrates the need for a revision of the CFR to turn it into a universal framework of EU fundamental values.

The *Charter of EU Fundamental Values*, however, is not intended to set detailed standards to be followed in order to achieve uniformity, as this would certainly conflict with the Member States' sovereignty, and constitutional pluralism within the EU.[213] Instead, it should aim to set a homogeneous framework of minimum standards by fleshing out positive determinations of the abstract values contained in Article 2 TEU.

For example, with a view to the value of the rule of law, the CJEU has already delivered numerous judgments in which the Court clarified the meaning and developed the core components of its meta-concept.[214] The most intensively examined component in this regard is the one of judicial independence. In this vein, the Court has developed standard minimum

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[208] Case C-156/21 *Hungary v European Parliament and Council of the European Union* ECLI:EU:C:2022:97, para 157.

[209] ibid, para 160.

[210] Gabriel N Toggenburg and Jonas Grimheden, 'Upholding Shared Values in the EU: What Role for the EU Agency for Fundamental Rights?' (2016) 54(5) Journal of Common Market Studies 1093, 1099.

[211] See in this manner also Sanja Ivic, 'The Four Values of the Charter of Fundamental Rights of the European Union' (2009) 4(2) International Journal of Good Conscience 278, 282.

[212] European Union Agency for Fundamental Rights, 'Fundamental Rights: Challenges and Achievements in 2013' (2014) 10 <https://fra.europa.eu/sites/default/files/fra-2014-annual-report-2013-2_en.pdf> accessed 9 April 2023.

[213] See Spieker (n 52) 257 ff.

[214] See for example on the principles of legality, legal certainty and the protection of legitimate expectations, the prohibition of arbitrariness of executive powers, on the prohibition of retroactive application and the principle of proportionality and separation of powers Joined Cases C-46/87 and 227/88 *Hoechst AG v Commission* ECLI:EU:C:1989:337, para 19; Case C-90/95 P *Henri de Compte v European Parliament* ECLI:EU:C:1997:198, para 35; Case C-120/86 *J Mulder v Minister van Landbouw en Visserij* ECLI:EU:C:1988:213, para 24; Case C-222/86 *Unectef v Heylens* ECLI:EU:C:1987:442, para 15.

requirements for an independent national judiciary focusing on external and internal aspects of independence.[215] The external aspect centres on autonomy of the court and requires that the court is free from any 'external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions'.[216] The internal aspect, instead, concerns the impartiality of the judges and requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law.[217] These guarantees of independence and impartiality require rules, particularly as regards the composition of the body and the appointment, length of service, and grounds for abstention, and the rejection and dismissal of its members, so as to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it.[218] Furthermore, freedom from external factors requires certain guarantees to be given to judges, such as those against removal from office and the receipt of a certain level of remuneration.[219]

These positive determinations of minimum standards could be accomplished equally for all EU values, including all their components. In practical terms, such determinations could for example be established by conducting comparative research by looking at each particular Member State and drawing a common base for the components and minimum standards of EU fundamental values. In that way of setting a homogenous framework of minimum standards by fleshing out positive determinations of the abstract values, each value enshrined in Article 2 TEU will thus acquire a corresponding and congruent counterpart in the *Charter*. This would then provide for a clearly defined and recognisable framework not only for Member States but also for EU institutions responsible for protecting it, and for the citizenry at large to gain a full picture of their rights. The content of these definitions, however, will not be considered exhaustive, but rather as 'living instruments' open to further development. Such a *Charter* could finally serve as a basis for all tools of the EU values protection framework, either by forming the basis for judicial proceedings, setting minimum standards for political tools, or serving

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[215] Case C-192/18 *European Commission v Republic of Poland* ECLI:EU:C:2019:924, paras 109 ff; see also Stanisław Biernat and Paweł Filipek, 'The Assessment of Judicial Independence Following the CJEU Ruling in C-216/18 LM' in Armin von Bogdandy (eds), *Defending Checks and Balances in EU Member States. Taking Stock of Europe's Actions* (Springer 2021) 408.

[216] Case C-192/18 *European Commission v Republic of Poland* ECLI:EU:C:2019:924, para 109 also with reference to Case C-64/16 *Associação Sindical dos Juízes Portugueses* ECLI:EU:C:2018:117, para 44.

[217] Case C-192/18 *European Commission v Republic of Poland* ECLI:EU:C:2019:924, para 110 with reference to Case C-216/18 PPU *LM* ECLI:EU:C:2018:586, para 65; and C-619/18 *Commission v Poland (Independence of the Supreme Court)* ECLI:EU:C:2019:531, para 73.

[218] Case C-192/18 *European Commission v Republic of Poland* ECLI:EU:C:2019:924, para 111.

[219] Case C-64/16 *Associação Sindical dos Juízes Portugueses* ECLI:EU:C:2018:117, para 45; Case C-216/18 PPU *LM* ECLI:EU:C:2018:586, para 64.

as definitional conceptualisations for financial instruments. It thus represents a necessary step in the direction of a concerted strategy of EU values protection and enforcement. Nevertheless, in general, it remains debatable whether over-legislation can solve the current status of democratic and constitutional backsliding. It will again all come down to interpretation in particular cases, primarily by the CJEU but also by other relevant actors.

5 Concluding remarks

This overview of available mechanisms and procedures to protect EU values and the demonstration of their shortcomings in the EU values crisis provides clear evidence that the EU is ill equipped to bring recalcitrant Member States back in line with its fundamental values enshrined in Article 2 TEU. While a great deal has been written and proposed on how to better enforce EU values, all key proposals have merely offered individual 'pieces of the puzzle' unlikely to solve the crisis if taken in isolation, and ultimately do not provide for a comprehensive solution either. This article instead opted for a different stance by taking a broader perspective, relying on the idea of reconceptualising the framework of EU values protection pursuing Treaty change.

In this vein, it has argued for a rethinking of the constitutional balance between Member States' sovereignty and supranational competences held at EU level, most importantly to provide the EU with values protection competences corresponding to the constitutional importance of EU values. This would particularly entail a written affirmation of the principle of primacy, a re-formulation of Article 4(2) TEU, and an amendment of Article 2 TEU – all seeking to strike the right balance between the need for differentiation and the need for unity in the common EU legal system and paving the way for more EU competences in the area of EU values. It has further favoured a reform of the institutional set-up by clearly defining responsible actors and substantiating obligations in the context of EU values protection. Finally, it has demonstrated the inevitable need to constitutionalise EU values by creating a legally binding *Charter of EU Fundamental Values* as a universal framework to refer to, in order to bring the abstract values enshrined in Article 2 TEU to life and simultaneously to avoid diverging standards.

Such a reconceptualisation strategy necessarily rests on the premise of Treaty change. As has been identified, the current values protection framework in its present state is not sufficient, and the single 'pieces of the puzzle' are not adequate responses either to tackling the ongoing crisis of EU values. It is therefore inevitable to pursue the path of Treaty change. First, blurred boundaries, even if they allow room for flexibility and adaptation to challenges, must be clearly indicated to avoid arbitrariness and susceptibility to political preferences, and only Treaty re-

visions can provide the necessary degree of legal certainty and clarity.[220] Second, Treaty change is already preferable since several institutions of different stakeholders, including the European Parliament, the European Commission, the Council of the EU, the European Council, as well as national parliaments, would be involved.[221] Since, for example, the European Parliament is directly elected by the citizens, and Member States are represented in the European Council by their Heads of State or Government, and in the Council by their governments, themselves democratically accountable either to their national parliaments, or to their citizens,[222] Treaty change will eventually provide for stronger democratic credentials, thereby strengthening the EU's overall legitimacy. Third, this would not only illustrate the extension of the reach of EU law and the broadening of competences for EU relevant actors in a visible and transparent manner, but also provide for easily accessible and clearly identifiable rights to be enforced before courts more generally.[223] Finally, Treaty change would also elucidate the 'politically agreed shared understanding of the balance between conflicting rights and interests' relevant to protect EU values,[224] thereby enshrining the constitutional and non-negotiable mandate of EU core values in the Treaties in order to preclude policy changes made on a political whim or necessitated by a shift of circumstances.[225] Treaty change is therefore preferable over, for example, further developing the individual 'pieces of the puzzle' which bypass possible Treaty changes, already limited in their ability to change the course of backsliding and prone to overstretching EU competences in a questionable and controversial way. This is mainly because Treaty change will be the result of the 'agreed shared understanding' of the relevant actors involved in the process of Treaty change and will provide for the necessary degree of legal certainty and clarity, therefore potentially avoiding being subject to contestations.

Following the conclusions of the Conference on the Future of Europe and the Parliament's resolution calling for major Treaty changes, the EU is currently faced with a decision on whether to initiate reforms of the Treaties also in matters of EU values. Even if it is said that authoritarian states would possibly veto any of those proposals, such reforms do not necessarily mean that they are inconceivable in the long run. The topic of Treaty revisions is still on the agenda and considering that, so far, every single act of EU enlargement has been accompanied by Treaty changes, it does not seem entirely farfetched that these could become a reality

[220] See European Central Bank, 'Continuity and Change: How the Challenges of Today Prepare the Ground for Tomorrow' (ECB Legal Conference 2021) 18 <https://www.ecb.europa.eu/pub/pdf/other/ecb.ecblegalconferenceproceedings202204~c2e5739756.en.pdf> accessed 22 June 2023.

[221] See Article 48 TEU.

[222] Article 10 TEU.

[223] Muir et al (n 113) 22.

[224] ibid 22.

[225] Grimm (n 197) 300.

with the accession of further Member States. In this sense, the proposed reforms could then also be realised to achieve a consistent and coherent overall strategy of EU values protection. Conclusively, the EU could be put on a new level of further integration by achieving a stronger 'Union of values'[226] in which several actors at different levels play a crucial role, EU values become deeply constitutionalised, and Member States' sovereignty and supranational competences are rebalanced.

The ball is now in the court of the EU institutions, and it remains to be seen whether they will consider Treaty change to strengthen the procedure to protect EU values.

Suggested citation: I Böttge, 'Rearranging the Puzzle: How Treaty Change Can Strengthen the Protection of EU Values' (2023) 19 CYELP 39.

[226] See Koen Lenaerts, 'The European Union as a Union of Democracies, Justice and Rights' (2017) 3(2) International Comparative Jurisprudence 132, 136; Koen Lenaerts, 'On Checks and Balances: The Rule of Law Within the EU' (2023) 29(2) The Columbia Journal of European Law 25, 25.

EVOLUTION OF THE EUROPEAN POLITICAL COMMUNITY IN TIMES OF THE EU'S 'GEOPOLITICAL AWAKENING'[1]

Sylwia K Mazur[*]

Abstract: The latest developments on the global scene, notably Russia's war on Ukraine, not only accelerated the European Union's review of available measures to stabilise its neighbourhood, but also ignited a search for new forms of structuring relationships with its neighbours. With the inauguration of the European Political Community, the differentiation principle driving those relationships was enhanced. The new endeavour was not, however, conceived according to the blueprint, hence raising the crucial question about whether this was a relaunch of the EU position in its vicinity or a redundant layer added to the already complex reality of European foreign policy. Additionally, with the lack of even a simple written communiqué released after the summits, questions regarding its institutionalisation remain open.

Keywords: European Political Community, 'wider Europe', enlargement, European Neighbourhood Policy

1 Introduction

The European Union has been the 'primary vehicle for organizing Europe'.[2] That feeling was especially strong after communism collapsed when the EU appeared to be the 'only game in town' for States that had just gone through political, economic, and social transformation.[3] Relevantly, due to events in the late 1980s, two Nordic countries (Finland and Sweden) and Austria had opted for accession to the EU. The introduction of the so-called 'Copenhagen criteria' in 1993 (created to assess the readiness of applicant States to access the EU) and the commitment of

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[1] A term used by the EU High Representative for Foreign Affairs and Security Policy to characterise the European Union's response to war in Ukraine. See Josep Borrell, 'Europe in the Interregnum: Our Geopolitical Awakening after Ukraine' (*Groupe d'études géopolitiques*, 24 March 2022) <https://geopolitique.eu/en/2022/03/24/europe-in-the-interregnum-our-geopolitical-awakening-after-ukraine/> accessed 6 April 2023.

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[2] Andreas Staab, *The European Union Explained: Institutions, Actors, Global Impact* (3rd edn, Indiana University Press 2013).

[3] Wim van Meurs, 'Introduction' in Wim van Meurs and others (eds), *The Unfinished History of European Integration* (Amsterdam University Press 2018).

Central and Eastern European States to the reforms combined with EU willingness to accommodate new Member States enhanced the perception that the EU was the main actor in the 're-unification or re-creation of Europe'[4] and that the 'European Union could, and even should, be open to the inclusion of the whole of Europe'.[5] Attracting neighbours from the East was accompanied by building relationships with the Southern and Eastern Mediterranean States.[6]

At some point after the 'big-bang' enlargement, the EU was portrayed as a rising power, ready to become part of a new tri-polar world order.[7] It was not only expanding in geographical terms, but also launched its own currency and became a leader in areas of development cooperation and humanitarian aid. On the legal front,[8] however, the overhaul of the institutional system encapsulated in the draft of the Treaty Establishing a Constitution for Europe[9] failed following 'no' votes in two Member States.[10] The Treaty of Lisbon introduced the new institutional set-up[11] aimed at strengthening the international influence of the EU and improving consistency in the field of EU external relations. However, the sense of an overall 'mission' on an external front is still lacking.[12]

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4 Marise Cremona, 'Accession to the European Union: Membership Conditionality and Accession Criteria' (2001) XXV PYIL 219.

5 ibid.

6 The Barcelona Process, aimed at strengthening relations between Europe and the Southern Mediterranean countries, was inaugurated in 1995.

7 Parag Khanna, *The Second World: Empires and Influence in the New Global Order* (1st edn, Random House 2008).

8 The Treaty of Nice did not fully prepare the EU for the enlargements; therefore, the Laeken Declaration was followed by the European Convention.

9 Treaty Establishing a Constitution for Europe [2004] OJ C310.

10 In 2015, several Member States organised referenda on ratifying the draft of the Treaty Establishing a Constitution for Europe. 'No' votes in the Netherlands and France heralded the end of the European Constitution. For more, see Anne Peters, 'The Constitutionalisation of the European Union: Without the Constitutional Treaty' in Sonja Puntscher Riekmann and Wolfgang Wessels (eds), *The Making of a European Constitution* (VS Verlag für Sozialwissenschaften 2006); Sara Binzer Hobolt and Sylvain Brouard, 'Contesting the European Union? Why the Dutch and the French Rejected the European Constitution' (2011) 64(2) PRQ 309; Boyka Stefanova 'The "No" Vote in the French and Dutch Referenda on the EU Constitution: A Spillover of Consequences for the Wider Europe' (2006) 39(2) Political Science and Politics 251.

11 With the Treaty of Lisbon entering into force, the EU acquired legal personality, the post of High Representative for Foreign Affairs and Security Policy was created (the High Representative is not only the Vice President of the European Commission, but also presides over the Foreign Affairs Council), the European External Action Service has been operationalised and the EU Delegations has increased the EU's diplomatic and policy outreach.

12 Marise Cremona, 'A Constitutional Basis for Effective External Action? An Assessment of the Provisions on EU External Action in the Constitutional Treaty' (EUI Working Papers 30) <https://cadmus.eui.eu/handle/1814/6293> accessed 3 February 2023.

Currently, the EU's economic and regulatory *gravitas* is clearly a mismatch for its strength as a foreign policy actor,[13] even provoking voices that the EU should opt for separation between economic integration on one hand and foreign policy and defence cooperation on the other.[14] Moreover, Brexit, the deterioration of cooperation under the Eastern Partnership, the never-ending membership negotiations and the diplomatic dead end in relations with Turkey, layered with permacrisis,[15] diluted any sense of optimism about the EU future, including in its neighbourhood.

Interdependence between the EU and its neighbours has been a reality for some time.[16] Unsurprisingly, already in 2020, Josep Borrell pointed out that the EU neighbourhood 'is in flames'.[17] Russia's re-emergence as a revisionist power pursuing the creation of a 'safety belt' in Central and Eastern Europe, willing not only to weaponise its energy supplies and cyber capabilities, but also conventional forces (and potentially nuclear arsenal) re-ignited discussions on the EU's lack of 'political will' and 'military capabilities' which are elements of 'genuine political power'.[18] Moreover, criticism of the EU concerns its limited responses in military crisis management.[19]

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[13] On the EU position in the world, see, among others: Sven Biscop, 'European Strategy in the 21st Century New Future for Old Power' (1st edn, Routledge 2019); Zaki Laïdi (ed), *EU Foreign Policy in a Globalized World: Normative Power and Social Preferences* (Routledge 2008); Ioanna Hadjiyianni, 'The European Union as a Global Regulatory Power' (2021) 41(1) OJLS 243; Filip Tereszkiewicz, 'The European Union as a Normal International Actor: An Analysis of the EU Global Strategy' (2020) 57 International Politics 95; Asle Toje, 'The European Union as a Small Power' (2011) 49(1) JCMS 43; Ian Manners, 'European Union "Normative Power" and the Security Challenge' (2006) 15 (4) European Security 405.

[14] Tim Koopmans, 'Guest editorial: In search of purpose' (2005) 42 CMLR 1241, 1244.

[15] Fabian Zuleeg, Janis A Emmanouilidis, and Ricardo Borges de Castro, 'Europe in the Age of Permacrisis' (European Policy Center, Commentary, 11 March 2021) <www.epc.eu/en/Publications/Europe-in-the-age-of-permacrisis~3c8a0c> accessed 27 February 2023.

[16] It was already acknowledged by the European Commission in 2003. See Commission, 'Communication from the Commission to the Council and the European Parliament. Wider Europe - Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours' (Commission of the European Communities, 11 March 2003) <https://eeas.europa.eu/archives/docs/enp/pdf/pdf/com03_104_en.pdf> accessed 24 February 2023.

[17] Michael Peel and Ben Hall, 'In the Last 10 Months, Our Neighbourhood Has Become Engulfed in Flames, from Libya to Belarus' *Financial Times*, (London, 13 September 2020) <www.ft.com/content/aeab4c81-50d3-4aaa-9bf1-e6593b394047> accessed 21 March 2023.

[18] Joschka Fischer, 'What Kind of Great Power Can Europe Become?' (Project Syndicate, 30 January 2020) <www.project-syndicate.org/commentary/european-union-great-power-potential-by-joschka-fischer-2020-01> accessed 3 March 2023.

[19] Asle Toje, 'The European Union as a Small Power, or Conceptualizing Europe's Strategic Actorness' (2008) 30 JEI 199.

The unprovoked and unjustified war on Ukraine[20] not only 'put EU enlargement to the fore of the European agenda',[21] but also triggered the search for efficient forms of a structuring relationship with its neighbours. The latest foreign policy endeavour, the European Political Community (EPC), is a dramatic consequence of Russia's aggression[22] and a direct outcome of that exogenous shock.[23]

On Europe Day 2022, French President Emmanuel Macron – who is not shy of setting out his ideas in anticipated appearances – delivered a speech in front of the European Parliament during the closing ceremony of the Conference on the Future of Europe which he had initiated.[24] In what is known as a 'hallmark of Macron's method',[25] stirring public debate and the media, he called on 'democratic European nations that subscribe' to shared values to find 'a new space' for political and security cooperation, as well as collaboration in crucial areas like energy and transportation.[26] Macron's concept referred to the 'new geopolitical context' created by the above-mentioned war, the membership aspirations of Ukraine, Moldova, and Georgia, and the over-stretched accession process for the Western Balkan States.[27] A few days later, European Council President Charles

[20] Apart from Russia's war on Ukraine, the autocratic threat from Belarus, the active jihadist network and long-term conflicts in Libya and Syria are still affecting Europe.

[21] Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. 2022 Communication on EU Enlargement Policy', (European Commission 12 October 2022) <https://neighbourhood-enlargement.ec.europa.eu/enlargement-policy/strategy-and-reports_en> accessed 28 February 2023.

[22] European Council, 'Informal meeting of the European Council Prague' (European Council 7 October 2022) <www.consilium.europa.eu/media/59393/20221005-informal-euco-backgroundbrief.pdf> accessed 7 March 2023.

[23] Which, contrary to previous ones, did not create 'distributional conflict' among Member States. Frank Schimmelfennig, 'European Integration (Theory) in Times of Crisis. A Comparison of the Euro and Schengen Crises' <www.eui.eu/Documents/RSCAS/JMF-25-Presentation/Schimmelfennig-European-Integration-in-Crisis-RSC.pdf> accessed 3 March 2023.

[24] The Conference on the Future of Europe was created as an opportunity for European citizens to debate priorities and challenges in front of the European Union. The collected opinions initiated European Citizens' Panels and Plenaries across the continent. The outcome was published in a report to the Joint Presidency. The Conference was placed under the authority of the European Parliament, the Council and the European Commission.

[25] Éric Pestel, Jeanette Süß, 'Vive L'Europe. French European Policy-making under Emmanuel Macron, Friedrich Nauman Foundation' (Friedrich Naumann Foundation for Freedom, 24 May 2022), <www.freiheit.org/european-union/publication-vive-leurope-french-european-policy-making-under-emmanuel-macron> accessed 13 February 2023.

[26] Emmanuel Macron, 'Speech at the Closing Ceremony of the Conference on the Future of Europe' (Ambassade de France en Lettonie, 9 May 2022) <https://lv.ambafrance.org/Speech-by-Emmanuel-Macron-at-the-closing-ceremony-of-the-Conference-on-the accessed> accessed 21 February 2023.

[27] The idea was clearly 'undercooked', but according to Charles Grant it emerged shortly before the speech in Strasbourg, and therefore the French administration had no chance to polish it. See Charles Grant, 'Macron Is Serious about the 'European Political Community' (Centre for European Reform, 1 August 2022) <www.cer.eu/sites/default/files/insight_CG_1.8.22.pdf> accessed 11 February 2023.

Michel enhanced the proposal by speaking about the 'European geopolitical community'.[28] According to both speeches, the new framework would not replace existing EU policies and instruments and would respect the EU's decision-making autonomy.[29] Although first met with scepticism[30] by the Associated Trio[31] and the wait-and-see attitude of the Western Balkan States,[32] the idea quickly gained traction. EU leaders agreed during the European Council meeting in June 2022 to launch the European Political Community.[33] The first meeting of the new diplomatic hub[34] took place on 6 October 2022 in Prague,[35] and the second one on 1 June 2023 in Bulboaca, Moldova.[36]

In a fluctuating geopolitical environment, the EU has significant need to stabilise its wider strategic neighbourhood with values which helped to stabilise its Member States. Following the EU's decline in membership[37]

[28] Charles Michel, 'Speech at the Plenary Session of the European Economic and Social Committee' (European Council, 18 May 2022) <www.consilium.europa.eu/en/press/press-releases/2022/05/18/discours-du-president-charles-michel-lors-de-la-session-pleniere-du-comite-economique-et-social-europeen/> accessed 21 February 2023.

[29] Neither of the speeches was detailed enough to contain speculation on the EU leaders' motivations and potential outcomes of the proposed endeavour.

[30] Initial reaction, especially on the Ukraine part, was cold. They were suspicious that the EPC would serve as a long-term ante room or even an alternative to enlargement. See Philippe Ricard, 'Ukraine Wary of Macron's "European political community" project' *Le Monde* (Paris, 13 May 2022) <www.lemonde.fr/en/international/article/2022/05/13/ukraine-wary-of-the-european-political-community-project_5983395_4.html> accessed 12 April 2023.

[31] The Associated Trio is a format created for the enhancement of cooperation between Georgia, Moldova, and Ukraine on issues related to European integration. It is commonly accepted that the EU prefers to negotiate with groups of States that already foster relation with one another.

[32] Florent Marciacq, 'The European Political Community and the Western Balkans. Strategic Thinking or Misleading Hope?' (Friedrich Ebert Stiftung. Analysis, December 2022) <https://library.fes.de/pdf-files/bueros/sarajevo/19790.pdf> accessed 19 February 2023.

[33] European Council, 'European Council meeting (23 and 24 June 2022) – Conclusions' (European Council, 24 June 2022) <www.consilium.europa.eu/media/57442/2022-06-2324-euco-conclusions-en.pdf> accessed 23 February 2023.

[34] Term used by Arancha González and Sébastien Maillard, 'A European Political Community for a Geopolitical Era' (Notre Europe, Sciences Po, 24 May 2023) <https://institutdelors.eu/wp-content/uploads/2023/05/EPC-Chisinau-version-finale.pdf> accessed 18 April 2023; and Sarah Wolff and others, 'How the European Political Community Can Help Bring Peace to Europe' (*Blog LSE*, 1 June 2023) <https://blogs.lse.ac.uk/europpblog/2023/06/01/how-the-european-political-community-can-help-bring-peace-to-europe/> accessed 2 June 2023.

[35] The inaugural meeting of the European Political Community preceded an informal meeting of the European Council. Both meetings shared common topics, namely peace and security (including energy safety) and economic issue.

[36] The fact that the summit was organised in a small non-EU country that shares a border with the war-torn Ukraine and is under direct threat from Russia was interpreted as a sign of solidarity and support for Moldova. The European Political Community, 'Moldova Brings Europe together in an Expression of Unity and Shared Commitment to Peace' (1 June 2023) <www.epcsummit2023.md/moldova-brings-europe-together-expression-unity-and-shared-commitment-peace> accessed 4 June 2023.

[37] The United Kingdom withdrew from the European Union on 31 January 2020.

and Brussel's vanishing leverage, a deteriorating European Neighbourhood Policy and an unstable situation in the neighbourhood, the author argues that the European Political Community, as a way of fostering the EU's relations with its neighbours, can be a suitable response for contemporary challenges and can break the inflexibility impasse. Positioned at the juncture of different EU foreign policy initiatives, it can serve as a multilateral vehicle in the re-emergence of traditional power politics and the dominance of a transactional approach. In short, it can – at least partially – fill a geopolitical void in Europe.

This paper provides an analytical framework which aims to examine the European Political Community as a measure in EU foreign policy, with special attention given to its innovative elements, although the idea of gathering the EU's neighbours under one cooperation umbrella is not new. Despite two meetings[38] of the EPC already having taken place, not even a simple *communiqué* was released, raising questions on the EPC's final structure and possible further institutionalisation. Besides, even though throughout its existence, the EU has established different frameworks to address regional specificities,[39] the EPC will be positioned against the enlargement policy and the European Neighbourhood Policy in a comparative manner. All the above is reflected in the paper's structure. However, in connection to the lack of any type of resolution – which could serve not only as guidelines for the project but would allow for testing some principles before embodying them in an establishing treaty – some parts of the article should be treated as an exercise in foresight. Moreover, since the EPC is still a project in the making, any critique can only be sectional.

Considering that cooperation between States inhabits a fluid spot at the junction of international law and international politics, interdisciplinary and mixed methods are used for the purpose of this research. IR methods will be considered since any kind of discussion regarding the EU's position in the world must be embedded in discourse on the nature of the world order. Apart from normative and authoritative sources (including a brief review of think-tank reports), a body of documents produced by the EU institutions is analysed.

2 The 'new' old idea

The idea presented by Emmanuel Macron is not particularly groundbreaking. It was built on concepts presented by European leaders in the past. In fact, a few weeks before Macron's speech, Enrico Letta called for the creation of a European Confederation consisting of: EU Member

[38] As noted by Arancha González and Sébastien Maillard (n 34) 'one gathering is an event; two is an established feature'.

[39] Fabrizio Tassinari, 'The European Political Community: Putting Politics First?' (DIIS Policy Brief, May 2023) <https://pure.diis.dk/ws/files/21048982/DIIS_PB_EPC_WEB.pdf> accessed 2 June 2023.

States; Ukraine, Georgia and Moldova; and six Western Balkan States.[40] According to the former Italian Prime Minister, under the European Confederation umbrella, aspiring States could 'participate in European public life' simultaneously taking part in the accession process. Pursuant to the presented vision, a summit of all leaders would be followed by a meeting of the European Council. The formation of the new platform would be accompanied by a 'deepening' reform with the abolition of veto power.[41] Not for the first time in history, in face of a tectonic shift, European leaders were in search of a structure to allow for a systemic transformation of the EU neighbourhood, creating a stability zone, but without the burdens, risks, and binarity of an enlargement process.

In January 1989, Jacques Delores proposed the concept of structuring relations between Community Member States and countries of the European Free Trade Association (EFTA).[42] Contrary to the *status quo* then, the President of the Commission presented a vision of a 'new, more structured partnership with common decision-making and administrative institutions'[43] which evolved into the Agreement on the European Economic Area (EEA)[44] bringing EU Member States and EFTA States into a single market and reaffirming that the relationship was based on 'proximity, long-standing common values and European identity'.[45]

In December the same year, French President François Mitterrand proposed the creation of 'a common and permanent organisation for exchanges, peace and security', dubbed 'the European Confederation'. Delivered on the brink of the collapse of the Soviet Union, it was aimed at associating all States of the continent and to sustain the balance of power in Europe.[46] However, François Mitterrand's proposal anticipated Russia's partnership which was deemed unacceptable for many former Soviet Union countries. Moreover, it lost appeal as a path toward membership and started to look like a Community entry ban. In the end, both projects failed. Establishing the EEA did not result in the 'full' membership of the

[40] Enrico Letta, 'Una Confederazione europea e il percorso per l'adesione di Kiev' *Corriere della sera* (Rome, 19 April 2022) <www.corriere.it/economia/finanza/22_aprile_19/enrico-letta-confederazione-europea-percorso-l-adesione-kiev-9fda6a1c-c014-11ec-9f78-c9d279c21b38.shtml> accessed 27 February 2023.

[41] ibid.

[42] At that time, those were Norway, Sweden, Finland, Iceland, Austria and Switzerland. Liechtenstein joined the EFTA in 1991.

[43] Jacques Delors, 'Statement on the Broad Lines of Commission Policy (17 January 1989)' in the European Economic Area 1994-2009 (EFTA Commemorative Publication 2009).

[44] Agreement on the European Economic Area - Final Act - Joint Declarations - Declarations by the Governments of the Member States of the Community and the EFTA States - Arrangements - Agreed Minutes - Declarations by one or several of the Contracting Parties of the Agreement on the European Economic Area [1994] OJ L001.

[45] ibid.

[46] While praising 'velvet revolutions', President Mitterrand also stressed that East Europe would need the help of the West after years of communist rule. See Frédéric Bozo, 'The Failure of a Grand Design: Mitterrand's European Confederation, 1989-1991' (2008) 17(3) Contemporary European History 391.

involved third countries, but instead institutionalised another form of variable geometry,[47] while François Mitterrand's 'European Confederation' remained an 'unfinished grand project'.[48]

Another idea was presented by Romano Prodi shortly before the Eastern enlargement in 2004. The then-President of the European Commission called for a 'proximity policy' which 'would not start with the promise of membership and it would not exclude eventual membership'.[49] The goal was to find an arrangement that would accommodate the ambitions of neighbouring States and not allow for a too hasty enlargement.[50] While acknowledging that the EU wanted to retain its appeal factor in the neighbourhood, Romano Prodi stressed, however, that accession could also be a source of challenges.[51] Therefore, according to the proposal, the 'ring of friends' would be a golden means that could create opportunities for States choosing the transformation and would be structured and process-oriented on the basis of a framework considered 'Copenhagen proximity criteria'.[52] In the end, this idea was also not taken on.

3 European Political Community: what has been established?

3.1 Aim and scope

The idea of a new platform was presented by Macron when the war in Ukraine was entering its third month. The rapidity with which the inaugural meeting was organised suggests that the reason behind the platform deeply concerned Member States and their neighbours. A press release of the European Council clearly stated that the idea to bring on board countries on the European continent was a consequence of Russia's war.[53] According to Charles Michel, the new community was to be created to 'forge convergence and deepen operational cooperation to address common challenges' and 'to promote peace, stability, and security' on the European continent.[54] The European Council's Conclusion did not offer any more details than those, simply stating that the EPC is to 'offer

[47] Benjamin Leruth, Stefan Gänzle, Jarle Trondal, 'Differentiated Integration and Disintegration in the EU after Brexit: Risks versus Opportunities' [2019] JCMS 1383.

[48] Jean Musitelli, 'François Mitterrand, architecte de la Grande Europe: le projet de Confédération européenne (1990-1991)' [2011] RIS 18.

[49] Romano Prodi, 'A Wider Europe: A Proximity Policy as the Key to Stability' (Speech, 'Peace, Security and Stability International Dialogue and the Role of the EU, European Commission 5-6 December 2002) <https://ec.europa.eu/dorie/fileDownload.do?docId=255969&cardId=255969> accessed 1 March 2023.

[50] The speech was delivered a few days before the Copenhagen European Council meeting during which a formal membership invitation was extended to Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, the Slovak Republic and Slovenia.

[51] Prodi (n 49).

[52] ibid.

[53] European Council (n 22).

[54] Michel (n 28).

a platform for political coordination for European countries across the continent' and to 'address issues of common interest so as to strengthen the security, stability, and prosperity of the European continent'.[55] In the process, an additional layer was added by France's Foreign Minister Laurence Boone who claimed that the EPC's goal of stability can also be enhanced by interconnections in trade, research, and education.[56]

Regarding the scope of the platform, Charles Michel pointed out that the main area of cooperation within the new community would be foreign policy. Additionally, States would participate in socio-economic programmes which do not require regulatory alignment. According to the European Council's statement released right before the Prague meeting, the ambition was to foster European leaders' cooperation on issues like 'peace and security, the economic situation, energy and climate, and migration and mobility'.[57] The Czech Presidency statement was vaguer, suggesting that the first meeting was expected to be as open as possible.[58] The Moldova meeting, on the other hand, focused on three topics: efforts for peace and security; energy resilience and climate action; and interconnections in Europe for a better connected and more stable continent.[59]

At this point, it is safe to say that there is a clear link between Russia's action and the substantive issues reflecting geopolitical challenges caused by Russia's attack on Ukraine, namely an energy crisis, climate change, recession and inequality, demographics, and technology.[60] However, the list could undoubtedly be broadened building from experience.[61]

3.2 Membership and members

Again, the lack of any joint declaration hinders identifying membership and exclusion criteria.[62] Considering the two meetings that have already taken place, it can be assumed that the core of the participating States was outlined in the sent invitations. A preview of the participating States was sketched by Macron who in his Strasbourg speech established

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55 European Council (n 33).

56 Laurence Boone, 'Europe Must Become a Global Political Power' *Financial Times* (London, 25 August 2022) <www.ft.com/content/dfb90cca-cd02-4add-8378-86fddae2aefc> accessed 23 March 2023.

57 European Council (n 22).

58 Czech Presidency of the Council of the European Union, 'European Political Community' (Czech Presidency 2022) <https://czech-presidency.consilium.europa.eu/en/presidency/prague-summit/european-political-community/> accessed 21 February 2023.

59 European Political Community Summit hosted by the Republic of Moldova <www.epc-summit2023.md/> accessed 3 June 2023.

60 Corina Stratulat, 'The Beginning of the European Political Community' (European Policy Center, Discussion Paper, 3 October 2022) <www.epc.eu/en/Publications/The-beginning-of-the-European-Political-Community~4b012c> accessed 28 February 2023.

61 Franz C Mayer and others, 'Enlarging and Deepening: Giving Substance to the European Political Community' (Bruegel, September 2022) 6-9.

62 ibid.

EU membership as a reference point. The French president underlined that joining the new organisation 'would not prejudge future accession' to the European Union, and 'would not be closed to those who have left the EU'.[63] In a rather poetic description, but nonetheless using the geographical criterion, EU Council President Charles Michel stated that the new platform would include states 'from Reykjavik to Baku or Yerevan, from Oslo to Ankara'.[64]. However, there are opposing voices, claiming that geography should not be the sole condition for participation.[65]

Regarding accession criteria for the new platform, the majority of proposals supported the idea of conditions for membership rooted in a set of common values. The discussion paper prepared by the French Presidency (never released to the public), pointed out that the new community would accept European States 'that share a common set of democratic values', irrespective of their current relationship with the EU 'whether they wish to join it, have left it, do not plan to join it, or are linked to it only by economic agreements'.[66] According to a more crystallised vision presented by one of the think tanks, the three main criteria for EPC membership should include: a) observance of democratic values and the rule of law; b) respect for human rights (confirmed by full participation in the Council of Europe); and c) geopolitical alignment on the EU's stance on Russia's aggression. Therefore, membership would be rooted in the 'endorsement of a common set of principles' instead of 'hard-wired rules'.[67] In a similar tone, Josep Borrell stated before the inaugural meeting that the EPC should be a 'community of shared principles', yet sombrely noted that these principles are upheld differently across countries.[68]

The invitation list for the first summit consisted of 44 countries.[69] Apart from the EU27, the list included six Western Balkan States; three States that applied to join the EU at the beginning of 2022 (Ukraine in February, Georgia and Moldova in March) aka the Associated Trio;[70] four out of the four EFTA Countries (Iceland, Liechtenstein, Norway, Switzerland); Armenia and Azerbaijan; Turkey (whose accession process has

[63] Macron (n 26).

[64] Michel (n 28).

[65] Mayer and others (n 61).

[66] Rikard Jozwiak, 'Paper Shows France's Vision of New "Community" for All of Europe' (Radio Free Europe, 15 June 2022) <www.rferl.org/a/eu-france-paper-new-community/31899602.html> accessed 13 March 2023.

[67] Mayer and others (n 61).

[68] Josep Borrell, 'Revisiting the question of Europe's Order' (*EEAS Blog*, 5 October 2022) <www.eeas.europa.eu/eeas/revisiting-question-europe%E2%80%99s-order-0_en>accessed 21 March 2023.

[69] Czech Presidency of the Council of the European Union (n 58).

[70] After the transformation Europe went through in early 90s, the European Union was not able to commit to enlargement beyond the Western Balkan States and Turkey. After three States submitted their application in spring 2022, the European Commission recommended granting a European perspective to all three states. However, only Ukraine and Moldova were granted candidate status.

been at a standstill since 2018)[71] and – despite some original hesitancy – the United Kingdom.[72] According to the invitation letter, leaders were put 'on an equal footing'. Invitations for the second summit were extended to 47 heads of States and government.[73] Apart from the original group of States, San Marino,[74] Andorra, and Monaco were included.[75] Interestingly, the summit was organised by Moldova which – together with five EU Member States[76] – does not recognise Kosovo which was invited too[77]. The above-mentioned lack of institutionalisation allows for freedom to join and withdraw not only from the platform, but also from summits. The Danish Prime Minister Mette Frederiksen missed the inaugural meeting due to domestic reasons, whereas Turkish President Recep Tayyip Erdoğan pulled out at the last minute from the Moldova gathering.

Clearly missing from the guest list were Russia and Belarus. Through the lack of invitations, both countries were not only excluded from the EPC gatherings, but also from wider Europe, which shows that despite some differences, EU Member States and 'non-EU' members share some geostrategic interest. Questions were also raised due to Israel's absence.[78] The simplest explanation is the geographic one – the State of Israel is not part of Europe. Additionally, it is quite evident that the EPC was addressed toward the 'Eastern neighbourhood', not the 'Southern Mediterranean' with which the European Union associates Israel.[79] Some analysts pointed out that the United States was excluded, which may

[71] Turkey is backsliding not only in the area of fundamental rights, but also in the independence of the judiciary, economic management, and the lack of reforms in some sectoral issues.

[72] Liz Truss, when still foreign secretary, said that the United Kingdom considers NATO as the main guarantor of security and the G7 as the economic cooperation platform. See: 'Liz Truss: UK Not Interested in Joining European Political Community – Video' *The Guardian* (London, 28 June 2022) <www.theguardian.com/politics/video/2022/jun/28/liz-truss-uk-not-interested-in-joining-european-political-community-video> accessed 2 March 2023. The UK was also sceptical about the name of the new platform, which, according to London, could refer to the European Communities. Instead, London suggested the name 'European Political Forum'. See J Hanke Vela, 'Brexit Britain Wants to Come Back' (*Politico*, 29 September 2022) <www.politico.eu/article/brexit-britain-wants-to-host-big-european-political-summit/> accessed 4 March 2023.

[73] Invitations were also extended to President of the European Council, the President of the European Commission, and the President of the European Parliament.

[74] San Marino confirmed its presence at the beginning of 2023.

[75] Next to the UN General Assembly and COP, it was one of the biggest meetings of world leaders that year.

[76] The Member States that do not recognise Kosovo are Spain, Slovakia, Cyprus, Romania and Greece.

[77] Despite not being recognised by five EU Member States, Kosovo holds 'potential candidate' status in its accession pursuit.

[78] Before the Prague summit, Czech radio informed listeners that Israel would be represented. Later the information was corrected. iROZHLAS, 'Na evropský summit do Prahy přijedou i lídři západního Balkánu nebo Británie, říká Bek' <www.irozhlas.cz/zpravy-svet/bek-evropska-unie-bruselske-chlebicky_2209191117_pj> accessed 12 February 2023.

[79] For example, Commission of the European Communities, 'European Neighbourhood Policy. Strategy Paper' (Communication) COM(2004) 373 final.

highlight European efforts to strength its own responsibility for affairs.[80] Opposite to the presented views, Corine Stratulat argued that if the EPC was framed in a geopolitical context, this should be irrespective of whether or not the allies were strictly 'European' or 'democratic by whatever standards"[81] On the other hand, the risk of aligning the continent on the 'smallest common democratic denominator' was also raised.[82]

To sum up, although originally pitched as a community of democratic States, the EPC did not become an alliance of values.[83] Similarly, it is also not a club of States steadfastly resisting Russia.[84] Moreover, the fact that the Europe Union did not reach for '*the neighbours of our neighbours*'[85] *may suggest that* the EPC is and will be built on the basis of limited membership founded on geography (and geostrategic interests[86]) and is aimed at consolidation of the continent.

3.3 Structure

According to the French discussion paper, the EPC should have a 'light legal structure'[87] and meetings would take place several times a year at heads-of-state, governmental, and ministerial levels. A leader-oriented structure was also preferred by Charles Michel, who suggested meetings taking place at least twice a year and since from its inception it was known that the focus of the platform would be on foreign affairs, the foreign ministers of non-EU member States would join the EU Foreign Affairs Council meetings 'on a regular basis'.[88]

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[80] Sissy Martinez and Mathieu Droin, 'The European Political Community: A Successful Test?' (Center for Strategic and International Studies) <www.csis.org/analysis/european-political-community-successful-test> accessed 21 March 2023.

[81] Stratulat (n 60).

[82] Marc Pierini, 'Five Takeaways from the European Political Community Summit' (Carnegie Europe) <https://carnegieeurope.eu/strategiceurope/88189> accessed 29 February 2023.

[83] Especially controversial in this regard is the presence of Azerbaijan, Serbia and Turkey.

[84] Armenia, Azerbaijan, Hungary, Serbia and Turkey maintain links with Russia.

[85] The concept was introduced by the European Commission in 2006 and concerned States in Central Asia and in the Gulf, States beyond the North African ENP and Kazakhstan. Commission of the European Communities, 'On Strengthening the European Neighbourhoods Policy' (Communication) COM(2006)726 final.

[86] According to Hans Kribbe and Luuk van Middelaar, Russia's attack on Ukraine showed that both EU and non-EU States share 'certain territorial and geostrategic interests'. Hans Kribbe and Luuk van Middelaar, 'At the Prague Summit, the Family Photo Is the Message' (*Politico*, 5 October 2022) <www.politico.eu/article/at-the-prague-summit-the-family-photo-is-the-message/> accessed 13 March 2023.

[87] This view was supported by the High Representative of the European Union for Foreign Affairs and Security Policy / Vice-President of the European Commission Josep Borrell who also pointed that "it cannot be just a meeting or talking shop'. Borrell (n 68).

[88] Michel (n 28).

One of the ideas floated was also a model of 'back-to-back meetings' where sessions of the Councils would follow on with EPC summits.[89] The organisational role would fall to the European External Action Service.[90] The Jacques Delors Institute went further when its researchers suggested that participation in the Community should entail 'taking part in the EU institutional life and an immersion in civic life'. The former includes participation in European Council summits and the opportunity to attend meetings of the European political families. Additionally, delegations should sit in European Parliament plenary sessions as observers, enjoying the right to speak and be involved with the work of parliamentary commissions[91] which would embody the principle of 'institutions first'. If realised, this would break with previous ideas often based on the principle 'everything but institutions'.[92]

For now, it seems that the platform will operate on the principle of rotating 'presidencies', with bi-annual summits being organised alternately by EU Member States and non-members[93] which can be considered as an 'equaliser' of the balance between the two groups. The fact that the first meeting took place in Prague during the Czech Presidency and Spain being nominated to organise a meeting in autumn 2023 indicates that the EPC meetings will be arranged according to the state holding the EU Council Presidency. Regarding the format, the first two meetings consisted of plenary sessions and roundtables[94] co-facilitated by a Member State and non-EU country.[95] During the summits, leaders were also given the opportunity to hold bi- and multi-lateral meetings on the sidelines[96] to discuss pending issues. At the first meeting in Prague, Swedish Prime Minister Magdalena Andersson held talks with the President of Turkey on Sweden's accession to NATO[97] and British Prime Minister Liz Truss

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89 Michael Emerson, 'Will the European Political Community Actually Be Useful?' (CEPS Explainer, March 2022) <www.ceps.eu/wp-content/uploads/2022/09/CEPS-Explainer-2022-03_EPC-possibilities.pdf> accessed 13 March 2023.

90 ibid.

91 Thierry Chopin, Lukáš Macek, Sébastien Maillard, 'The European Political Community. A New Anchoring to the European Union' (Notre Europe. Institute Jacques Delors, May 2022) <https://institutdelors.eu/wp-content/uploads/dlm_uploads/2022/05/PB_220517_TheEuropeanPoliticalCommunity_Chopin_Macek_Maillard_EN.pdf> accessed 10 March 2023.

92 Among others, it was a formula presented by Romano Prodi (n 49).

93 According to the established schedule, the next meetings of the EPC will take place in Spain and the United Kingdom.

94 European Parliament, 'Outlook for the Meetings of EU Leaders in Prague on 6 and 7 October 2022' (At a Glance) <www.europarl.europa.eu/RegData/etudes/ATAG/2022/734670/EPRS_ATA(2022)734670_EN.pdf> accessed 13 April 2023.

95 Format of hosting roundtables co-facilitated by an EU and non-EU countries was earlier introduced during the EU-African Union summit.

96 Czech Presidency of the Council of the European Union (n 58).

97 European Parliament, 'Outcome of the European Political Community and European Council meetings in Prague on 6-7 October 2022' (Briefing) <www.europarl.europa.eu/RegData/etudes/BRIE/2022/734671/EPRS_BRI(2022)734671_EN.pdf> accessed 14 April 2023.

met with Emmanuel Macron to discuss bilateral cooperation, notably on energy and migration.[98] In Prague, Liz Truss secured agreement on a Memorandum of Understanding to work with the North Sea Energy Cooperation which was signed in December 2022.[99]

One of the most notable outcomes of the Prague meeting was progress between the South Caucasus countries. A quadrilateral meeting between the President of the European Council, the President of France, Azerbaijani President Ilham Aliyev, and Armenian Prime Minister Nikol Pashinyan resulted in Armenia's consent to facilitate a two-month civilian EU mission alongside its border with Azerbaijan. Both States also confirmed their commitment to the UN Charter and the Alma Ata Declaration.[100] However, after the second summit, Azerbaijan accused Macron of distorting the position of parties during peace talks with Armenia.

4 On the path to a full-fledged international organisation?

After the first meeting in Prague, President Macron, Prime Minister Peter Fiala, and the President of Moldova Maia Sandu gave assurances that the notion of informality was at the core of the EPC. It allowed leaders to express themselves freely on the crucial challenges and common solutions.[101] In the same vein, meetings were even lacking a chair.[102] Missing institutionalisation is generally perceived as an advantage, also by other participating European leaders.[103] Albania's Prime Minister Edi Rama and his Dutch counterpart Mark Rutte underlined that the driving force behind the EPC should be flexibility.[104] This applies not only to the rationale behind the platform but should also apply to agendas which focus on common concerns. To put it simply, a new platform means 'no boxes to

[98] Prime Minister's Office, 10 Downing Street, 'UK-France Joint Statement: 6 October 2022' (GOV.UK, 2022) <www.gov.uk/government/news/uk-france-joint-statement-6-october-2022> accessed 17 February 2023.

[99] The memorandum introduces a framework for voluntary cooperation on joint projects but does not mean rejoining of the group. North Seas Energy Cooperation, 'Memorandum of Understanding on Offshore Renewable Energy Cooperation between the Participants of the North Seas Energy Cooperation (NSEC), of the one side, and the United Kingdom of Great Britain and Northern Ireland, of the other side', 18 October 2022.

[100] European Council, 'Statement following quadrilateral meeting between President Aliyev, Prime Minister Pashinyan, President Macron and President Michel' (European Council, 6 October 2022) <www.consilium.europa.eu/en/press/press-releases/2022/10/07/statement-following-quadrilateral-meeting-between-president-aliyev-prime-minister-pashinyan-president-macron-and-president-michel-6-october-2022/> accessed 8 March 2023.

[101] It also remains the first meetings of the European Council.

[102] This contrasts with EU-Western Balkan summits which are chaired by the European Council President.

[103] Wolff and others (n 34).

[104] Edi Rama and Mark Rutte, 'Albanian and Dutch PMs: The European Political Community Is a Good Idea' (*Politico*, 5 October 2022).

tick, no milestones, no conditions to fulfil'.[105] However, despite the Prague meeting being the 'main message', the missing decision-making process and governance details can be a valid hurdle toward ambitious goals like restoration of peace and stability on the continent.[106]

From the inception of the new platform, European leaders presented it as an extremely light-structured form of cooperation that would neither replace nor even overlap with existing EU policies, nor operating international organisations. The Czech Presidency in a released note explicitly stated that the format does not replace 'existing organisations, structures or processes, nor does it aim to create new ones at this stage'.[107] Edi Rama and Mark Rutte pointed out that the European States need a platform that 'doesn't overlap with the strong regional organisations we already have in Europe'.[108] Reassuring voices were also coming from international organisations. The President of the Parliamentary Assembly of the Council of Europe stated that 'there is no confrontation' between the EPC and the Council of Europe,[109] pointing to the fact that the defence of human rights is not in the scope of the new platform.[110] In a different tone, the CEPA claimed outright that the EPC can help resolve issues which cannot be resolved by the EU or NATO alone.[111]

All the above did not silence questions of potential institutionalisation. In theory, international organisations are negotiated responses to the problems which actors face.[112] In the spirit of functionalism theory, the *raison d'être* of international organisation is carrying out specific tasks to address issues concerning more than one State. International law requires a certain threshold of 'organisationhood' since 'informal international organisation' – from a legal perspective – is 'close to meaningless'.[113] For some, international organisation requires a permanent

[105] Hans Kribbe, Sébastien Lumet and, Luuk van Middelaar, 'Bringing the Greater European Family Together. New Perspectives on the European Political Community (Brussels Institute for Geopolitics), <https://big-europe.eu/> accessed 1 June 2023.

[106] Marta Mucznik, 'The European Political Community: From Prague to Chisinau and beyond' (European Policy Center, 31 May 2023) <www.epc.eu/en/Publications/The-European-Political-Community-From-Prague-to-Chisinau-and-beyond~511bac> accessed 3 June 2023.

[107] Czech Presidency of the Council of the European Union (n 58).

[108] Rama and Rutte (n 104).

[109] The list of Council of Europe's members converges with the list of invited states.

[110] Agence Europe, 'Launch of European Political Community Makes Fourth Council Of Europe Summit Urgent' (Europe Daily Bulletin No 13043, 15 October 2022) <https://agenceurope.eu/en/bulletin/article/13043/27> accessed 19 March 2023.

[111] Sam Greene, Edward Lucas, and Nicolas Tenzer, 'The Road to Chișinău. How the European Political Community Can — and Cannot — Address the Wider Continent's Conundrums' (CEPA 2023) <https://cepa.org/comprehensive-reports/the-road-to-chisinau-the-european-political-community/>accessed 17 June 2023.

[112] Barbara Koremenos, Charles Lipson, Duncan Snidal, 'The Rational Design of International Institutions' (2001) 55 IO 761.

[113] Jan Klabbers, 'Formal Intergovernmental Organizations' in Jacob Katz Cogan, Ian Hurd, Ian Johnstone (eds), *The Oxford Handbook of International Organizations* (OUP 2016).

secretariat and three or more member states.[114] However, despite the existence of 'fully integrated institutions that impose regulation through comprehensive, hierarchical rules', at the other pole 'highly fragmented collections of institutions with no identifiable core'[115] can also be found.

Currently, the European Political Community cannot be qualified as an international organisation. Even the fact of calling it a 'community' conveys the willingness of European leaders to maintain an image of flexibility (and potentially adaptability). It is a valid argument since international organisations can become victims to politics by implementing one-size-fits-all approaches without considering the context which leads to internal confrontations and isolation from States.[116] In these cases, technocratic design can implode in the face of political realities. Moreover, bureaucrats can move institutions away from member States' interest.[117] Despite all of the above, institutionalisation, at least partial, would allow for the structuring of continuity and prevent organisations from turning into a 'zombie' without any impact[118] or desuetude.[119]

One of the most pressing issues regarding the EPC is its relations with the European Union. The creation of another entity with high complexity or relying on EU institutions could slow down the decision-making process, thus harming its effectiveness. The idea of close association with EU institutions in order to gain access to EU funds is met with reluctance from frugal Member States.[120] Some even called for a clear separation between the EPC and the EU in pursuit of maximising the platform's 'agility, inclusivity, and efficacy'.[121] Too close ties with the EU could possibly discourage the current British government.[122] Another issue is the potential dominance of the EU institutions and Member States within the EPC. In spite of the first meeting being held at the invitation of the European Council President and the Czech Prime Minister Peter Fiala, in

[114] Jon Pevehouse, Inken von Borzyskowski, 'International Organizations in World Politics' in Jacob Katz Cogan, Ian Hurd, Ian Johnstone (eds), *The Oxford Handbook of International Organizations* (OUP 2016)

[115] Robert O Keohane and David G Victor, 'The Regime Complex for Climate Change' [2011] 9 Perspectives on Politics 7-23.

[116] Michael N Barnett, Martha Finnemore, 'The Politics, Power, and Pathologies of International Organizations' [1999] 53 IO 699.

[117] Michael Barnett and Liv Coleman, 'Designing Police: Interpol and the Study of Change in International Organizations' (2005) ISQ, 593.

[118] Julia Gray, 'Life, Death, or Zombie? The Vitality of International Organizations' (2018) ISQ 62(1) 1.

[119] Maria J Debre and Hylke Dijkstra, 'Institutional Design for a Post-liberal Order: Why some International Organizations Live Longer Than Others' (2021) 27(1) EJIR 311.

[120] Vessela Tcherneva, 'The Future of the European Political Community' (European Council on Foreign Relation, 1 June 2023) <https://ecfr.eu/article/the-future-of-the-european-political-community/> accessed 4 June 2023.

[121] Greene, Lucas, and Tenzer (n 111).

[122] Luigi Scazzieri, 'Can the European Political Community Be a bridge between the UK and the EU? (Center for European Reform and Konrad Adenauer Stiftung, 2023) <www.cer.eu/sites/default/files/pb_LS_EPC_28.4.23.pdf> accessed 3 June 2023.

the official communication it was underlined that all countries are on an equal footing, mitigating the perception that the EU Member States and EU institutions are in some way at the helm. It seems also that the EU as a whole is not interested in holding a rotating presidency, similarly to the G20 where the rotating presidency is given only to member States. Furthermore, assuming that the current number of participating States will be maintained, arguments about Member States being over-represented may not be valid.

Lastly, some organisations are created by the legal act of an already existing organisation which allows asking about a future treaty and the potential embedding of the EPC in it. Interestingly, while presenting ideas on the new form of cooperation with the EU neighbours, Enrico Letta, Emmanuel Macron, and Charles Michel expressed the need for EU structural reform. Moreover, Macron delivered his speech during the closing ceremony of the Conference on the Future of Europe, which had resulted in a set of reform proposals. According to the European Commission, the Conference created 'new momentum to focus on renewing and improving the European project'.[123] However, Sweden and 12 Member States quickly issued a 'non-paper' opposing any treaty change due to different priorities in wartime and efficacy of crisis responses within the current Treaty framework.[124]

Although the current chances of a revision of the EU Treaties which could embed the European Political Community are low, the EPC could be institutionalised via the so-called 'Schengen method'. Similarly to the Schengen *acquis* originating with the Schengen Agreement signed in 1985 and later incorporated into the legal framework of the European Union with the Treaty of Amsterdam, the European Political Community can be regulated outside the legal and normative framework of the EU and later brought into the corpus of EU law. Clearly at such a point this is pure speculation. In the end, notwithstanding the current posture of the heads of States and governments of participating States, neither the EPC turning into one of the EU policies nor its evolution into a full-fledged international organisation can be excluded. As in the case of the Organization for Security and Co-operation (OSCE),[125] evolution from convening conferences on a more or less regular basis into an international organisation is possible.

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[123] European Commission, 'Conference on the future of Europe. Putting vision into Concrete Action' (Communication) COM(2022) 404 final.

[124] Swedish Presidency of the Council of the EU, 'Non-paper by Bulgaria, Croatia, the Czech Republic, Denmark, Estonia, Finland, Latvia, Lithuania, Malta, Poland, Romania, Slovenia, and Sweden on the outcome of and follow-up to the Conference on the Future of Europe' (Twitter @sweden2023eu, 9 May 2022) <https://twitter.com/sweden2023eu/status/1523637827686531072> accessed 19 March 2023.

[125] Miriam Sapiro, 'Changing the CSCE into the OSCE: Legal Aspects of a Political Transformation' [1995] 89 AJIL 631.

5 The European Political Community and enlargement policy

Russia's aggression against Ukraine was not only 'a harsh awakening to a new geopolitical reality' but, as previously mentioned, a push that raised the European Union's enlargement process to the top of the agenda.[126] Enlargement policy is one of the European Union's most powerful policy tools – it has shaped the European continent for the last fifty years during which the number of Member States has increased from six to 28, and later – due to Brexit – reduced it to 27.[127] The process of enlargement has made the EU 'much safer, more prosperous, stronger and more influential than the original European Economic Community'.[128] From the perspective of the EU, a credible enlargement policy is not only a 'geostrategic investment in peace, stability, security and economic growth in the whole of Europe',[129] but also a source of political stabilisation.[130] According to Alexander Stubb, in a new European security order it is 'the best geopolitical tool'.[131] For an aspiring Member State, the perspective of membership is considered a 'strong anchor not only for prosperity, but also for peace and security'.[132]

Despite the significance of enlargement, the path to membership is long and arduous. Its slow pace has not only irritated aspiring States, but has also even drawn criticism of the EU's ally – the United States.[133] The procedure itself is technocratic, formalistic and based on the principle 'nothing is agreed until everything is agreed'.[134] The EU acts on procedures that ensure that the aspiring States will be admitted only when they are able to operate as members. The fact that a country becomes

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[126] Commission, 'Communication on EU Enlargement Policy' (Communication) COM(2021) 644 final.

[127] For more on enlargement, see Marise Cremona (ed), *The Enlargement of the European Union* (OUP 2003); Frank Schimmelfenning and Ulrich Sedelmeier (eds), *The Politics of European Union Enlargement: Theoretical Approaches* (Routledge Advances in European Politics 2005); Eli Gateva (ed), *European Union Enlargement Conditionality* (Palgrave Studies in European Union Politics 2015); Jurgen Elvert, Wolfram Kaiser (eds), *European Union Enlargement: A Comparative History* (Routledge Advances in European Politics 2004).

[128] European Commission, Directorate-General for Enlargement, *20 Myths and Facts about Enlargement* (Luxembourg Office for Official Publications of the European Communities 2006).

[129] ibid.

[130] For example, Greece entered the Communities in 1981 after seven years of Junta rule. Five years later, Spain and Portugal – emerging from authoritarian rule, followed.

[131] Alexander Stubb, 'The Case for a Confederal Europe' (European Council on Foreign Relations, 21 June 2022) <https://ecfr.eu/article/the-case-for-a-confederal-europe/> accessed 2 May 2023.

[132] European Commission (n 21).

[133] Kristin Archick and Sarah E Garding, 'European Union Enlargement' (Congressional Research Service, 11 August 2021) <https://crsreports.congress.gov/product/pdf/RS/RS21344> accessed 13 March 2023.

[134] Commission, 'Understanding Enlargement. The European Union's Enlargement Policy' (2007) <https://europa.rs/images/publikacije/22-Understanding_Enlargement.pdf> accessed 19 April 2023.

an official candidate[135] does not automatically lead to the opening of negotiations. Formal membership negotiations are a process that prepares an aspiring State to meet the accession criteria.[136] Only when the negotiations and accompanying reforms are concluded, the State can join the EU. The accession treaty[137] is binding when it is supported by the EU Council, the European Commission, and the European Parliament; when it is signed by representatives of Member States and candidate countries; finally, when it is ratified[138] by Member States and candidate countries. Moreover, the process is highly politicised. Pursuant to Article 49 of the Treaty on European Union (TEU) – which, together with Article 2 TEU,[139] constitutes the legal basis for enlargement – almost all the crucial steps in the process require the unanimity of Member States.[140]

Due to the constant evolution of the EU *acquis*, the process of accession has become 'a far greater challenge than in earlier enlargements'.[141] The case of the Western Balkans proves that it can become unbearably long and can be described as 'everlasting purgatory'. The number of voices calling for its reform constantly increasing.[142] Calls to tie further en-

[135] States that do not yet fulfil the requirements for membership are considered "potential candidates'. Currently this is the status of Georgia and Kosovo.

[136] Subject of negotiations are the conditions and timing of the candidate's adoption, implementation, and enforcement of the *acquis*. Each of the thirty-five chapters is negotiated separately.

[137] The treaties on the accession of the new Member States are considered primary source of EU law which means that they are at the top of the European legal order. They contain the terms and conditions of membership, transitional arrangements and safeguard clauses, deadlines and details of financial arrangements.

[138] Both Member States and candidate States ratified it in accordance with their constitutional rules.

[139] Article 2 TEU states that the EU is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

[140] The applicant State addresses its application to the Council, which after consulting the Commission and receiving the consent of the European Parliament, acts unanimously. Further in the process, not only do the conditions of admissions, but also adjustments to the Treaties, have to be agreed by the Member States and by the aspiring State.

[141] European Union, Agenda 2000 - Volume I - Communication: for a stronger and wider Union [2007] DOC/97/6.

[142] Ideas for the reform were presented in, among others: Non-paper. Reforming the European Union accession process.

largement to institutional reform are also more common.[143]

Additionally, up to the start of the war in Ukraine, the shadow cast by the Eastern enlargement paralysed further 'widening'. Although partially alleviating the effects of the Cold War, the 'big bang' enlargement still led to 'enlargement fatigue'.[144] The 2004-2007 enlargement was commonly considered the most challenging expansion in the history of the EU. The number of applicants and the huge scale of the transformation they underwent to become EU members required the mobilisation of politicians, experts, civil society, and citizens across Europe to make it a reality. After Croatia's accession in 2013, although still formally pending, the enlargement policy was 'practically dead'.[145] Thus, the EU not only risked violating its own principles as an actor committed to promoting its values,[146] but also undermined its credibility since the lack of a membership perspective reduces external capacity.[147]

From the moment of its announcement, discussions on the EPC were accompanied by debates on how the new form of cooperation should be positioned in relation to the enlargement process, including opinions that without reform of the enlargement process, the EPC would amount to a 'fig leaf' covering the Union's geopolitical struggles.[148] As mentioned, the initial proposal presented by President Emmanuel Macron evoked wariness among candidate and aspiring States. Charles Michel assured that the 'geopolitical community' goes 'beyond enlargement', it is neither its replacement nor a guarantee that the participating State will one day be

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[143] Calls for treaty changes accompanying EU expansion do reflect the federalist view that 'widening' must be supported by 'deepening'. One of the strongest advocates for mutual reform is German Chancellor Olaf Scholz who also called for the simultaneous strengthening of democracy and the rule of law. Oliver Noyan, 'Germany Pushes to Tie Together Enlargement and EU Reform' (*Euractiv*, 22 June 2022) <www.euractiv.com/section/all/news/germany-pushes-to-tie-together-enlargement-and-eu-reform/> accessed 19 March 2023. Among those endorsing this idea is also Josep Borrell. Josep Borrell, 'The Geo-political Imperative for the EU Is to Both Widen and Deepen' (*EEAS Blog*, 27 June 2022) <www.eeas.europa.eu/eeas/geo-political-imperative-eu-both-widen-and-deepen_en> accessed 20 March 2023.

[144] Oli Rehn, 'What's the Future for EU Enlargement?' (Speech, 25 September 2007) <www.eu-un.europa.eu/articles/es/article_7355_es.htm> accessed 12 March 2023.

[145] Nathalie Tocci, 'Enlargement's Back on the Political Agenda' (*Politico*, 20 June 2023) <www.politico.eu/article/enlargements-back-on-the-political-agenda/> accessed 20 June 2023.

[146] According to Article 49 TEU, any European state may apply for EU membership if it respects its common values and is committed to promoting them. EU values are encapsulated in Article 2 TEU.

[147] Tanja A Börzel, Antoaneta Dimitrova and Frank Schimmelfennig, 'European Union Enlargement and Integration Capacity: Concepts, Findings, and Policy Implications' (2017) 24 JEPP 157.

[148] Piotr Buras, 'European Political Community: A Second-tier Europe Risks Being a Fig Leaf for the EU's Woes' (*Euronews*, 3 October 2022) <www.euronews.com/2022/10/03/european-political-community-a-second-tier-europe-risks-being-a-fig-leaf-for-the-eus-woes-> accessed 27 February 2023.

amember of the European Union.[149] The President of the European Council also explicitly stated that the reformed EU enlargement policy which would consist of 'gradual, phased integration, even while the accession process is ongoing',[150] will be a reference point for the new community. In its Conclusion from June 2022, the European Council asserted that the new Community will 'not replace existing EU policies and instruments, notably enlargement'.[151] Most importantly, with the same Conclusion, the Council decided to grant Ukraine and Moldova candidate status which helped to reduce fears that the EPC was some sort of alternative for membership. Conducted skilfully, the EPC can considerably enhance the EU's external integration capacity[152].

6 Quo vadis, the European Neighbourhood Policy?

Despite its revision launched in 2015,[153] voices on the EU's neighbourhood policy ranged from those stating that it is a 'geo-branding of "traditional" foreign policy'[154] to those claiming it has completely failed.[155] The main argument for the latter group was the fact that instead of turning its neighbours into the previously mentioned 'ring of friends', it did not offer sufficient incentives to embrace the reforms. Some even claim that it has added to Russia's revisionist policy over its neighbourhood.[156] Yet, the notion of an 'overlapping neighbourhood'[157] was never sustainable and Moscow's war on Ukraine diminished any space for ambiguity.

The European Neighbourhood Policy is based on the EU's bilateral privileged relations with partner countries. It was created as a response to the challenges arising from the Eastern enlargement.[158] It has two re-

[149] Michel (n 28).

[150] It means that 'widening' would happen simultaneously with 'deepening'.

[151] European Council (n 33).

[152] External integration capacity refers to the ability of the European Union to prepare non-member States for membership. Internal integration capacity, on the other hand, helps to preserve EU functioning and cohesion in the post-accession phase. See Börzel, Dimitrova and Schimmelfennig (n 147).

[153] One of the main aims of the process was to adapt the policy's tools which would consider particular aspirations of partner countries.

[154] Steven Blockmann, *The Obsolescence of the European Neighbourhood Policy* (Rowman & Littlefield International 2017).

[155] Sandra Lavenex, 'On the Fringes of the European Peace Project: The Neighbourhood Policy's Functionalist Hubris and Political Myopia' (2005) 19(1) BJPIR 63.

[156] ibid.

[157] For more on the notion of the 'overlapping neighbourhood', see Tom Casier, 'Identities and Images of Competition in the Overlapping Neighbourhoods: How EU and Russian Foreign Policies Interact' in Remi Piet, Licínia Simão (eds), *Security in Shared Neighbourhoods. New Security Challenges* (Palgrave Macmillan 2016); and Magdalena Dembińska and David Smith, 'Navigating in-between the EU and Russia' (2021) 62 Eurasian Geography and Economics 247.

[158] Commission, 'European Neighbourhood Policy. Strategy Paper' (Communication) COM(2004) 373 final.

gional dimensions. First, the Eastern Partnership (EaP),[159] inaugurated in 2009, aimed at enhancing relations with Armenia, Azerbaijan, Belarus, Georgia, Moldova and Ukraine.[160] Its objective was threefold. Firstly, it was created in order 'to share the benefits of the EU's enlargement with neighbouring countries in strengthening stability, security and well-being for all concerned'.[161] Secondly, it was to 'prevent the emergence of new dividing lines between the enlarged EU and its neighbours'.[162] Its final aim was to 'offer them the chance to participate in various EU activities, through greater political, security, economic and cultural co-operation'.[163] Regulatory rapprochement in this case did not mean full access to the single market.[164] It was also kept separate from the enlargement process[165] which, as explained by Jan Klabbers, dilutes the European Union, since expansion eastward is contrary to 'ever closer union'.[166].

As a second dimension, the Union for the Mediterranean (UfM) includes 27 EU Member States and 16 Mediterranean countries and Libya with observer status.[167] Launched at the 2008 Paris Summit, it is the continuation of the Barcelona Process. From the beginning it was known that UfM is independent not only from enlargement, but also from accession negotiations and the pre-accession process.[168] Both of the previously mentioned dimensions suffered blows. The latter by the Arab Spring, the former by Russia's reaction to the Association Agreement which was about to be signed in 2013. Moreover, Belarus withdrew from the Eastern Partnership after the EU imposed sanctions over a fraudulent presidential election and a radical deterioration of human rights, democracy and

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[159] The idea was introduced by Poland's and Sweden's foreign ministers, Radosław Sikorski and Carl Bildt.

[160] Despite the initial scepticism, also due to the plurality of an existing neighbourhood policy, the initiative was pushed forward after the war between Georgia and Russia broke out. The plan for Eastern Partnership was approved under the French Presidency and launched under the Czech Republic Presidency. Soon afterwards, Russia launched its own Eurasian Union, created to bring EaP countries back under its influence.

[161] Commission (n 141).

[162] ibid.

[163] ibid.

[164] Including freedom of movement.

[165] In the Commission's words, 'Since this policy was launched, the EU has emphasised that it offers a means to reinforce relations between the EU and partner countries, which is distinct from the possibilities available to European countries under Article 49 of the Treaty on European Union'. Commission (n 141).

[166] Klabbers (n 113).

[167] Along with the 27 EU Member States, the following States are members of the UfM: Albania, Algeria, Bosnia and Herzegovina, Egypt, Israel, Jordan, Lebanon, Mauritania, Monaco, Montenegro, Morocco, North Macedonia, Palestine, Syria (currently suspended), Tunisia and Turkey.

[168] Council of the European Union, 'Joint Declaration of the Paris Summit for the Mediterranean
Paris, 13 July 2008' (Presse 213) 11887/08.

the rule of law[169].

From the perspective of time, what is especially interesting is the fact that contrary to the Western Balkans, none of the EaP countries was considered a candidate State before Russia's war on Ukraine, despite high hopes in Georgia, Moldova, and Ukraine. All three countries have concluded Association Agreements (AAs)[170] with the EU aimed at promoting cooperation and bringing them closer to EU rules and standards[171] and facilitating and deepening trade relations.[172] The conclusion of an AA, however, does not represent a commitment to EU membership, and therefore at the July 2021 trilateral summit, Georgia, Moldova, and Ukraine issued a declaration pledging to pursue EU accession-oriented reforms and calling for a clearer membership perspective from Brussels, stating that 'European integration has no alternative' and 'no third party could influence this sovereign choice'[173].

With the inception of the European Political Community, the European Union cannot neglect its southern rim. Despite not only close historical and cultural links but also common strategic interest,[174] no Mediterranean state was included in the list of invitees. The 'ring of well-governed countries'[175] – crucial from the security perspective – is incomplete without southern partners, and therefore the EU has to offer some realistic path for modernisation. However, as presented above, any form of cooperation modelled on the enlargement process but without the advantages of membership would not be successful.

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[169] Before the presidential election of 9 August 2020, relations between the European Union and Belarus were correct. Policy dialogue was enhanced by financial assistance, including through the European Investment Bank and European Bank for Reconstruction and Development.

[170] The Association Agreements remain the best instruments for the short and medium terms.

[171] The Agreement with Armenia never entered into force due to the decision of Armenia's government to join the Eurasian Economic Union.

[172] In the short and medium terms, Association Agreements are considered highly suitable for overcoming tensions between political and technical concerns. Guillaume Van der Loo and Peter Van Elsuwege, 'The EU–Ukraine Association Agreement after Ukraine's EU Membership Application: Still Fit for Purpose' (Europe in the World Programme, 14 March 2022) <www.epc.eu/content/PDF/2022/Ukraine_DP.pdf> accessed 19 March 2023.

[173] Batumi Summit Declaration Issued by the Heads of State of Association Trio - Georgia, Republic of Moldova and Ukraine, 19 July 2021.

[174] Commission, 'Barcelona Process: Union for the Mediterranean' (Communication) COM(2008) 319 final.

[175] Council of the European Union, 'A Secure Europe in a Better World - European Security Strategy' (Brussels, 2003).

7 Conclusions

The European Political Community is a product of its time, an adaptation policy, which requires the alignment of the EU's neighbours with its common foreign and security policy[176] and serves as a supplementary measure for the EU's financial and regulatory power. As a 'trust building exercise'[177] it also confirms that 'multilateralism is in Europe's DNA'[178] and is considered an 'identity factor'.[179] The new formula allows the EU to exercise leadership in the face of regional threats, whereas non-EU Member States, under the EPC umbrella, can act against such a powerful actor like Russia.

With the European Union's constant struggle with its foreign and security policy,[180] a 'flexible pan-European structure'[181] might deliver a desirable effect, especially since the EU enlargement may soon be nearing its geographic end and with the European Neighbourhood Policy exhausting its formula. For now, the EPC can be an avenue toward a stronger Europe, a facilitation endeavour for candidate States which would not disrupt the cohesion and functioning of the EU, and a platform of cooperation with 'non-accession' States, like the United Kingdom, especially since the European Security Council aimed, among other things, to keep the UK in the European foreign policy orbit but failed to do so. The current geopolitical situation undoubtedly fosters chances for re-engagement between Brussels and London at the political level.[182]

In order to avoid becoming a one-hit wonder, a formula with such an ambitious goal might sooner than later exhaust itself, and therefore at least minor institutionalisation is necessary, especially since international organisations evolve through the dynamic interpretation of constituent acts, institutional practice, and secondary law.[183] The EPC should not

[176] The issue was raised also during a meeting between EU and Western Balkan leaders which took place on 23 June 2022.

[177] Tcherneva (n 120).

[178] Ursula von der Leyen, 'A Union That Strives For More. My Agenda for Europe. Political Guidelines for the Next European Commission 2019-2024' (European Commission, 2019) <https://commission.europa.eu/system/files/2020-04/political-guidelines-next-commission_en_0.pdf> accessed 12 February 2023.

[179] David O'Sullivan, 'The European Union and the Multilateral System. Lessons from Past Experience and Future Challenges' (European Parliament, March 2021) <www.europarl.europa.eu/RegData/etudes/BRIE/2021/689365/EPRS_BRI(2021)689365_EN.pdf> accessed 13 February 2023.

[180] van Meurs and others (n 3).

[181] Michael Leigh, 'New Approaches to EU Governance and Enlargement (GIS Reports online, 3 November 2022) <www.gisreportsonline.com/r/eu-governance-enlargement/> accessed 19 March 2023.

[182] The United Kingdom's participation in the first summit was described as the 'modest return of the United Kingdom to a continental forum. Pierini (n 81). The UK will host the EPC summit in the first half of 2024.

[183] Anne Peters, 'International Organizations and International Law' in Jacob Katz Cogan, Ian Hurd, Ian Johnstone (eds), *The Oxford Handbook of International Organizations* (OUP 2016).

only be able to cope with a new geopolitical reality, but must also face issues arising from seemingly unstoppable technological developments and climate change. Moreover, irrespective of the area of cooperation, the EPC, as a political organisation, contrary to technical counterparts, will possibly succumb to 'political sentiments' leading to 'unproductive debates and disagreements'.[184] Considering the geopolitical stakes, this should be avoided at all costs.

According to France's foreign minister Laurence Boone, Russia's war on Ukraine accelerated the EU 'evolution into a fully-fledged sovereign political power'.[185] Although it might be an overstatement, the creation of the EPC embodies European responsibility to act in the area of foreign policy which has evolved for more than five decades.[186] With globalisation moving toward a more polycentric and segmented system, the European Union should also be more considerate in regarding not only its relations with neighbours, but also 'friends in every single democratic nation on this globe'.[187] Second, apart from enriching relations with its neighbours, it should also counter the influence of other States in its neighbourhood.

On a bleaker note, the EU is not a State, notwithstanding its legal personality and some exclusive competences. It is an international organisation *per se* which was built against the politics of power. Moreover, as a form of cooperation between 27 Member States, it has a serious issue with unified messaging when it comes to crucial global events,[188] with the war in Ukraine being one of the few exceptions. Within the current legal framework, the EU 'is bound to remain a foreign and security policy actor of limited ambitions and capabilities beyond soft-power projection and beyond its immediate environment'.[189] So far, the strength of European policymaking was 'its ability to reconcile domestic political imperatives with the need for international diplomacy'.[190] Whether the European Political Community becomes an efficient product of that diplomacy and a tool to mitigate the EU's 'capabilities-expectations gap'[191] remains to be seen.

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[184] Jan Klabbers, *An Introduction to International Organizations Law* (3rd edn, CUP 2015) 25.

[185] Laurence Boone, 'Europe Must Become a Global Political Power' *Financial Times* (London 25 August 2022) <www.ft.com/content/dfb90cca-cd02-4add-8378-86fddae2aefc> accessed 24 March 2023.

[186] Heidi Maurer, Richard G Whitman, Nicolas Wright, 'The EU and the Invasion of Ukraine: a Collective Responsibility to Act?' (2023) 99 IA 219.

[187] SOTEU 2022

[188] The list includes war against Hamas, the issue of Kosovo's independence, the breakup of Yugoslavia, or the latest comment by French President Emmanuel Macron on the *status quo* in Taiwan which surprised European and transatlantic partners.

[189] van Meurs and others (n 3).

[190] Mark Leonard, 'Will Putin Unite Europe?' (Project Syndicate, 15 February 2022) <www.project-syndicate.org/commentary/ukraine-crisis-uniting-european-union-by-mark-leonard-2022-02> accessed 19 February 2023.

[191] Christopher Hill, 'The Capability–expectations Gap, or Conceptualizing Europe's International Role' (1993) 31 JCMS 305.

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SWITCHING GEAR: LAW APPROXIMATION IN UKRAINE AFTER THE APPLICATION FOR EU MEMBERSHIP

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Abstract: In the wake of a full-scale Russian invasion, Ukraine applied for EU membership on 28 February 2022. In a matter of months, it was formally confirmed by the European Council as a candidate country. This has had a plethora of consequences; one of them is the obligation to approximate its national law with the EU acquis in its entirety. Unless there is a change of paradigm in EU pre-accession policy, transitional arrangements are strictly the exception to the rule, and therefore the law approximation effort has to go way beyond existing commitments under the EU-Ukraine Association Agreement, the Energy Community Treaty, and the Civil Aviation Agreement. Such switching of gear in the law approximation process comes with additional layers of complexity. For instance, compliance with the horizontal provisions of the Treaty on the Functioning of the European Union governing freedoms of the internal market requires comprehensive screening of national law before any legislative changes are made. Furthermore, law approximation with EU legal acts which can only apply when a country becomes a Member State must be carefully planned and timed. The legal system must be ready to accommodate EU law, with all the principles governing enforcement, including the direct application of EU regulations. While this is all doable, it must be handled with care, especially in a country whose economy and society at large have been shattered by war.

Keywords: law approximation, dynamic approximation, pre-accession policy, membership of the European Union, association agreements, rapprochement.

1 Introduction

On 28 February 2022, in the most dramatic circumstances of a full-scale illegal Russian invasion, Ukraine applied for EU membership. This bold move has had many consequences. As is well known, submitting a bid for EU membership is *par excellence* a political act, albeit with con-

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siderable economic and legal implications, especially when an aspiring country is granted candidate status. The latter, in relation to Ukraine, materialised very quickly on 23 June 2022.[1] Since then, against all odds, Ukrainian authorities have proceeded with the necessary reforms to make a deeper *rapprochement* with the European Union a reality, not just a figurative exercise. All of this has taken place despite the war and all the atrocities that have come with it. Leaving the assessment of the political and economic implications of an application for EU membership to representatives of other genres of science, the centre of gravity of this article is on the legal implications of this new trajectory that Ukraine has embarked on. In particular, the analysis that follows looks at the obligation to approximate Ukrainian law with the EU *acquis*. As the starting point, we put under the microscope the existing obligations to align the domestic legal order with EU law, which stem from the EU-Ukraine Association Agreement[2] as well as the Energy Community,[3] and the Civil Aviation Agreement (section 2).[4] In turn, we proceed beyond the existing bilateral and multilateral frameworks to assess how the application for EU membership has translated into a switching of gear when it comes to regulatory alignment. Despite the hazy legal basis, there is no doubt that Ukraine has now the obligation to approximate its domestic law with the EU *acquis* in its entirety. This, as demonstrated in section 3, is a way more nuanced exercise than it has been so far under the terms of the Association Agreement and related legal instruments. Conclusions are offered in section 4.

2 Law approximation under existing EU-Ukraine agreements

2.1 Introduction

At the time of Russia's full-scale aggression, Ukraine is at the point where the prospect of membership in the European Union, and joining the European family, is more real than ever. This, however, is connected with the extremely complex and difficult task of approximating the Ukrainian legal system with the EU *acquis*. In normal circumstances, it is a gargantuan exercise in itself, but – in the case of Ukraine – the challenge is exacerbated by the war and the impact it has had on society at large, the economy, and the business community, as well as the political players. There is no doubt that law approximation, and the ability to implement newly adopted rules, serve as litmus tests to gauge the levels

[1] See, para 11 of European Council Conclusions, 23-24 June 2022, EUCO 24/22 <www.consilium.europa.eu/media/57442/2022-06-2324-euco-conclusions-en.pdf> 2 December 2023.

[2] Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part [2014] OJ L161/3 [hereinafter: EU-Ukraine AA].

[3] The Energy Community Treaty [2006] OJ L198/18.

[4] Common Aviation Area Agreement Between the European Union and its Member States, of the One Part, and Ukraine, of the Other Part [2021] OJ L387/3.

of maturity and readiness of Ukraine, its state authorities, including the judiciary, to join the European Union. After all, the EU is not a classic international organisation but a supranational entity, constructed on a new legal order where the principles of primacy and direct effect determine the application of rules in the national courts.[5]

One should not be under the impression that law approximation is a novelty for Ukraine. Nothing could be further from the truth. Ukraine has been proceeding with this exercise for many years, albeit with mixed results.[6] For a host of reasons, it has not been an easy ride. While we leave this story for others to tell, it is necessary to emphasise that over the last thirty years Ukraine has been engaged in building its statehood on the ashes of the Soviet Union, and this has been happening against precarious economic, societal, and political circumstances.[7] Furthermore, just like other countries of the region, it has been recovering from questionable 'joys' of staying – for decades – in the Council of Mutual Economic Assistance.[8] From the formal point of view, Ukraine has had the obligation to proceed with law approximation as of the entry into force of the Partnership and Cooperation Agreement (hereinafter: EC-Ukraine PCA).[9] As explained in section 2.2 below, it envisaged only a very general obligation in this respect. For the first time ever, gears were switched with the EU-Ukraine AA, which not only transformed the obligation to approximate from the best endeavours clause to the obligation to achieve high levels of alignment, but also provided lists of the EU *acquis*, or parts thereof, pencilled in for law approximation. It is now supplemented by commitments undertaken by Ukraine as a result of accession to the Energy Community, as well as the conclusion of the Common Aviation Area Agreement with the EU and its Member States. As alluded to earlier in the introduction to this article, with the application for EU membership, the gears of law approximation switched once again. All the above is addressed in turn.

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5 See, *inter alia*, K Lenaerts, P Van Nuffel and T Corthaut, *EU Constitutional Law* (OUP 2021) 629–653.

6 See, *inter alia*, R Petrov, 'How Far to Endeavour? Recent Developments in the Adaptation of Ukrainian Legislation to EU Laws' (2003) 8 European Foreign Affairs Review 125; R Petrov, 'Legislative Approximation and Application of EU Law in Ukraine' in R Petrov and P Van Elsuwege (eds), *Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union. Towards a Common Regulatory Space?* (Routledge 2014).

7 See, *inter alia*, T Kuzio, *Ukraine: State and Nation Building - Routledge Studies of Societies in Transition* (Routledge 1998); S Yekelchyk, *Ukraine: What Everyone Needs to Know* (2nd edn, OUP 2020).

8 Council for Mutual Economic Assistance was an economic cooperation endeavour for the Soviet Union and satellite countries. The assistance was one sided and ultimately the only beneficiary remained the Soviet Union, Russia in particular. See further, *inter alia*, J Brine, *Comecon: The Rise and Fall of an International Socialist Organization* (Transaction Publishers 1992).

9 Partnership and Cooperation Agreement between the European Communities and their Member States, and Ukraine [1998] OJ L49/3.

2.2 Early days of law approximation in Ukraine: EC-Ukraine Partnership and Cooperation Agreement

Ukraine relations with the then European Community had begun much earlier than with the entry into force of the Association Agreement. After gaining independence in 1991, Ukraine was the first of the former Soviet republics to sign a Partnership and Cooperation Agreement with the European Communities in 1994 (hereinafter: EC-Ukraine PCA).[10] Despite this important and symbolic step, the EC-Ukraine PCA could be called rather soft, especially in terms of law approximation obligations. It was also not very ambitious as far as trade was concerned. While it envisaged liberalisation of trade, it fell shy of creating a free trade area. With the benefit of hindsight, it should be perceived as an important political step, determining the general direction of travel, yet without specifics regarding the development of further relations between the European Union and Ukraine. It is notable that similar agreements were concluded with many other independent States that emerged after the collapse of the USSR, and neither on the side of those states nor on the EU side was there any appetite to deepen bilateral relations beyond the basic frameworks that the PCAs had to offer.[11] Unlike the three Baltic States, Ukraine was no exception and, at this point in history, it was very much torn apart in its – *prima facie* – binary choice of *rapprochement* with the West or with Russia.[12]

As far as law approximation was concerned, Article 51 EC-Ukraine PCA was of the essence. It provided:

> 1. The Parties recognize that an important condition for strengthening the economic links between Ukraine and the Community is the

[10] See, *inter alia*, A Lewis (ed), *EU and Ukraine: Neighbours, Friends, Partners?* (Federal Trust 2002).

[11] Agreement on partnership and cooperation establishing a partnership between the European Communities and their Member States and the Russian Federation [1997] OJ L327/3; Partnership and Cooperation Agreement between the European Communities and their Member States and the Republic of Moldova [1998] OJ L181/3; Partnership and Cooperation Agreement between the European Communities and their Member States and the Republic of Georgia [1999] OJ L205/3; Partnership and Cooperation Agreement between the European Communities and their Member States and the Republic of Kazakhstan [1999] OJ L196/3; Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and the Republic of Azerbaijan, of the other part [1999] OJ L246/3; Partnership and Cooperation Agreement establishing a partnership between the European Communities and their Member States, of the one part, and the Kyrgyz Republic, of the other part [1999] OJ L196/48; Partnership and Cooperation Agreement establishing a partnership between the European Communities and their Member States, of the one part, and the Republic of Uzbekistan, of the other part [1999] OJ L229/3; Partnership and Cooperation Agreement establishing a partnership between the European Communities and their Member States, of the one part, and the Republic of Tajikistan, of the other part [2009] OJ L350/3. For an academic appraisal, see Ch Hillion, 'Partnership and Cooperation Agreements between the European Union and the New Independent States of the Ex-Soviet Union' (1998) 3 European Foreign Affairs Review 399.

[12] For a historical account, see, *inter alia*, S Plokhy, *The Russo-Ukrainian War* (Penguin 2023).

> approximation of Ukraine's existing and future legislation to that of the Community. Ukraine shall endeavour to ensure that its legislation will be gradually made compatible with that of the Community.
>
> 2. The approximation of laws shall extend to the following areas in particular: customs law, company law, banking law, company accounts and taxes, intellectual property, protection of workers at the workplace, financial services, rules on competition, public procurement, protection of health and life of humans, animals and plants, the environment, consumer protection, indirect taxation, technical rules and standards, nuclear laws and regulations, transport.

As already alluded to, this was merely a best endeavours obligation. Put differently, Ukraine had the obligation to act, not to achieve a particular result. An indicative list of areas was also provided and focused on the internal market *acquis*. In many respects, the law approximation clause in question was not original. In fact, it was a standard clause which, at the time, could be found in Europe Agreements with Central and Eastern European countries,[13] and later also in the Stabilisation and Association

[13] Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other part [1993] OJ L348/2; Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Hungary, of the other part [1993] OJ L347/2; Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Czech Republic, of the other part [1994] OJ L360/2; Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Slovak Republic, of the other part [1994] OJ L359/2; Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and Romania, of the other part [1994] OJ L357/2; Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Bulgaria, of the other part [1994] OJ L358/3; Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Lithuania, of the other part [1998] OJ L51/3; Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Latvia, of the other part [1998] OJ L26/3; Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Estonia, of the other part [1998] OJ L8/3; Europe Agreement establishing an association between the European Communities and their Member States, acting within the framework of the European Union, of the one part, and the Republic of Slovenia, of the other part [1999] OJ L51/3. For a comparative analysis of law approximation clauses in Europe Agreements, see A Łazowski, 'Approximation of Laws' in A Ott and K Inglis (eds), *Handbook on European Enlargement. A Commentary on the Enlargement Process* (TMC Asser Press 2002). More generally on Europe Agreements, see, *inter alia*, M Maresceau, '"Europe Agreements": A New Form of Co-operation between the European Community and Central and Eastern Europe' in P-Ch Müller-Graff (ed), *East Central European States and the European Communities: Legal Adaptation to the Market Economy* (Nomos 1993); M Maresceau and E Montaguti, 'The Relations between the European Union and Central and Eastern Europe: A Legal Appraisal' (1995) 32 CML Rev 1327.

Agreements with the Western Balkan States.[14] Having said that, according to Eugeniusz Piontek, with the applications for EU membership of one country after another,[15] the respective law approximation clauses laid down in the Europe agreements and Stabilisation and Association Agreements have had to be reinterpreted into strict obligations to approximate and implement EU-based rules.[16] This, of course, was not the case with Ukraine as Article 51 EC-Ukraine PCA had become a part of legal history before Ukraine applied for EU membership.

2.3 The EU-Ukraine Association Agreement in context

With the EU accession of Poland, Slovakia, and Hungary in 2004, and Romania in 2007, Ukraine became a direct neighbour of the European Union. This did not immediately lead to an upgrade of bilateral treaty relations. At that time, the EU paid more attention not to target cooperation with Ukraine but to develop relations within the framework of the newly established European Neighbourhood Policy (hereinafter: ENP), and later its regional dimension, the Eastern Partnership (hereinafter: EaP). The ENP and the EaP aimed to create policy *chapeaux* through which the EU would spread common European values among the 'close circle of friends' and promote political association as well as economic

[14] Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Former Yugoslav Republic of Macedonia, of the other part [2004] OJ L84/1; Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Albania, of the other part [2009] OJ L107/116; Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Montenegro, of the other part [2010] OJ L108/3; Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Serbia, of the other part [2013] OJ L278/14; Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and Bosnia and Herzegovina, of the other part [2015] OJ L164/2; Stabilisation and Association Agreement between the European Union and the European Atomic Energy Community, of the one part, and Kosovo*, of the other part [2016] OJ L71/3. See further, D Phinnemore, 'Stabilisation and Association Agreements: Europe Agreements for the Western Balkans?' (2003) 8 European Foreign Affairs Review 77.

[15] In the order of submission: Hungary (31 March 1994), Poland (5 April 1994), Romania (22 June 1995), Slovakia (27 June 1995), Latvia (13 October 1995), Estonia (24 November 1995), Lithuania (8 December 1995), Bulgaria (14 December 1995), Czech Republic (17 January 1996), Slovenia (10 June 1996).

[16] See, in relation to the Europe Agreements, E Piontek, 'Central and Eastern European Countries in Preparation for Membership in the European Union. A Polish Perspective' (1997) 1 Yearbook of Polish European Studies 73. See also A Łazowski and S Blockmans, 'Between Dream and Reality: Approximation of Domestic Laws with EU Law in the Western Balkans' in R Petrov and P Van Elsuwege (eds), *The Application of EU Law in the Eastern Neighbourhood of the European Union. Towards a Common Regulatory Space?* (Routledge 2013).

integration with the freshly expanded European Union.[17] However, initial implementation of these initiatives was based on existing EU agreements with countries covered by the ENP/EaP. This, apart from anything else, created a good deal of asymmetry, as Ukraine, just like Moldova, Georgia, and Armenia, had only modest PCAs in place,[18] while many countries of the Mediterranean, also covered by the ENP, had free trade agreements with the European Union.[19] The implementation of these initiatives with Ukraine, Moldova, Georgia, and Armenia became the foundation for negotiations of the future Association Agreements. In the case of Ukraine – without exaggeration – it became a turning point for its fate. As one would expect, closer *rapprochement* with the European Union was not seen favourably by Russia, which continued with its imperialistic drive, attempting to force the ENP *avant garde* to join the Eurasian Economic Union instead.[20] To achieve that goal, the authorities in Moscow exercised a fair

[17] See, *inter alia*, S Gstöhl (ed), *The European Neighbourhood Policy in a Comparative Perspective. Models, Challenges, Lessons* (Routledge 2016); S Poli (ed), *The European Neighbourhood Policy: Values and Principles* (Routledge 2016). As to the future of the ENP and Eastern Partnership, see S Blockmans, *The Obsolescence of the European Neighbourhood Policy* (Rowman and Littlefield International 2017); A Łazowski, 'Where Do We Go from Here? EU Relations with the Eastern Partnership Avant Garde' in W Douma and others (eds), *The Evolving Nature of EU External Relations Law* (Springer/TMC Asser Press 2021).

[18] While the Partnership and Cooperation Agreement with Belarus was negotiated, it never entered into force as a direct consequence of the Lukashenko dictatorship. On current and future EU relations with Belarus, see, *inter alia*, M Karliuk, 'The EU and Belarus. Current and Future Contractual Relations' in S Lorenzmeier, R Petrov and C Vedder (eds), *EU External Relations Law. Shared Competences and Shared Values in Agreements Between the EU and Its Eastern Neighbourhood* (Springer 2021).

[19] Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part [2000] OJ L70/2; Euro-Mediterranean Agreement establishing an Association between the European Community and its Member States, of the one part, and the Republic of Lebanon, of the other part [2006] OJ L143/2; Euro-Mediterranean Agreement establishing an Association between the European Community and its Member States, of the one part, and the People's Democratic Republic of Algeria, of the other part [2005] OJ L265/2; Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Arab Republic of Egypt, of the other part [2004] OJ L304/39; Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Hashemite Kingdom of Jordan, of the other part [2002] OJ L129/3; Euro-Mediterranean Interim Association Agreement on trade and cooperation between the European Community, of the one part, and the Palestine Liberation Organization (PLO) for the benefit of the Palestinian Authority of the West Bank and the Gaza Strip, of the other part [1997] OJ L187/3; Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the State of Israel, of the other part [2000] OJ L147/3; Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Tunisia, of the other part [1998] OJ L97/2. For an academic appraisal, see, *inter alia*, K Pieters, *The Mediterranean Neighbours and the EU Internal Market: A Legal Perspective* (TMC Asser Press 2010).

[20] See R Vilpišauskas, 'European Union or Eurasian Union? A Dilemma for the Eastern Partnership Countries' in S Gstöhl and D Phinnemore (eds), *The Proliferation of Privileged Partnerships between the European Union and Its Neighbours* (Routledge 2016). Further on the evolution of the Eurasian Economic Union, see M Karliuk, *The Emerging Autonomous Legal Order of the Eurasian Economic Union* (CUP 2023).

amount of pressure and forced Ukrainian and Armenian leaders to do a last-minute reverse ferret. While Armenia backed down without major drama,[21] in Ukraine it triggered a revolution which came down in history as Maidan 2.0 or the revolution of dignity. The uprising proved that for many Ukrainians, especially generations born in the terminal years of the Soviet Union or early years of the freshly independent Ukraine, the European choice was irreversible and they felt capable of resolutely defending European values.[22] While the upheaval led to a change of guard in Kyiv, and the signing of the EU-Ukraine AA, it also contributed to the Russian invasion of Crimea and Donbass in early 2014.[23] As for the EU-Ukraine AA itself, it also suffered from ratification drama in the European Union, as the Netherlands, following a referendum of dubious credentials, initially refused to ratify the Agreement.[24] Solutions were eventually found, allowing for parts of the Association Agreement to apply partly,[25] before its full entry into force on 1 September 2017.

It should be noted that association agreements are not a uniform category.[26] Considerable time has passed since one of the first association agreements was concluded between the European Coal and Steel

[21] Eventually, the European Union and Armenia negotiated a new agreement which is an upgrade of the EC-Armenia Partnership and Cooperation Agreement, yet it does not go as far as the Association Agreements with Georgia, Moldova, and Ukraine. See Comprehensive and Enhanced Partnership Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Armenia, of the other part [2018] OJ L23/4. For an academic appraisal, see A Khvorostiankina, 'The EU-Armenia Comprehensive and Enhanced Partnership Agreement: A New Instrument of Promoting EU's Values and the General Principles of EU Law' in S Lorenzmeier, R Petrov and C Vedder (eds), *EU External Relations Law. Shared Competences and Shared Values in Agreements Between the EU and Its Eastern Neighbourhood* (Springer 2021).

[22] For a detailed account of these events, see, *inter alia*, C Miller, *The War Came to Us. Life and Death in Ukraine* (Bloomsbury Continuum 2023) 79-119.

[23] ibid 120-235.

[24] This experience triggered a wider discussion about the difficulties with the ratification of EU mixed agreements, which, in order to enter into force, require approval by the EU, all of its Member States, and a non-EU party (parties). See, *inter alia*, P Van Elsuwege, 'The Ratification Saga of the EU-Ukraine Association Agreement: Some Lessons for the Practice of Mixed Agreements' in S Lorenzmeier, R Petrov, and C Vedder (eds), *EU External Relations Law. Shared Competences and Shared Values in Agreements Between the EU and Its Eastern Neighbourhood* (Springer 2021); G Kübek, 'The Non-Ratification Scenario: Legal and Practical Responses to Mixed Treaty Rejection by Member States' (2018) 23 European Foreign Affairs Review 21; G Van Der Loo and RA Wessel, 'The Non-Ratification of Mixed Agreements: Legal Consequences and Options' (2017) 54 CML Rev 735. More generally on the EU procedure for the conclusion of international agreements, see J Heliskoski, 'The Procedural Law of International Agreements: A Thematic Journey through Article 218 TFEU (2020) 57 CML Rev 79.

[25] The political part of the EU-Ukraine AA began to be temporarily applied as of 1 November 2014. This was followed by the temporary application of the economic part of the Agreement as of 1 January 2016.

[26] See further P Van Elsuwege and M Chamon, *The Meaning of 'Association' under EU Law. A Study on the Law and Practice of EU Association Agreements* (European Parliament 2019) <www.europarl.europa.eu/RegData/etudes/STUD/2019/608861/IPOL_STU(2019)608861_EN.pdf> accessed 20 December 2023.

Community and the United Kingdom.[27] They have, however, one common aim: the creation of privileged relations between the European Union and a non-EU country or countries, which is short of partial membership.[28] Apart for the post-Brexit EU-UK Trade and Cooperation Agreement,[29] association agreements have always served as upgrades of formal relations, and, in the case of countries meeting the eligibility criteria laid down in Article 49 TEU, potentially leading to membership of the European Union.[30] Association agreements may also vary in their structure, content, and levels of underlying ambitions. Among the characteristic features of all association agreements, the following can be distinguished: the mutual rights and obligations they provide for; the joint actions and special procedures they envisage; special privileged relations with the EU; the participation of a third country in the EU system, yet without full institutional involvement.[31] While each and every association agreement is tailor-made to a specific non-EU State, it is customary to distinguish 'generations' of association agreements designed for particular groups of countries.[32] With this in mind, the association agreements with Ukraine,

[27] Agreement concerning the relations between the United Kingdom of Great Britain and Northern Ireland and the European Coal and Steel Community < www.cvce.eu/en/recherche/unit-content/-/unit/5cc6b004-33b7-4e44-b6db-f5f9e6c01023/9f64d11c-0f79-4eeb-983d-b2700fc62cfd/Resources#de859fe5-dd07-4666-89b0-4f1ef2825b13_en&overlay> accessed 20 December 2023. For a commentary, see C Lord, 'Lessons from the Past? The 1954 Association Agreement between the UK and the European Coal and Steel Community' in M Westlake (ed), *Outside the EU. Options for Britain* (Agenda Publishing 2020).

[28] As per Article 217 of the Treaty on the Functioning of the European Union: 'The Union may conclude with one or more third countries or international organisations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure'.

[29] Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part [2021] OJ L149/10. See further, *inter alia*, A Łazowski, 'Mind the Fog, Stand Clear of the Cliff! From the Political Declaration to the Post-Brexit EU-UK Legal Framework (Part I)' (2020) 5 European Papers (2020) 1105; J Larik and R A Wessel, 'The EU-UK Post-Brexit Trade and Cooperation Agreement: Forging Partnership or Managing Rivalry?' in A Łazowski and A Cygan (eds), *Research Handbook on Legal Aspects of Brexit* (Edward Elgar Publishing 2022).

[30] See, *inter alia*, A F Tatham, *Enlargement of the European Union* (Kluwer Law International 2009).

[31] These factors also influence interpretation of association agreements by the Court of Justice of the European Union. See seminal Case 12/86 *Meryem Demirel v Stadt Schwäbisch Gmünd* ECLI: EU:C:1987:400. For recent developments in this respect, see, *inter alia*, N Ghazaryan, 'Who Are the "Gatekeepers"? Continuation of the Debate on the Direct Applicability and the Direct Effect of EU International Agreements' (2018) 37 Yearbook of European Law 27.

[32] See YM Kostyuchenko, 'The Evolution of the Conclusion of Association Agreements by the European Union with Third Countries and/or International Organizations: Theoretical and Historical Aspects' (2017) 3 Journal of European and Comparative Law 14, 20-22.

Georgia,[33] and Moldova[34] belong to the 'new generation' of association agreements, which differ in complexity and conditionality from any association agreement concluded before (*sans* the European Economic Area).[35]

After the entry into force of the EU-Ukraine AA, many myths emerged about what this Agreement amounted to. For example, one such myth was that the Association Agreement was a promise of future EU membership. This myth was helped, on the one hand, by the preamble to the AA, and, on the other hand, by the fact that there are indeed association agreements overtly aimed at preparing non-EU States for EU membership. A good example are the stabilisation and association agreements with the Western Balkan States.[36] So far, however, only the EU-Croatia Stabilisation and Association Agreement has gone full circle.[37] Furthermore, as the Association Agreement with Turkey proves, even if the endgame is explicitly EU membership, accession is not *fait accompli*.[38] In the case of Ukraine, although membership is not explicitly mentioned, the preambular proviso confirms that:

> the European Union acknowledges the European aspirations of Ukraine and welcomes its European choice, including its commitment to building a deep and sustainable democracy and a market economy.

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[33] Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part [2014] OJ L261/4. See further M Emerson and M Kovziridze (eds), *Deepening EU-Georgia Relations. What, Why and How?* (2nd edn, CEPS 2018).

[34] Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part [2014] OJ L260/4. See further M Emerson and D Cenusa (eds), *Deeping EU-Moldovan Relations. What, Why and How?* (2nd edn, CEPS 2018).

[35] Agreement on the European Economic Area [1994] OJ L1/1. See further F Arnesen and others (eds), *Agreement on the European Economic Area. A Commentary* (CH Beck, Hart Publishing, Nomos Verlag 2018); C Baudenbacher (ed), *The Handbook of EEA Law* (Springer 2015).

[36] Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Former Yugoslav Republic of Macedonia, of the other part [2004] OJ L84/1; Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Albania, of the other part [2009] OJ L107/116; Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Montenegro, of the other part [2010] OJ L108/3; Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Serbia, of the other part [2013] OJ L278/14; Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and Bosnia and Herzegovina, of the other part [2015] OJ L164/2; Stabilisation and Association Agreement between the European Union and the European Atomic Energy Community, of the one part, and Kosovo, of the other part [2016] OJ L71/3.

[37] Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Croatia, of the other part [2005] OJ L26/3.

[38] See, *inter alia*, E Baracani, *EU–Turkey Relations. A New Direction for EU Foreign Policy?* (Edward Elgar Publishing 2021).

Arguably, this does not amount to a well-veiled promise of EU accession.[39] Now that Ukraine has applied for EU membership, the question is whether the Association Agreement needs to reflect this very fact, and therefore should be revised. According to the present authors, this is not required. A case in point to prove it may be, for instance, the EU-Poland Europe Agreement which contained merely a unilateral declaration of the Polish authorities as to the direction of travel.[40] This did not stop the Europe Agreement from serving as a vehicle for accession; it was merely subject to reorientation.[41]

Accession to the European Union is heavily drenched in conditionality and benchmarks.[42] This, although on a different scale, is the case with the European Neighbourhood Policy and Eastern Partnership.[43] Ukraine has already had a taste of rule of conditionality as domestic political shenanigans led to delays in the signing of the Association Agreement.[44] It is also embedded in the Association Agreement itself and will become a dominant theme as Ukraine proceeds with its *rapprochement*.[45] The Preamble to the Association Agreement establishes unequivocally:

> the political association and economic integration of Ukraine into the European Union will depend on the results of the implementation of this Agreement, as well as ensuring that Ukraine respects common values and achieving rapprochement with the EU in the political, economic and legal spheres.

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[39] It is interesting to note that Ukraine expressed a desire to include EU membership as a long-term objective already in the EC-Ukraine PCA. That request was not entertained, though. See G Van der Loo, *The EU-Ukraine Association Agreement and Deep and Comprehensive Trade Area. A New Legal Instrument for EU Integration without Membership* (Brill Nijhoff 2016) 66.

[40] Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other part [1993] OJ L348/2.
The last recital of the Preamble reads: 'Recognising the fact that the final objective of Poland is to become a member of the Community and that this association, in the view of the Parties, will help to achieve this objective'.

[41] K Inglis, 'The Europe Agreements Compared in the Light of their Pre-accession Reorientation' (2000) 37 CML Rev 1173.

[42] For a comprehensive overview, see E Gateva, *European Union Enlargement Conditionality* (Palgrave 2015).

[43] See, *inter alia*, N Ghazaryan, *The European Neighbourhood Policy and the Democratic Values of the EU. A Legal Analysis* (Hart Publishing 2014); S Şemşit, 'The EU's Enlargement and Neighbourhood Policy Strategies: The Role of Political Conditionality' in S Gstöhl (ed), *The European Neighbourhood Policy in a Comparative Perspective. Models, Challenges, Lessons* (Routledge 2016).

[44] See Plokhy (n 12).

[45] It should be remembered that in accordance with the principle of non-regression, the rule of law standards cannot be lowered once a candidate country becomes a Member State. See Case C-896/19 *Repubblika v Il-Prim Ministru* ECLI:EU:C:2021:311. For an academic commentary, see, *inter alia*, A Łazowski, 'Strengthening the Rule of Law and the EU Pre-accession Policy: Repubblika v Il-Prim Ministru' (2022) 59 CML Rev 1803; M Leloup, D Kochenov and A Dimitrovs, 'Opening the Door to Solving the "Copenhagen Dilemma"? All Eyes on *Repubblika v Il-Prim Ministru*' (2021) 46 EL Rev 692.

For this purpose, the parties conduct continuous assessment of progress in the implementation of the EU-Ukraine AA and of all domestic laws adopted to implement the obligations that Ukraine has. Article 476 EU-Ukraine AA envisages a monitoring mechanism, the results of which determine the next steps in the gradual access to chunks of the EU internal market, for example access to public procurement markets or recognition of freedom to provide services. Conditionality is linked not only to compliance with specific provisions of the Agreement or legislation adopted in its implementation, but also to respect for EU values. For example, Article 478 EU-Ukraine AA stipulates that:

> 2. In the selection of appropriate measures, priority shall be given to those which least disturb the functioning of this Agreement. Except in cases described in paragraph 3 of this Article, such measures may not include the suspension of any rights or obligations provided for under provisions of this Agreement, mentioned in Title IV (Trade and Trade-related Matters) of this Agreement. These measures shall be notified immediately to the Association Council and shall be the subject of consultations in accordance with paragraph 2 of Article 476 of this Agreement, and of dispute settlement in accordance with paragraph 3 of Article 476 and Article 477 of this Agreement.
>
> 3. The exceptions referred to in paragraphs 1 and 2 above shall concern:
>
> (a) denunciation of the Agreement not sanctioned by the general rules of international law, or
>
> (b) violation by the other Party of any of the essential elements of this Agreement, referred to in Article 2 of this Agreement.

The reference to Article 2 of the EU-Ukraine AA makes it clear that the main elements of the Agreement include respect for democratic principles, human rights and fundamental freedoms, as well as respect for the rule of law. That is, in essence, the consolidation of EU values as mandatory standards for Ukraine, the violation of which by a party can lead to the suspension of the free trade area which is at the heart of the EU-Ukraine AA.[46] Since Ukraine is now fully covered by the EU pre-accession policy, a comprehensive monitoring exercise is done by the European Commission on an annual basis.[47] It extends to both respect for EU values and compliance with the EU *acquis* in all 35 negotiation chapters.[48]

[46] For more details on the value of the EU for Ukraine, see T Komarova, 'The Principle of Judicial Independence as a Component of the Rule of Law and a Key Element of the Association Agreement' (Human Rights and Democracy: collection of science articles based on the materials of the 4th All-Ukrainian Scientific and Practical Conference, 12 May 2023, Kharkiv) 3-7.

[47] The first report on the progress of Ukraine, delivered as part of the Enlargement Package, was issued on 8 November 2023.

[48] European Commission, 'Staff Working Paper. Analytical Report following the Communication from the Commission to the European Parliament, the European Council and the Council Commission Opinion on Ukraine's application for membership of the European Union' SWD (2023) 30 final.

2.3 *Switching gear for the first time: EU-Ukraine Association Agreement*

As already alluded to, the EU-Ukraine AA requires legal approximation with sways of the EU *acquis*. Relevant provisions put great emphasis on both ensuring that the law book is fully compliant with relevant EU legislation and that the Ukrainian legislation adopted for that purpose is fully implemented by state authorities, including courts. However, to use the words of Helen Xanthaki, we are dealing here with legal transplants.[49] Until the date of accession, this exercise is all about the application of a certain body of EU law on the territory of Ukraine without its membership in the organisation. Of course, unless it is provided in a bilateral agreement between the EU and a non-EU country, one cannot talk about the exterritorial application of EU law as the EU-Ukraine AA does not create a common legal space between the parties.[50]

In general terms, the EU-Ukraine AA can be divided into political and economic parts. As for the latter, according to many authors, it is extremely ambitious as it has laid down the foundations for the creation of the unprecedented Deep and Comprehensive Free Trade Area.[51] Its unique nature lies in the fact that it aims at the gradual and partial integration of Ukraine into the EU internal market based on the approximation of Ukrainian legislation to the EU *acquis*.[52] This is precisely what is achieved through the implementation of approximation clauses which, compared to the predecessor EC-Ukraine PCA, are strict and require not only action but, first and foremost, the achievement of specific results.[53]

The lists of EU legal acts, or their parts, and deadlines for transposition into the Ukrainian legal system, are – with some exceptions – con-

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[49] See H Xanthaki, 'Legal Transplants in Legislation: Defusing the Trap' (2008) 57 International and Comparative Law Quarterly 659.

[50] See A Łazowski, 'Enhanced Bilateralism and Multilateralism: Integration without Membership' (2008) 45 CML Rev 1433.

[51] See G Van der Loo, *The EU-Ukraine Association Agreement and Deep and Comprehensive Free Trade Area: A New Legal Instrument for EU Integration without Membership* (Brill Nijhoff 2016); M Emerson and V Movchan (eds), *Deepening EU-Ukrainian Relations. What, Why and How?* (CEPS 2018).

[52] See further, *inter alia*, R Petrov, 'The EU-Ukraine Association Agreement as a General Framework of Contemporary EU-Ukraine Relations' in H Richter (ed), *Competition and Intellectual Property Law in Ukraine* (Springer 2023).

[53] For an evaluation of the implementation process, the Government of Ukraine established in 2017 a unique system of online monitoring of the implementation of the EU-Ukraine AA – 'Pulse of Agreement' (https://pulse.kmu.gov.ua). Moreover, in 2023 the government started work on the development of a new online information system for managing Ukraine's European integration activities 'Pulse of Accession', which will replace the existing 'Pulse of Agreement' and will provide automation of planning processes, interdepartmental interaction, as well as monitoring and evaluation of task performance.

tained in the annexes to the EU-Ukraine AA.[54] This form of shaping the obligation to approximate is very effective. Firstly, the scope of required effort is presented in a very transparent way, and from the point of view of civil servants in charge of law approximation, it makes this exercise easier to navigate. To prove the point, it is enough to juxtapose the EU-Ukraine AA to the SAAs with the Western Balkan countries. The vague law approximation clauses laid down therein frequently make planning of law approximation akin to fishing in the dark.[55] Secondly, by placing the lists in the annexes, and by empowering the EU-Ukraine association institutions to update them, necessary revisions are made easier than if every time a full-scale revision of the EU-Ukraine AA were required. It also contributes to the dynamism of the EU-Ukraine AA, which reflects the dynamism of EU law as such.[56] As is well known, standing still is not part of the DNA of EU law. There is no one-size-fits-all approach when it comes to updates to the EU-Ukraine AA. The general rules are provided in Article 463(3) EU-Ukraine AA. It reads:

> 3. The Association Council may update or amend the Annexes to this Agreement to this effect, taking into account the evolution of EU law and applicable standards set out in international instruments deemed relevant by the Parties, without prejudice to any specific provisions included in Title IV (Trade and Trade-related Matters) of this Agreement.

From the wording, it is clear that making changes to the annexes is not an obligation but is subject to a voluntary decision of the Association Council.[57] One could argue that Ukraine has discretion in this regard.

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[54] One of the exceptions is the area of competition law, where the list is included also in the main body of the EU-Ukraine AA. See Article 256 EU-Ukraine AA. See further on law approximation in this area, H Richter (ed), *Competition and Intellectual Property Law in Ukraine* (Springer 2023); K Smyrnova, 'Europeanization of Competition Law: Principles and Values of Fair Competition in Free Market Economy in the EU and Association Agreements with Ukraine, Moldova, and Georgia' in S Lorenzmeier, R Petrov and C Vedder (eds), *EU External Relations Law. Shared Competences and Shared Values in Agreements Between the EU and Its Eastern Neighbourhood* (Springer 2021).

[55] On the challenges of EU accession for public administration, see, *inter alia*, A Łazowski and M Vlašić Feketija, 'The Seventh EU Enlargement and Beyond: Pre-Accession Policy vis-à-vis the Western Balkans Revisited' (2014) 10 *Croatian Yearbook of European Law and Policy* 1.

[56] For more details on amendments to the Annexes to the Association Agreements with Ukraine, Georgia, and Moldova, see G Van der Loo and T Akhvlediani, *Catch Me If You Can: Updating the Eastern Partnership Association Agreements and DCFTAs* (CEPS 2020) <www.ceps.eu/wp-content/uploads/2020/05/GVDL-and-TA-Updating-AA-DCFTAs.pdf> accessed 20 December 2023.

[57] Despite the fact that the Association Council has considerable powers to amend the Agreement, however, it has not used this discretion widely yet. See, *inter alia*, A Tyushka, 'The Power and Performance of "Association Bodies" under the EU's Association Agreements with Georgia, Moldova and Ukraine' (2022) 60 Journal of Common Market Studies 1165. These powers of the Association Council may be delegated further to other EU-Ukraine bilateral institutions established under the Agreement. See, *inter alia*, G Van Der Loo, 'The Institutional Framework of the Eastern Partnership Association Agreements and the Deep and Comprehensive Free Trade Areas' in S Gstöhl and D Phinnemore (eds), *The Proliferation of Privileged Partnerships between the European Union and Its Neighbours* (Routledge 2019).

Here, too, the progressiveness of the state authorities involved in approximation and their awareness of novelties in EU law, which are not reflected in the EU-Ukraine AA, are of great importance. Arguably, nothing prevents Ukraine from approximating its domestic legal order with new EU legislation. It should be emphasised that the Ukrainian authorities do not have to wait for information from the EU institutions or a request for revision of the AA as per Article 463 EU-Ukraine AA. Put differently, the Ukrainian government may decide on a unilateral basis to proceed with approximation extending to more recent EU legislation, especially now that it is a candidate country with a very ambitious *rapprochement* agenda. It is easy to imagine a situation whereby approximation with a new EU regulation or directive would bring political benefits in accession negotiations. Yet, at the same time, the expediency and technical possibilities of such a leap forward should be weighed. This was so before 24 February 2022, and even more so since Russia started the full-scale invasion of Ukraine. In simple terms, approximation with newly adopted EU legislation may not be a desired solution if it proves costlier for the Ukrainian business community than the *acquis* listed in the EU-Ukraine AA. Either way, it is necessary for the domestic authorities to follow developments in EU law to be in a position to make an early assessment of how pending revisions of EU law may affect the implementation of the EU-Ukraine AA.

Apart from Article 463 EU-Ukraine AA, tailor-made *modi operandi* for dynamic approximation are provided in the DCFTA part of the Agreement. For instance, Article 3 of Annex XVII (Regulatory approximation) envisages almost automatic adaptation of the Annex by the Trade Committee:

> 2. In order to guarantee legal certainty, the EU Party will inform Ukraine and the Trade Committee regularly in writing on all new or amended sector-specific EU legislation.
>
> 3. The Trade Committee shall add within three months any new or amended EU legislative act to the Appendices. Once a new or amended EU legislative act has been added to the relevant Appendix, Ukraine shall transpose the legislation into its domestic legal system in accordance with Article 2(2) of this Annex. The Trade Committee shall also decide on an indicative period for the transposition of the act.

Consequentially, Ukraine has less room for manoeuvre in this area when compared with areas falling under the general clause of Article 463 EU-Ukraine AA.

Another example is the area of energy, where the obligations are split between the EU-Ukraine AA and the Energy Community Treaty.[58] As per paragraphs 1-2 ANNEX XXVII-A to the EU-Ukraine AA:

[58] See further in section 2.4 below.

> 1. The European Commission shall promptly inform Ukraine about any European Commission proposals to adopt or amend, and about any EU act altering, the EU acquis listed in this Annex.
>
> 2. Ukraine shall ensure the effective implementation of the approximated domestic acts and undertake any action necessary to reflect the developments in Union law in its domestic law in the energy sector, as listed in Annex XXVII-B.

On top of this, in para 5, Ukraine has the obligation to coordinate all legislative proposals in the energy sector with the European Commission. Another example is Annex XVII to the EU-Ukraine AA, which concerns such service sectors as financial services, telecommunications services, and international transportation services and provides that the EU side will inform Ukraine and the Trade Committee on a permanent basis about all new legislative acts or changes to EU legislation in a specific sector. The Trade Committee, in turn, introduces any new or amended EU legislation into the annexes to the Association Agreement within three months. Again, this considerably limits room for manoeuvre.

A reminder is fitting at this stage that both the EU-Ukraine AA as well as the prospect of accession to the European Union require way more than just fixing the law book. It is necessary to emphasise the importance of transposition not only of the letter but also the spirit of EU law. Put differently, Ukrainian laws approximated with the EU *acquis* should be properly interpreted and implemented by domestic authorities, including Ukrainian courts. For anyone *au courant* with EU law, it is very clear that interpretation of approximated rules needs to be applied not in siloes but as part of the system. With this in mind, recourse should be made to available instruments supporting interpretation of EU secondary legislation, including soft law instruments, reports on the experience of Member States in the transposition and application of particular pieces of legislation, as well as the case law of the Court of Justice.[59] It is interesting to note that while the EU-Ukraine AA does not create general obligations in this regard, it does, in Article 264, provide that:

> The Parties agree that they will apply Article 262, Article 263(3) or Article 263(4) of this Agreement using as sources of interpretation the criteria arising from the application of Articles 106, 107 and 93 of the Treaty on the Functioning of the European Union, including the relevant jurisprudence of the Court of Justice of the European Union, as well as relevant secondary legislation, frameworks, guidelines and other administrative acts in force in the European Union.

[59] See T Komarova, *The Court of Justice of the European Union: The Development of Judicial System and Practice of Interpretation of EU Law* (Pravo 2018).

While such a broad sweep approach is required for state aid,[60] arguably with the application for EU membership in place, it should be considered for other areas covered by the EU-Ukraine AA. Bearing in mind the challenges of the implementation of EU law in Ukraine, such a bold desideratum may seem, *prima facie*, to be bordering on the naïve.[61] Yet, it should be noted that the Ukrainian judiciary has taken a fairly active pro-European position and successfully uses the interpretation of EU law, the decisions of the Court of Justice, and the practice of the European Commission as sources of interpretation. One of the latest examples is the Decision of the Constitutional Court of Ukraine in Case no 3-53/2022(126/22) of 1 November 2023 in which the Court stated that it took into account the *acquis communautaire* as a whole and the relevant legal acts of the European Union which were connected with the subject of constitutional control. Moreover, the Constitutional Court of Ukraine, applying the principle of proportionality, considered the case law of the CJEU.[62] Furthermore, there is practice regarding the direct application of the provisions of the Association Agreement by different Ukrainian courts.[63] Last but not least, CJEU case law seems to be taken into account at least by some law drafters. As argued by Liliia Oprysk, it influenced the shaping of the new Copyright Law adopted in 2023.[64]

2.4 Legal approximation under the Energy Community Agreement and the Civil Aviation Agreement

As already alluded to, the EU-Ukraine bilateral and multilateral framework goes beyond the Association Agreement. While some of the supplementing agreements have no major law approximation relevance, two do indeed stand out. Firstly, as of 2011, Ukraine is a member of the Energy Community. This sectoral international organisation was established primarily to serve as a vehicle to integrate the Western Balkan States into the EU energy framework. It has, however, expanded now also

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60 See K Smyrnova, 'The "Europeanization" of Competition Law in Ukraine' in H Richter (ed), *Competition and Intellectual Property Law in Ukraine* (Springer 2023).

61 On the implementation of the EU-Ukraine AA, see R Petrov, 'Challenges of the EU-Ukraine AA's Effective Implementation into the Legal Order of Ukraine' in S Lorenzmeier, R Petrov and C Vedder (eds), *EU External Relations Law. Shared Competences and Shared Values in Agreements Between the EU and Its Eastern Neighbourhood* (Springer 2021).

62 Constitutional Court of Ukraine, Decision no 9-p(II)/2023.

63 T Komarova, 'Practice of the Court of Justice of the European Union Regarding Association Agreements: Ukrainian Perspectives. (The Association Agreement as a Tool of Legal Reforms in Ukraine: Materials of the international conference, 23 October 2017, Kharkiv) 76-84; R Petrov, 'The Impact of the ECJ on the Legal System of Ukraine' in A Reich and H-W Micklitz (eds), *The Impact of the European Court of Justice on Neighbouring Countries* (OUP 2020).

64 See L Oprysk, 'Harmonisation with the EU Acquis amid the Resistance to Russian Aggression as a Catalyst of Ukrainian (Copyright) Recovery' in A Pintsch and M Rabinovych (eds), *Ukraine: A New EU Member State? From 'Integration without Membership' to 'Integration through War'* (Routledge 2024) forthcoming.

to Ukraine, Moldova, and Georgia.[65] The Energy Community Agreement creates the obligation to approximate national laws with the EU energy and environment *acquis* as listed in the Agreement and its annexes.[66] Furthermore, in 2021 the EU, its Member States, and Ukraine signed the Agreement on the Common Aviation Space. When the present article was completed, the Agreement was provisionally in force, awaiting ratification by all EU Member States.[67] Again, the list of the EU aviation *acquis* that requires approximation is provided in the annex to the Agreement.[68] Both of these frameworks constitute *leges speciales* to the EU-Ukraine AA.

2.5 Interim conclusions: plus ça change?

With the application for EU membership accepted and the decision to open accession negotiations taken by the European Council in December 2023, not much and yet very much has changed when it comes to law approximation under the existing bilateral and multilateral EU-Ukraine frameworks. This contrapuntal conclusion is arguably sound, despite its *prima facie* lack of logic. Let us start with the first part: no change. All three discussed agreements, the EU-Ukraine AA, the Energy Community Treaty, and the Civil Aviation Agreement are destined to continue to have a life of their own, in parallel to the accession process. Their annexes will continue to serve as beacons for navigation for the Ukrainian authorities when it comes to planning law alignment activities and their implementation. Yet, at the same time, a big change will come. Following the footsteps of Europe Agreements, the EU-Ukraine AA is likely to continue to be reorientated into a pre-accession vehicle. In this respect, at least three aspects of what is yet to come need attention. Firstly, thus far, despite the existence of all *modi operandi* discussed earlier, the EU-Ukraine AA, in particular its annexes, have not been updated in a very

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[65] See further, *inter alia*, D Buschle, K Talus (eds), *The Energy Community: A New Energy Governance System* (Intersentia 2015); D Buschle, 'Challenges in Exporting the Internal Market: Lessons from the Energy Community' in S Gstöhl (ed), *The European Neighbourhood Policy in a Comparative Perspective. Models, Challenges, Lessons* (Routledge 2016); D Buschle and R Karova, 'The EU's Sectoral Communities with Neighbours: The Case of the Energy Community' in S Gstöhl, D Phinnemore (eds), *The Proliferation of Privileged Partnerships between the European Union and Its Neighbours* (Routledge 2019).

[66] For instance, Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU (recast) [2019] OJ L158/125; Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC [2009] OJ L211/94.

[67] Council Decision (EU) 2021/1897 of 28 June 2021 on the signing, on behalf of the European Union, and provisional application of the Common Aviation Area Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part [2021] OJ L387/1.

[68] This includes parts of dozens of EU legal acts on, *inter alia*, market access, aviation safety, pilot licences, environmental protection, working conditions, consumer protection.

dynamic fashion, making parts of the lists out of date.[69] While the reason for the snail's pace of the updates may be of a multifarious nature, this will have to be attended to, bearing in mind the direction of travel that Ukraine opted for when it applied for EU membership.[70] At the same time, any potential updates need to be handled with care. For reasons which deserve no explanation, such changes will have to take into account the state of the Ukrainian economy, societal change, and – above all – they must not undermine the war effort and the post-war recovery. Secondly, it may be useful to consider, as a starting point, a revision of the annexes taking into account a dramatic change of circumstances, permitting for regression in terms of some commitments. For instance, with the dramatic impact of the war on the environment, including the effects of environmental crimes committed by Russian forces, it is hard

[69] The list of revisions of the EU-Ukraine AA, including its annexes, includes: Decision No 1/2018 of the EU-Ukraine Association Committee in Trade Configuration of 14 May 2018 updating Annex XXI to Chapter 8 on Public Procurement of Title IV — Trade and Trade-Related Matters of the Association Agreement and giving a favourable opinion regarding the comprehensive roadmap on public procurement [2018] OJ L175/1; Decision No 2/2018 of the EU-Ukraine Association Committee in Trade Configuration of 14 May 2018 on recalculating the schedule of export duty elimination and safeguard measures for export duties set out in Annexes I-C and I-D to Chapter 1 of Title IV of the Association Agreement [2018] OJ L188/17; Decision No 1/2018 of the EU-Ukraine Customs Sub-Committee of 21 November 2018 replacing Protocol I to the EU-Ukraine Association Agreement, concerning the definition of the concept of 'originating products' and methods of administrative cooperation [2019] OJ L20/40; Decision No 1/2018 of the EU-Ukraine Association Council of 2 July 2018 supplementing Annex I-A to Chapter 1 of Title IV of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part [2019] OJ L192/36; Agreement in the form of an exchange of letters between the European Union and Ukraine amending the trade preferences for poultry meat and poultry meat preparations provided for by the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part [2019] OJ L206/3; Decision No 1/2019 of the EU-Ukraine Association Council of 8 July 2019 as regards the amendment of Annex XXVII to the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part [2019] OJ L248/88; Decision No 1/2019 of the EU-Ukraine Sanitary and Phytosanitary Management Sub-committee of 18 November 2019 modifying Annex V to Chapter 4 of the Association Agreement [2020] OJ L59/31; Decision No 1/2021 of the EU-Ukraine Association Committee in Trade Configuration of 22 November 2021 amending Appendix XVII-3 (Rules applicable to telecommunication services), Appendix XVII-4 (Rules applicable to postal and courier services) and Appendix XVII-5 (Rules applicable to international maritime transport) to Annex XVII to the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part [2021] OJ L447/23; Decision No 1/2022 of the EU-Ukraine Association Committee in Trade Configuration of 25 October 2022 as regards the update of Annex XV (Approximation of customs legislation) to the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part [2022] OJ L301/214; Decision No 1/2023 of the EU-Ukraine Association Committee in Trade configuration of 24 April 2023 modifying Appendix XVII-3 (Rules applicable to telecommunication services) of Annex XVII to the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part [2023] OJ L123/38.

[70] G Van Der Loo and T Akhvlediani, *Catch Me If You Can: Updating the Eastern Partnership Association Agreements and DCFTAs* (CEPS 2020).

to imagine Ukraine fully approximating and implementing its obligations laid down in the environmental chapter of the EU-Ukraine AA. Thirdly, a big change may also come to the bilateral EU-Ukrainian institutions. As announced by the European Commission in its Communication on revised pre-accession policy, institutions based on association agreements are now, apart from being engaged in the functioning of the agreements themselves, also involved in the accession process. The exact parameters are yet to be determined, though.[71]

3 Law approximation beyond the existing bilateral and multilateral EU-Ukraine frameworks

3.1 Introduction

Having looked at the existing law approximation commitments resting on the shoulders of the Ukrainian authorities, in this section the analysis moves to legal approximation falling outside the bilateral and multilateral frameworks currently in force. As a starting point, we should like to investigate if Ukraine, following its application for EU membership, is under a general obligation to approximate its domestic law with the EU *acquis* in its entirety (section 3.2). Having dealt with this fundamental issue, we proceed to look more closely at the idiosyncrasies of law approximation in the pre-accession context. Bearing in mind the wide suite of EU sources of law, approximation with EU primary law (section 3.3) and EU secondary legislation and other sources (section 3.4) are discussed in turn.

3.2 Alignment with the EU acquis as a conditio sine qua non *of EU membership*

As already discussed in part 2 of the article, the EU-Ukraine AA, the Energy Community Treaty, and the Civil Aviation Agreement provide lists of EU legal acts which Ukraine has the obligation to approximate its laws with. The legal character of these obligations varies from a strict obligation to comply by pre-determined dates to the best endeavours clauses. Unlike the former EU-Ukraine PCA or the Stabilisation and Association

[71] Commission, 'Communication from the European Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Enhancing the accession process - A credible EU perspective for the Western Balkans' COM (2020) 57 final.

Agreements with the Western Balkan countries,[72] neither of the existing EU-Ukraine binding agreements envisages a horizontal law approximation clause. This, rightly so, triggers a pivotal question about whether Ukraine, as a candidate country, has the obligation to approximate its law beyond the scope of the current commitments analysed earlier. Arguably, in strictly legal terms, there is no binding provision explicitly requiring Ukraine to do so, although it is neither a problem nor a matter that should be remedied by revision of the EU-Ukraine AA. It is submitted that such a horizontal obligation to approximate stems implicitly from Article 49 TEU. Be that as it may, the application for EU membership, followed by the decisions of the European Council to grant Ukraine candidate status and to open the accession negotiations, has put the wheels of Article 49 TEU in motion, meaning that in order to successfully complete its *rapprochement*, Ukraine has to comply with the membership criteria laid down in Article 49 TEU, and specified further in the Copenhagen Conclusions adopted by the European Council in 1993.[73] Thus, for Ukraine to join, it needs to approximate its domestic law with the EU *acquis* in its entirety. The only exceptions will be selected pieces of EU secondary legislation covered by transitional periods regulated in the act on conditions of accession, which will form part of an accession treaty.[74] Traditionally, at that stage, no permanent opt-outs are available to newcomers.[75]

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[72] For instance, Article 70 of SAA EU-Albania reads:

1. The Parties recognise the importance of the approximation of Albania's existing legislation to that of the Community and of its effective implementation. Albania shall endeavour to ensure that its existing laws and future legislation shall be gradually made compatible with the Community acquis. Albania shall ensure that existing and future legislation shall be properly implemented and enforced.

2. This approximation shall start on the date of signing of this Agreement, and shall gradually extend to all the elements of the Community acquis referred to in this Agreement by the end of the transitional period as defined in Article 6.

3. During the first stage as defined in Article 6, approximation shall focus on fundamental elements of the internal market acquis as well as on other important areas such as competition, intellectual, industrial and commercial property rights, public procurement, standards and certification, financial services, land and maritime transport — with special emphasis on safety and environmental standards as well as social aspects — company law, accounting, consumer protection, data protection, health and safety at work and equal opportunities. During the second stage, Albania shall focus on the remaining parts of the acquis. Approximation will be carried out on the basis of a programme to be agreed between the Commission of the European Communities and Albania.

4. Albania shall also define, in agreement with the Commission of the European Communities, the modalities for the monitoring of the implementation of approximation of legislation and law enforcement actions to be taken.

[73] European Council Conclusions, Bulletin EU 6-1993, point 13.

[74] For the most recent example, see A Łazowski, 'EU Do Not Worry, Croatia Is Behind You: A Commentary on the Seventh Accession Treaty' (2012) 8 Croatian Yearbook of European Law & Policy 1.

[75] For a comprehensive overview, see A Łazowski, 'Permanent Derogations and Transitional Arrangements for New Member States of the European Union: Accession Condictiones Sine Quibus Non' in D Fromage (ed), *(Re-)defining Membership: Differentiation in and outside the European Union* (OUP 2024) forthcoming.

3.3 Approximation with EU primary law

Thus far, Ukraine and its law approximation effort have remained largely immune to EU primary law. With the application for membership submitted, and the commencement of accession talks expected in the coming years, the legal alignment needs to expand also to primary sources of EU law. While it is true that the EU Founding Treaties, the Charter of Fundamental Rights, and other primary sources will apply directly to Ukraine upon accession, some legislative changes are required before EU membership materialises.[76] This extends, in particular, to the provisions of the Treaty on the Functioning of the European Union which regulate the basics of the freedoms of the internal market, which are of particular relevance when no secondary legislation has been adopted by the EU to harmonise or unify domestic laws. In this respect, law approximation is not, however, a straightforward affair. *Au contraire*, it is quite a nuanced exercise, indeed. As is well known and firmly established in EU law, including the case law of the Court of Justice, none of the EU Internal Market freedoms is unlimited. Put differently, impediments, obstacles, or outright restrictions to the free movement of goods, persons, services, capital, or right of establishment are permissible providing they serve legitimate objectives and meet the proportionality test.[77] Thus, before accession, it is essential to conduct screening of national laws as to their compliance with the internal market principles, including the case law of the CJEU. As experience proves, it is a resource-thirsty task, which requires time and perseverance. In general terms, it can be conducted in three main stages. As a starting point, it is essential to adopt a roadmap for the screening exercise, which may include a necessary legislative framework. For the European Union, completion of stage 1 may constitute a benchmark that needs to be complied with as a condition for the opening of the internal market chapters as part of Cluster 2 of the EU negotiation framework.[78] Stage 2 comprises a large scale screening exercise whereby national authorities of the candidate country identify national measures which fall within the scope of the relevant provisions of the TFEU (for instance, Article 34 TFEU), verify if they meet one of the TFEU exceptions as well as the case-law-driven mandatory requirements or objective justifications and, if so, whether they meet the proportionality test. A cliché it may be, but successful implementation of stage 2

[76] In accordance with the principle of immediate effect, accession treaties always envisage the principle of immediate effect, meaning that EU law applies to a newcomer as of the date of accession. See S L Kalėda, 'Immediate Effect of Community Law in the New Member States: Is there a Place for a Consistent Doctrine?' (2004) 10 European Law Journal 102; S L Kalėda, 'Intertemporal Legal Issues in the European Union Case Law Relating to the 2004 and 2007 Accessions' in A Łazowski (ed), *The Application of EU Law in the New Member States. Brave New World* (TMC Asser Press 2010).

[77] See P Koutrakos, N Nic Shuibhne, and P Syrpis (eds), *Exceptions from EU Free Movement Law. Derogation, Justification and Proportionality* (Hart Publishing 2019).

[78] This was the case with Serbia. See Screening Report Serbia, Chapter 1, 20 <www.mei.gov.rs/upload/documents/eu_dokumenta/Skrining/screening_report_ch_1.pdf> accessed 20 December 2023.

requires in-depth knowledge of internal market principles, including the case law of the Court of Justice of the European Union. It is important to note that depending on the freedom of the internal market, the screening exercise may not be limited only to EU primary law, but it should also extend to secondary legislation. Directive 123/2006 on services is a case in point in this respect.[79] Put differently, the screening exercise should encompass all sectors included in the Directive as well as a long list of excluded sectors but covered by the TFEU and case law.[80] Finally, in stage 3, when the screening exercise is complete, a decision is made on which national measures need to be revised or repealed, and which may stay in place as justified and proportionate.

It goes without saying that even despite the best efforts, not all national measures will be caught at the early stages of *rapprochement*. Some may simply slip through the net which, after EU membership materialises, may come with a risk of heavy litigation in national courts. The Polish example of the tax discrimination of second-hand cars, falling under the prohibition laid down in Article 110 TFEU, may be a very good example.[81] The complexity of the accession process makes such cases inevitable.

3.4 Approximation with EU secondary legislation not listed in existing EU-Ukraine agreements

By now, Ukrainian administration and law makers are familiar with legal approximation with EU regulations and directives. After all, the annexes to the EU-Ukraine AA (and, for that matter, to the Energy Community Treaty and the EU-Ukraine Civil Aviation Agreement) are filled with lists of such legal acts. However, with EU membership on the horizon, numerous layers of complexity are added to the mix.

To begin with, the existing practice of not differentiating between EU regulations and directives for law approximation purposes requires a fundamental change. While in a pure association context, equalising these two legal instruments did have merits and was openly envisaged by the EU-Ukraine AA,[82] it is no longer fit for purpose when it comes to EU accession. This is a direct consequence of the different legal character assigned to EU regulations and directives by the creators of the former European Economic Community. In accordance with Article 288 TFEU,

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[79] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L376/36.

[80] See further U Stelkens, W Weiß and M Mirschberger (eds), *The Implementation of the EU Services Directive. Transposition, Problems and Strategies* (TMC Asser Press and Springer 2012).

[81] Case C-313/05 *Maciej Brzeziński v Dyrektor Izby Celnej w Warszawie* ECLI:EU:C:2007:33. See further A Łazowski, 'Half Full and Half Empty Glass: The Application of EU Law in Poland (2004-2010)' (2011) 48 CML Rev 503.

[82] For instance, Article 2 of Annex XVII to the EU-Ukraine AA provides that: 'an act corresponding to an EU Regulation or Decision shall as such be made part of the internal legal order of Ukraine'.

EU regulations are directly applicable in the Member States and, as per consistent case law of the Court of Justice, national laws may not replicate EU regulations, but their role is limited, if at all, to filling in the gaps left by the EU legislator or adopting domestic legal acts to facilitate direct applicability.[83] Consequentially, many existing and future Ukrainian laws and bylaws which approximate the national law with EU regulations will have to be repealed as of the date of accession to the European Union. They will be replaced by directly applicable EU regulations, which by the time of accession should be published in the Ukrainian language in a Special Edition of the Official Journal of the European Union.

Compliance with EU regulations may, however, be tricky at a number of levels. For instance, Regulation 492/2011 on the rights of workers, which gives effect to the principle of non-discrimination as laid down in Article 45 TFEU, is – *prima facie* – fully self-executing.[84] However, in order to comply with its crystal-clear prohibitions of discrimination in terms of access to jobs, remuneration, trade unions, domestic laws and practices will have to be scrutinised. Furthermore, as per established case law of the Court of Justice, the right to education for children of migrating workers creates for primary carers, who cannot benefit from the immigration rights under Directive 2004/38 on EU citizens' rights,[85] the right to reside in the host Member State of the European Union.[86] This will have to be reflected in the Ukrainian immigration law.

Another very good example is EU legislation on judicial cooperation in civil and commercial matters. *Prima facie*, it may look like a simple exercise. In the great majority of cases, it is composed of EU regulations, which will become directly applicable after accession to the European Union.[87] However, as the recent self-screening exercise conducted by the

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[83] See, *inter alia*, Case 39/72 *Commission of the European Communities v Italian Republic* ECLI:EU:C:1973:13. For an academic appraisal, see, *inter alia*, RH Lauwaars, 'Implementation of Regulations by National Measures' (1983) 10 Legal Issues of European Integration 41; A Łazowski, 'Regulations as a Source of EU Law' in A Łazowski and A Sikora (eds), *EU Regulations in Practice. Legislative and Judicial Approaches* (Hart Publishing 2024) forthcoming.

[84] Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union [2011] OJ L141/1.

[85] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L158/77. For an academic appraisal, see, *inter alia*, E Guild, S Peers and J Tomkin, *The EU Citizenship Directive: A Commentary* (2nd edn, OUP 2019).

[86] See, for instance, Case C-310/08 *London Borough of Harrow v Nimco Hassan Ibrahim and Secretary of State for the Home Department* ECLI:EU:C:2010:80; *Case C-480/08 Maria Teixeira v London Borough of Lambeth and Secretary of State for the Home Department* ECLI:EU:C:2010:83.

[87] See, for instance, Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L351/1.

Ukrainian Ministry of Justice shows, at some point before accession, it will have to be verified whether Ukrainian law will require changes to facilitate the direct application of the EU regulations in question.[88] EU regulations, while almost fully self-executing, may come with a fair amount of case law of the Court of Justice. For instance, Regulation 261/2004 on compensation for flight delays and cancellations has been supplemented by very prolific jurisprudence coming from the Court at Kirchberg.[89] This, too, has to be taken into account when approximation efforts are made by Ukraine.

In contrast to EU regulations, EU directives are not directly applicable, and they always require transposition to national law.[90] In this respect, the application for EU membership does not change much as the same law approximation methodology applies in the association and the membership context. Accession to the European Union, however, will bring in this respect one big qualitative change. Ukrainian laws and bylaws giving effect to EU directives will be legal transplants no more as they will become formal transposition measures due for notification to the European Commission.

Since the obligation to approximate extends now to the EU *acquis* in its entirety, attention will have to be paid to EU legal instruments other than EU regulations and directives. Firstly, contrary to the common perception and wording of Article 288 TFEU, EU decisions are not always individual acts akin to administrative decisions known from domestic legal systems. *Au contraire*, some EU decisions are applicable *erga omnes*, thus requiring legal approximation.[91] Secondly, in the realm of criminal law, many pre-Lisbon instruments remain in force and require transposition to Ukrainian law. This, in particular, extends to EU framework decisions which in the period between the Treaty of Amsterdam and the Treaty of Lisbon remained the key legal instrument for EU criminal law.[92] Bearing in mind the similarities between EU directives and framework decisions, the same law approximation methodology will have to be fol-

[88] Legal Gap Assessments on file with the authors courtesy of the PravoJustice Project, which is assisting the Ukrainian Ministry of Justice.

[89] Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 [2004] OJ L46/1. See further M Bobek and J Prassl (eds), *Air Passenger Rights. Ten Years On* (Hart Publishing 2018).

[90] See, *inter alia*, S Prechal, *Directives in EC Law* (2nd edn, OUP 2005).

[91] For a comprehensive assessment, see F Cherubini, 'Decisions under the Law of the European Union: "You May Be Six People, But I Love You"' (2022) 41 Yearbook of European Law 117.

[92] See further, *inter alia*, A Łazowski and B Kurcz, 'Two Sides of the Same Coin? Framework Decisions and Directives Compared' (2006) 25 Yearbook of European Law 177; MJ Borgers, 'Implementing Framework Decisions' (2007) 44 CML Rev 1361. On the changes introduced by the Treaty of Lisbon. see C Ladenburger, 'Police and Criminal Law in the Treaty of Lisbon. A New Dimension for the Community Method' (2008) 4 European Constitutional Law Review 20.

lowed to ensure compliance. This includes the flagship instrument of EU criminal law – the European Arrest Warrant – which will be a difficult EU legal act to approximate.[93] It is a far-reaching fast extradition mechanism based on cooperation between courts, without the involvement of political institutions (as is the case with traditional extradition). Furthermore, it requires extradition of own citizens, and therefore full compliance by Ukraine will require revision of Article 25 of the Ukrainian Constitution.[94]

Overall, more attention will also have to be paid to EU soft law instruments, which may take many shapes and forms, not to mention varied functions.[95] As already argued, taking account of the prolific case law of the Court of Justice is a *conditio sine qua non*.

A final point is required at this stage of the analysis. While it would have been tempting to plan and to proceed with law approximation in fast-track mode, this may not always be an optimal solution. As already mentioned, many pieces of EU secondary legislation may be approximated as legal transplants, perfectly operational ones, even way ahead of accession. However, in the case of many other EU legal acts, their application is inextricably linked to EU membership. Put differently, they can start to apply only when a country becomes an EU Member State, and thus it makes very little sense to approximate national law when the prospect of EU accession is far on the horizon. To demonstrate this phenomenon, it is fitting to put under the microscope a selection of legal acts forming EU criminal law.[96] As far as the first group of legal acts

[93] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L190/1.

[94] For an academic appraisal, see, *inter alia*, S Alegre and M Leaf, *European Arrest Warrant. A Solution Ahead of Its Time?* (Justice 2003); R Blekxtoon and W van Ballegooij (eds), *Handbook on the European Arrest Warrant* (TMC Asser Press 2005); N Keijzer and E van Sliedregt (eds), *The European Arrest Warrant in Practice* (TMC Asser Press 2009); L Klimek, *European Arrest Warrant* (Springer 2015); A Łazowski and V Mitsilegas (eds), *The European Arrest Warrant at Twenty. Coming of Age?* (Hart Publishing 2024) forthcoming.

[95] See, *inter alia*, M Eliantonio, E Korkea-aho and O Stefan (eds), *EU Soft Law in the Member States. Theoretical Findings and Empirical Evidence* (Hart Publishing 2021); P L Láncos, N Xanthoulis and L A Jiménez, *The Legal Effects of EU Soft Law. Theory, Language and Sectoral Insights* (Edward Elgar 2023).

[96] See V Mitsilegas, *EU Criminal Law* (2nd edn, Hart Publishing 2022).

is concerned, the defence rights directives are a case in point.[97] Each of them may be approximated in the early stages of *rapprochement*. As the recent self-screening exercise conducted by the Ukrainian Ministry of Justice proves, Ukrainian law is largely in compliance with this package of EU legal acts. At the same time, it is way too early to proceed with approximation with EU legal acts governing mutual recognition in criminal matters.[98] Since they may only apply when Ukraine becomes a Member State, the law approximation effort should be pushed back until the last stages of *rapprochement*.

4 Conclusions

Approximation of national law with the EU *acquis* goes back, in the case of Ukraine, almost as far as its independence from the Soviet Union. From the early days of its Statehood, Ukraine concluded the EU-Ukraine PCA, which envisaged a general obligation to make the best endeavours to approximate in selected areas of EU law listed in Article 51(2) of the EU-Ukraine PCA. While this provision belongs now to a bygone era, it did make a difference, even though, for a myriad of legal and political reasons, legal alignment has not always been a success. With profound consequences, a lot hinged on the simple fact that for many years Ukraine and its society were torn between *rapprochement* with the West and with the East. The EU-Ukraine AA, signed in dramatic consequences, has tilted the centre of gravity to the West. Since then, Ukraine has switched gear in the approximation of its laws with the EU *acquis*. In the wake of

[97] Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings [2010] OJ L280/1; Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings [2012] OJ L142/1; Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty [2013] OJ L294/1; Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings [2016] OJ L297/1; Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings [2016] OJ L65/1; Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings [2016] OJ L132/1.

[98] See, *inter alia*, Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties [2005] OJ L76/16; Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention [2009] OJ L294/20; Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union [2008] OJ L327/27; Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters [2014] OJ L130/1.

the full-scale Russian invasion, Ukraine has made its final choice and applied for EU membership. As this article argues, this means that the law approximation gear has been switched once again. At the same time, it has added complexity to the process of bringing the Ukrainian lawbook and practice up to EU standards. Many changes will come at this precarious time for Ukraine, the Ukrainian nation, and its business community. Thus, legal alignment and the steps leading to accession in the European Union will have to be handled with care.

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THE EU AND THE MASS INFLUX FROM UKRAINE: IS THERE A FUTURE FOR TEMPORARY PROTECTION?

Enes Zaimović*

Abstract: In an unexpected turn of events, Council Directive 2001/55/EC and the status of temporary protection became an inevitable choice of the EU when dealing with the largest displacement of individuals since World War II. What was once believed to be a forgotten reminiscence of the past within the Common European Asylum System stands now at the heart of the EU's response to the mass influx caused by the Russian aggression in Ukraine. And while arguably bringing a fresh change to EU asylum law, the current success of temporary protection is still only of a temporary nature given the Commission's New Pact on Migration and Asylum and the proposed repeal of the Directive. The article aims to tackle the use of temporary protection at the EU level in 2022 and 2023 and explore the question of its relevance in EU law more than two decades after the adoption of the currently employed legal framework of temporary protection within the Common European Asylum System.

Keywords: temporary protection, mass influx, EU asylum law, temporariness of protection, Council Directive 2001/55/EC, Common European Asylum System

1 Introduction

In 2023, temporary protection remains an unexpected 'mainstream' of the EU's migration and asylum policy and has become a synonym for protecting those fleeing the consequences of the Russian aggression in Ukraine. The numbers confirm the previous statements: the status of temporary protection has been granted to millions of Ukrainian and oth-

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er designated third-country nationals in all the EU Member States.[2] In the context of the Common European Asylum System, this situation is unprecedented – and so is the use of temporary protection's existing legal basis in EU law.

Council Directive 2001/55/EC (hereinafter: the Directive) is a more than 20-year-old protection instrument which established a protection scheme never amended or activated before 2022. Not to mention that I am referring to an EU Directive whose fate initially seemed to be sealed in the light of the Commission's 2020 proposal for a New Pact on Migration and Asylum. Ironically, it is exactly the framework of the Directive that was in 2020 labelled as 'no longer responding to Member States' current reality'.[3] The fact that the Directive and its framework are now at the heart of the EU response to the large-scale movement of Ukrainians could be proving the opposite and requires that the value and importance of the Directive be addressed once again.

What is the rationale behind this proposition? First, it is the fact that providing some form of sensible and immediate protection to individuals fleeing from their homes in large numbers never felt easier from the perspective of EU law. Temporary protection was provided to Ukrainian nationals swiftly, on a group basis and without the need to examine the situation of each individual applicant. The use of the only group-based protection scheme within the Common European Asylum System (hereinafter: CEAS) provided Member States' asylum systems with enough breathing space to handle the sudden arrivals of hundreds of thousands of third-country nationals, while the beneficiaries of temporary protection were instantly provided with a set of harmonised rights across all of the EU Member States. How important this was can only be demonstrated when one compares the current legal response with the one employed by the EU Member States in 2015, when calls for activating the framework of the Directive in response to the Syrian refugee crisis were not heeded.[4]

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2 Eurostat, '30 April 2023: Almost 4 Million with EU Temporary Protection' (*Eurostat,* 9 June April 2023) <https://ec.europa.eu/eurostat/statisticsexplained/index.php?title=Annual_asylum_statistics#Decisions_granting_temporary_protection>. I refer to temporary protection here as a *status*, in spite of its definition in EU law. The reasons behind this are mainly related to the fact that beneficiaries of temporary protection are provided with a set of harmonised rights defined by Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof (Temporary Protection Directive) [2001] OJ L212.

3 Commission, Proposal for a regulation of the European Parliament and the Council addressing situations of crisis and force majeure in the field of migration and asylum (Crisis Regulation Proposal) [2020] COM/2020/613 final, part 3.1 'Evidence-based policy-making' of the Explanatory Memorandum.

4 Danielle Gluns and Janna Wessels, 'Waste of Paper or Useful Tool? The Potential of the Temporary Protection Directive in the Current "Refugee Crisis"' (2017) 36 Refugee Survey Quarterly 62.

Secondly, the rather 'unproblematic' response of some Member States, for whom the Directive's broad language was now apparently sufficient to grant protection to millions of third-country nationals, appeared to many as particularly surprising also in the light of the proposed New Pact on Migration and Asylum. Why is this so? The very first 'activation' of the Directive in more than 20 years following its adoption will one day probably be hailed as a success story – at least from the standpoint of its effectiveness and the achieved collective effort in creating a safe haven for individuals fleeing war-torn Ukraine.

Yet the Directive was a dead letter of EU law until March 2022 and notwithstanding its success, it is apparently still not predestined to become the next big thing of EU asylum law. On the contrary, the Directive's fate is still rather uncertain as not long ago it was set to be repealed and completely replaced with the new Crisis Regulation[5] and the status of immediate protection: a novel, more, stringent form of protection in terms of its personal scope that simultaneously builds on more complex (and, most importantly, more complicated) solutions regarding the issue of solidarity among Member States.

This article aims primarily to reflect on the use of the Directive and temporary protection in 2022 and 2023 and on the Commission's 2020 Proposal for a Crisis Regulation: is the eventual repeal of the Directive a welcome change of EU asylum law? At first, the article examines this question from the perspective of the solidarity and burden-sharing mechanism anchored within the Directive: is there a lesson to be learned from the inaugural activation of the Directive on the Common European Asylum System and its rules relating to solidarity and responsibility? And if not, are there any other relevant factors and parts of its framework that would justify the Directive's continuing existence? This article will try to untangle these questions also by looking at the practice of providing temporary protection by Central and Eastern European EU Member States (hereinafter: CEE Member States), particularly the Czech Republic and Slovakia, former *nay-sayers* on the issue of relocation quotas and on EU asylum law in general, with their own and distinct historical experience and that are currently leading the way in addressing the Ukraine crisis.

2 Temporary Protection Directive: twenty years later

The framework of the Directive is one of the outcomes of the European experience in protecting individuals fleeing the armed conflict in Bosnia and Herzegovina (1991-1995) and Kosovo (1999).[6] The experience is not unfamiliar to the Czech Republic or other post-communist countries,

[5] Commission, Proposal for a regulation of the European Parliament and the Council addressing situations of crisis and force majeure in the field of migration and asylum (Crisis Regulation Proposal) [2020] COM/2020/613 final.

[6] Maryellen Fullerton, 'A Tale of Two Decades: War Refugees and Asylum Policy in the European Union' (2011) 10 Washington University Global Studies Law Review 1, 98; Guy Goodwin-Gil and Jane McAdam, *The Refugee in International Law* (3rd edn, OUP 2007) 340.

which were at the time providing this type of group-based protection based on their own national legislations.[7] The contemporary version of temporary protection status, and the subsequent evolution of its original form, the status of *temporary refuge*,[8] is therefore not an unknown form of protection in the whole European context. On the contrary, the use of national schemes of temporary protection independently by European countries in the 1990s signalled the subsequent need for a common protection status to be established at the level of EU law: an instrument specifically designed to deal with exceptional situations of mass influx and aiming to establish a shared minimum standard of harmonised rights for holders of such status.[9] In terms of the Directive's history, there is hardly anything to add beyond these introductory remarks. Over the course of the next twenty years, the Directive and its status of temporary protection were left out as the only non-amended and unexplored option offered by the complex of CEAS.[10] This, however, changed with the Russian aggression on Ukraine and the subsequent adoption of the Council Implementing Decision establishing the existence of a mass influx of displaced persons from Ukraine on 4 March 2022.[11] Suddenly – and more than twenty years later – the Directive was no longer a 'dead letter' of EU law.

Not much has been written about the Directive over the past years as the implementation of its framework was only a theoretical prospect of resolving past issues. One of the exceptions in this regard is the continuing work of Meltem Ineli-Ciger. In her work, she outlined a number of arguments in favour of implementing the content of the 'old' Temporary Protection Directive already back in 2016 when the number of asylum seekers in Europe hit an absolute peak.[12] In line with this argumentation and before moving to the issue of solidarity, I will briefly mention some of the Directive's normative aspects, which I believe proved relevant when defining the EU's current response to the mass influx from Ukraine – despite the 'primordial' character of the Directive.

First, as noted by Meltem Ineli-Ciger, the Directive employs a wide definition of its potential beneficiaries, so-called '*displaced persons*'. In terms of its personal scope, the purpose of the Directive is to address the protection needs of various categories of individuals fleeing their countries of origin. Subject to a final decision of the Council, the status of temporary protection can be provided to:

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[7] Věra Honusková, 'The Czech Republic and Solidarity with Refugees: There Were Times When Solidarity Mattered' (2018) 9 Czech Yearbook of International Law 242.

[8] Meltem Ineli-Ciger, *Temporary Protection in Law and Practice* (Brill Nijhoff 2018) 4.

[9] Temporary Protection Directive, Art 1.

[10] Meltem Ineli-Ciger, 'Time to Activate the Temporary Protection Directive' (2016) 18 European Journal of Migration 1, 14.

[11] Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection [2021] OJ L71.

[12] Meltem Ineli-Cigler (n 9).

> third-country nationals or stateless persons who have had to leave their country or region of origin, or have been evacuated, in particular in response to an appeal by international organisations, and are unable to return in safe and durable conditions because of the situation prevailing in that country, who may fall within the scope of Article 1A of the Geneva Convention or other international or national instruments giving international protection […].[13]

The Directive, in particular, mentions and refers to (i) persons who have fled areas of armed conflict or endemic violence, and (ii) persons at serious risk of, or who have been the victims of, systematic or generalised violations of their human rights.[14] The list of potential beneficiaries is, however, not exhaustive, making the framework of the Directive potentially capable of addressing situations not legally covered either by refugee (asylum) status or subsidiary protection status.[15]

The final decision in determining the personal scope of temporary protection lies in the discretion of the Council:[16] the Directive provides that the Council decision establishing the existence of a situation of mass influx includes, *inter alia*, a description of the specific groups of persons to whom the temporary protection applies.[17]

Secondly, and even more importantly, temporary protection is a group-oriented status and an exceptional measure[18] made for exceptional circumstances which involve the existence of *mass influx*,[19] a situation in which there could be a real risk that asylum system(s) will be unable

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[13] Temporary Protection Directive, Art 2(c).

[14] ibid.

[15] This aspect of temporary protection refers to the problem of the so-called *protection gaps*: especially those that are a by-product of the protection system established by the 1951 Refugee Convention and its 1967 Protocol. It is well known that not all individuals legitimately in need of protection can be, *ratione materiae*, provided with refugee status as codified by the 1951 Refugee Convention. In this respect, see Volker Turk and Rebecca Dowd, 'Protection Gaps' in Elena Fiddian-Qasmiyeh, Gil Loescher, Katy Long and Nando Sigona (eds), *The Oxford Handbook of Refugee and Forced Migration Studies* (OUP 2014) 238; MJ Gibney argues that the 'humanitarian objective', ie the broad personal scope of protection that surpassed the limits of the definition of refugee as provided by Article 1 A of the 1951 Convention was one of the main advantages of the temporary protection status in the European context of the late 1990s: Matthew J Gibney, 'Between Control and Humanitarianism: Temporary Protection in Contemporary Europe' (1999) 14 Georgetown Immigration Law Journal 690-691.

[16] Temporary Protection Directive, Art 5(1).

[17] ibid, Art 5(3).

[18] ibid, Art 2(a).

[19] Temporary Protection Directive, Art 2(d) provides that for the purpose of the Directive, 'mass influx' means '*arrival in the Community of a large number of displaced persons, who come from a specific country or geographical area, whether their arrival in the Community was spontaneous or aided, for example through an evacuation programme*'.

to process this influx without adverse effects for its operation.[20] A *prima facie* approach taken by the Directive in providing protection then adds to the practical dimension of temporary protection as a flexible and pragmatic tool of international protection.[21] A *prima facie* approach requires no individual assessment of a person's claims, making the temporary protection status capable of not overwhelming the asylum system of any Member State, for protection is afforded to the pre-described group at once.[22] To put it another way and with regard to the EU's response to the mass influx from Ukraine, Member States were in 2022 able to primarily focus on the reception conditions of temporary protection beneficiaries rather than on lengthy qualification proceedings concerning each individual seeking protection in the EU. Considering the number of individuals fleeing the well-known consequences of Russian aggression, this was probably the only sensible option on how to respond to the situation efficiently and in a timely manner.

Thirdly, as Ineli-Ciger argues, the Directive introduces a 'clear list of obligations that Member States have towards temporary protection beneficiaries'.[23] The list of rights guaranteed by the Directive is long and proves the complexity of temporary protection status in EU law. Many will oppose a separate mention of rights anchored by the Directive, for there is nothing new or revolutionary about the fact that the Directive guarantees certain rights to its beneficiaries. By doing so, the Directive in fact provides an even lower standard of treatment compared to refugee or subsidiary protection status. Yet the added value of the Directive lies in how these rights are afforded and the fact that temporary protection in EU law is conceived as an intermediate status not prejudging the eventual recognition of refugees.[24] With regards to the process of allocating protection, I refer to the above-mentioned *prima facie* approach to the grant-

[20] Considering the wording of the Temporary Protection Directive, the existence of a situation in which a mass influx renders an asylum system unable to operate regularly is not a prerequisite for the implementation of the EU's temporary protection regime. According to Art 2(a) of the Temporary Protection Directive, temporary protection 'means a procedure of exceptional character to provide (…) immediate and temporary protection to such persons, in particular if there is also a risk that the asylum system will be unable to process this influx without adverse effects'. On the other hand, the existence of a mass influx usually has at least some negative impact on the overall functioning of the asylum system concerned, notwithstanding the rather unclear definition of mass influx adopted by the Temporary Protection Directive. This conclusion is also supported by Achilles Skordas. See Daniel Thym and Kay Hailbronner, *EU Immigration and Asylum Law: A Commentary* (2nd edn, CH Beck 2016) 1064. In this respect, see also Hélène Lambert, 'Temporary Refuge from War: Customary International Law and the Syrian Conflict' (2017) 66(3) International and Comparative Law Quarterly 723–732.

[21]

[22] Meltem Ineli-Ciger (n 9) 25. Nevertheless, in some situations, the Directive also employs the opposite principle, ie individual determination of the relevant facts. Article 28 of the Directive carefully lists grounds enabling Member States to exempt a *person* from temporary protection. Any considerations regarding the application of exclusion under Art 28(2) of the Directive implicitly presuppose the individual assessment of a person's conduct.

[23] Meltem Ineli-Ciger (n 9) 25.

[24] Temporary Protection Directive, Art 3(1).

ing of protection. With regard to the aspect of complexity, certain rights anchored by the Directive deserve special reference. It is important in the first place to bear in mind that the Directive and its *may clauses* provide only a minimum harmonised standard to be applied. But even here, the Directive is far from providing completely abstract or irrelevant rights to individuals seeking protection abroad. On the contrary, the Member States are required to facilitate access to suitable accommodation or to provide persons enjoying temporary protection with means to housing.[25] Temporary protection beneficiaries are eligible for obtaining necessary assistance in terms of social welfare as well as for medical care.[26] Subject to certain circumstances, Member States shall also authorise persons enjoying temporary protection to engage in employed or self-employed activities.[27]

Individuals under the age of 18 years are to be granted access to education under the same conditions as nationals of the host Member State.[28] Moreover, the Directive anchors its own provisions on family reunification[29] or the granting of residence permits for temporary protection holders.[30] And, most importantly, the take on the temporary protection is, at least in law, meant to be in line with Member States' international obligations arising from the 1951 Refugee Convention and the 1967 Protocol.[31]

As previously noted, individuals enjoying temporary protection are therefore able to apply for asylum at any time, and applications not processed before the end of the temporary protection must be completed afterwards.[32] Another dominant aspect of the Directive lies in its burden-sharing mechanism and rules related to solidarity which were missing in the debates on the design of solidarity and responsibility-sharing measures in the New Pact on Migration and Asylum.[33] I will elaborate on the Directive's burden-sharing mechanism further in this paper.

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[25] ibid.

[26] Temporary Protection Directive, Art 13(2).

[27] ibid, Art 12.

[28] ibid, Art 14.

[29] ibid, Art 15.

[30] ibid, Art 8.

[31] Temporary Protection Directive, Recital 10, provides that 'This temporary protection should be compatible with the Member States' international obligations as regards refugees. In particular, it must not prejudge the recognition of refugee status pursuant to the Geneva Convention of 28 July 1951 on the status of refugees, as amended by the New York Protocol of 31 January 1967, ratified by all the Member States'.

[32] Temporary Protection Directive, Art 17.

[33] Daniel Thym, 'Temporary Protection of Ukrainians: The Unexpected Renaissance of "Free Choice"' (*EU Immigration and Asylum Law and Policy Blog*, 7 March 2021) <https://eumigrationlawblog.eu/temporary-protection-for-ukrainians-the-unexpected-renaissance-of-free-choice/> accessed 25 May 2023.

3 Temporary protection and solidarity: a burden sharing mechanism like no other

Arguably, the post-2015 period in EU asylum law is still marked by a search for the ideal or at least generally accepted formula on the matter of solidarity and responsibility among the EU Member States. The recent development in EU asylum law is no exception to this endeavour, as the configuration of particular rules on solidarity and responsibility between the Member States is a key theme in the ongoing reform of the Common European Asylum System and the New Pact on Migration and Asylum.[34] I will not dwell on the content of the substantive changes brought by the proposed Asylum and Migration Management Regulation[35] in its complexity and detail, as this would require additional space in this article given the proposal's complexity.[36] Only the general principles of the proposal will be mentioned here as I believe this will be sufficiently illustrative for the purposes of this article.[37]

First, the newly proposed Asylum and Migration Management Regulation reiterates to some extent the already existing rules on the determination of the Member State responsible for processing individual applications for international protection as established by the Dublin III Regulation subject to certain amendments drawn up by the former Proposal on the Dublin IV Regulation.[38] This ('responsibility') part of the newly proposed regulation must be read in conjunction with the proposed Screening Regulation[39] and the proposal for an Asylum Procedure Regulation[40] outlining a new 'pre-entry phase' which channels certain categories of international protection applicants into a faster border procedure.

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[34] Philippe De Bruycker, 'The New Pact on Migration and Asylum: What It Is Not and What It Could Have Been' in Daniel Thym (ed), *Reforming the Common European Asylum System: Opportunities, Pitfalls, and Downsides of the Commission Proposals for a New Pact on Migration and Asylum* (Nomos 2021) 43.

[35] Commission, 'Proposal for a Regulation of the European Parliament and of the Council on Asylum and Migration Management and Amending Council Directive (EC) 2003/109 and the Proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund]' COM (2020) 0279.

[36] For the overview analysis of the new proposal's content, I will refer to Francesco Maiani, 'Into the Loop: The Doomed Reform of Dublin and Solidarity in the New Pact' in Thym (n 33).

[37] Moreover, it is worth mentioning that the New Pact on Migration and Asylum and its instrument are still under legislative process and their final normative content is, therefore, still subject to potential change.

[38] Francesco Maiani (n 35) 45-48.

[39] Commission, '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) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817' [2020] COM/2020/612 final.

[40] Commission, '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 Directive 2013/32/EU' COM(2020) 611 final.

Second, the proposal on the Asylum and Migration Management Regulation implements within the current 'responsibility' part a new solidarity mechanism which should be *mandatory* but at the same time *flexible*. Here, things become increasingly complicated: the proposed solidarity mechanism builds on the already known relocations as a principal instrument of achieving a fair share in distributing applicants for international protection among the Member States. This time, relocations and the solidarity mechanism are accompanied by new concepts and terminology such as 'solidarity pool', 'critical mass correction mechanism' or, should some of the Member States prefer instead to legally avoid the above-mentioned relocations, alternative forms of solidarity such as financial contributions.[41] A complicated mechanism, for sure, which also has its own relevance for the modified solidarity mechanism related to the proposed Crisis Regulation and immediate protection status, functioning within the same normative structure. When reading the content of the Proposal for a New Pact on Migration and Asylum, it is important to bear in mind the Commission's words of explanation: 'There is currently no effective solidarity mechanism in place, and no efficient rule on responsibility'.[42]

Surprisingly, the problem of solidarity and responsibility in protecting individuals fleeing war-torn Ukraine was not the issue of the day when applying the framework of the 'old' Temporary Protection Directive. Considering the number of Ukrainians and other third-country nationals fleeing the armed conflict in Ukraine and when compared to the events of 2015/2016, this was a remarkable result. As noted by some scholars,[43] a number of factors was probably involved, including the visa-free regime for Ukrainians entering the territories of EU Member States and the absence of any third country in between Ukraine and the EU. But the primary question to be addressed is one of the Directive's merits in achieving this result. After all, the added value of the simplistic and voluntary 'solidarity mechanism' established by the Directive should, perhaps, also not be underestimated.

How does the solidarity mechanism operate within the framework of the Directive? At first glance, the framework of the Directive seems to be well equipped as it contains rules on financial sharing and rules on the sharing of received persons.[44] According to Article 24 of the Directive,

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41 Francesco Maiani (n 35).

42 In this respect, see Commission, 'Proposal for a Regulation of the European Parliament and of the Council on Asylum and Migration Management and Amending Council Directive (EC) 2003/109 and the Proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund]' COM (2020) 0279, Part 1 'Context of the Proposal'.

43 Joanne Van Selm, 'Temporary Protection for Ukrainians: Learning the Lessons of the 1990s?' in Sergio Carrera and Meltem Ineli-Ciger (eds), *EU Responses to the Large-Scale Refugee Displacement from Ukraine. An Analysis on the Temporary Protection Directive and Its Implications for the Future EU Asylum Policy* (European University Institute 2023) 381.

44 Karoline Kerber, 'The Temporary Protection Directive' (2003) 4(2) European Journal of Migration and Law 209.

measures based on its content are to benefit from the European Refugee Fund. Article 25 of the Directive then provides that 'The Member States shall receive persons who are eligible for temporary protection in a spirit of Community solidarity'. Member States are required in advance to state – in figures or at least in general terms – their capacity to receive temporary protection beneficiaries.[45] Notifications of reception capacities represent a crucial step in the process of ensuring *physical solidarity* as information on reception capacity is envisaged to become an integral part of the Council decision establishing the existence of a mass influx and *activating* the protection mechanism of the Directive.[46] However, closer inspection of the Directive's wording reveals here the apparent shortcoming of the system: the Directive specifies no limits, whether minimal or maximal, when obliging Member States to state their capacities.[47] As pointed out by many, the Directive's rules on solidarity are from the start based on the 'double voluntarism' of temporary protection, a striking feature of the EU's take on temporary protection.[48] The reception of displaced persons by Member States is dependent on the will of Member States to state their capacities under Article 25(1) of the Directive. The other side of voluntariness lies in the expression of the consent of displaced persons to be received in the territory of the Member State.[49]

Curiously, the 2022 Council Implementing Decision (2022/382) lacks any specification of the reception capacities of individual Member States, effectively providing leeway for the unprecedented situation of 'free choice' in which Ukrainian nationals were able to choose their host Member State freely.[50] Should the above-mentioned capacities prove in practice not to be enough, the Directive also includes its own quasi-correction mechanism: if the reception capacities of Member States are exceeded, the Council shall examine the situation and *take appropriate action*, including recommending additional support for the Member States affected.[51]

What does this mean? As argued by Meltem Ineli-Ciger, the cited provision empowers the Council to adopt binding measures, including relocations of the temporary protection beneficiaries from the Member

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[45] Temporary Protection Directive, Art 25(1).

[46] ibid, Art 5(3). Moreover, the Member States have agreed not to apply Article 11 of the Temporary Protection Directive which essentially prohibits the secondary movements of temporary protection beneficiaries. See the Council Implementing Decision, recital 15.

[47] The ambiguous wording of the Directive could be supporting the conclusion that Member States are, as a matter of law, not obliged to receive temporary protection holders at all. In this respect, see Meltem Ineli-Ciger (n 7) 157.

[48] Commission, 'Study on the Temporary Protection Directive Final Report' (January 2016) <https://home-affairs.ec.europa.eu/pages/document/012016-study-temporary-protection-directive_en> accessed 10 June 2023.

[49] Temporary Protection Directive, Art 25(2).

[50] Thym (n 32).

[51] Temporary Protection Directive, Art 25(3).

States most affected.[52] Meltem Ineli-Ciger then argues that the Council might take into consideration various factors when defining the distribution formula: GDP, size of the population, unemployment rate, or the past number of asylum seekers and resettled refugees.[53]

Nevertheless, not all authors share the same firm view on the content of the Council's competence under the Directive. Karoline Kerber contends that the Directive leaves rather open the question of whether the 'taking of appropriate action' means the additional distribution of persons.[54] Other authors share the same reluctance in giving a definitive meaning to this particular provision of the Directive.[55]

The Directive does not further elaborate on the matter of solidarity and responsibility among the Member States. While it is true that the text of the Directive also refers to the possibility of transferring beneficiaries of temporary protection to another Member State, the factual cooperation of the Member State requested is, in this case, mandatory and, therefore, questionable in practice. And most importantly, the Directive requires here again the consent of the displaced persons to be transferred, making the prospects of such transfers in some cases arguably even less realistic, despite the will of Member States to conduct the transfer of the individuals concerned.[56] In spite of this, the Directive's (un)intentionally minimalistic approach might prove appealing to many – at least to those who prefer abstract to casuistic legal solutions. Notwithstanding this debate, the Directive is without doubt producing results at the moment, and it does so without needing to normatively outline every possible scenario in detail. If this is the case for Ukrainians fleeing their country of origin, why should the notion of such *voluntary* solidarity not be prioritised over its *mandatory* counterpart as well in the future?

Obviously, one should not be too naive. As noted by some authors, the voluntary mechanism that counts in the first place on the provision of protection 'in *the spirit of the Community*' could be seen as a system securing not many guarantees to establish solidarity between the Member States and as a mere reminiscence of the solidarity shown to the individuals fleeing the horrors of the armed conflict in the former Yugoslavia.[57] After all, the Directive was one of the first instruments adopted within the framework of the CEAS and it reflects the experience of European countries in providing protection in similar situations at the dawn of EU asylum law. As further demonstrated using the example of some Member States' responses to the mass influx of Ukrainians, the burden-sharing

[52] Meltem Ineli-Ciger (n 9) 31.

[53] ibid 32.

[54] Kerber (n 43) 212.

[55] Skordas (n 19) 1099.

[56] Temporary Protection Directive, Art 26(1).

[57] Nataša Chmelíčková, 'Legislativní reakce Evropské komise na migrační krizi aneb spíše zamyšlení nad nesnesitelnou těžkostí bytí směrnice 2001/55/ES o dočasné ochraně' in Lenka Pítrová (eds), *Aktuální právní aspekty migrace* (Leges 2016) 55.

mechanism anchored within the Directive is producing positive results because the Member States precisely *want it* to do so. This applies in particular to the EU Member States reluctant in the past to contribute to resolving well-known deficiencies of EU law, especially the discrepancies in the allocation of responsibility for examining asylum applications caused by the Dublin regulation's infamous criteria of irregular entry.

4 A look into the past and the present: Czech Republic, V4 countries and migration

In 2015, the Czech Republic, Slovakia, and other Central-European countries gave a deliberate 'no' to relocation quotas and embarked on becoming the *naysayers* and self-proclaimed rebels[58] of the Community: an endeavour which culminated in the ECJ judgment of 2 April 2020 in Joined Cases C-715/17, C-718/17 and C-719/17[59] in which the ECJ concluded that the Czech Republic, Poland, and Hungary had failed to meet their obligations by not taking part in the mandatory relocations of international protection applicants. Back then, the Czech Republic committed to relocating 12 individuals from Greece. After relocating these individuals, the Czech Republic suspended the implementation of all its obligations.

Seven years later and with more than 430,000 temporary protection visas issued, the Czech Republic became the Member State hosting the largest number of displaced persons from Ukraine per capita.[60] Slovakia, Hungary, and Poland became the new 'frontline' States of the Union. Poland is now hosting a little less than one million displaced persons. In an unexpected turn of events, the former *naysayers* have shown solidarity with individuals fleeing the consequences of Russian aggression. What changed?

Some of the reasons behind the activation of the Directive and the sudden commitment of the CEE Member States in providing a safe haven for Ukrainians had already been outlined after the beginning of the armed conflict in Ukraine.[61] I find them all to be of importance, including the existence of a visa-free regime for Ukrainian citizens, yet needing certain clarification, especially with respect to the historical experience

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[58] Joined Cases C-715-17, C-718/17 and C-719-17 *European Commission v Poland, Czech Republic and Hungary* ECLI:EU:C:2019:917, Opinion of AG Sharpston, para 141.

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

[60] Ondrej Plevak, 'Czechia Hosts Most Ukrainian Refugees Per Capita' (*Euractiv*, 24 February 2023) <www.euractiv.com/section/politics/news/czechia-hosts-most-ukrainian-refugees-per-capita/> accessed 31 May 2023.

[61] Meltem Ineli-Cigler, '5 Reasons Why: Understanding the Reasons Behind the Activation of the Temporary Protection Directive in 2022' (*EU Immigration and Asylum Law and Policy*, 7 March 2022) <https://eumigrationlawblog.eu/5-reasons-why-understanding-the-reasons-behind-the-activation-of-the-temporary-protection-directive-in-2022/> accessed 31 May 2023.

of these Member States which I believe is one of the main reasons for their commitment to protecting individuals fleeing Ukraine. As rightly argued by some, Europe is known for its double standards in providing protection to certain categories of asylum seekers depending on where they come from.[62]

But this was hardly a novelty for Ukrainians before the commencement of the Russian aggression in February 2022. Legal practitioners and immigration attorneys in the Czech Republic and Slovakia could argue that Ukrainians were to some extent subject to their own double, and often nothing less than discriminatory, standards when dealing with the Czech or Slovak immigration authorities. This is not to say that the Czech or Slovak response to the Syrian refugee crisis would hypothetically be the same in 2022 as the one related to the Ukrainian mass influx, but both the population of the Czech Republic and Slovakia has undoubtedly had to take a different stance to the issue of mass migration recently. One way of understanding what changed is by defining what is at stake in the ongoing Russo-Ukrainian war.

After all, the Czech Republic, Slovakia or Poland were former victims of the Soviet Union's expansionist politics in Eastern Europe. Think of the invasion of Czechoslovakia in 1968, which crushed the ideal of democratisation in the socialist Czechoslovakia, or the aftermath of the Hungarian revolution in 1956 which led to the exile of more than 200,000 Hungarians and the execution of the country's president Imre Nagy. The Polish have an even more haunting experience of Russian and Soviet expansionism, which spans several centuries. As aptly put by the Slovak Minister of Foreign Affairs Miroslav Wlachovsky, no one in Slovakia wants to have the Russian Federation as his first neighbour.[63] The same would hardly be perceived differently in Hungary or Poland. The point is that most of the Central and Eastern European Member States underwent, be it in different forms, the reality Ukraine is experiencing today, and this is part of a collective memory passed onto younger generations.

But the case of providing aid to Ukrainians by the Central and Eastern European Member States is at the same time more complex. The migration part represents, in my opinion, only one aspect of this effort. The CEE Member States (with the exception of Hungary[64]) and the United States of America were arguably the first to push for the large and sys-

[62] ibid.

[63] RSI, 'Foreign Minister: No One in Slovakia Wants to Have Russia for Neighbor' (May 2023) <https://enrsi.rtvs.sk/articles/topical-issue/327832/foreign-minister-no-one-in-slovakia-wants-to-have-russia-for-neighbour> accessed 5 June 2023.

[64] Hungary has primarily been focused on providing humanitarian and financial aid to Ukraine. Nevertheless, Viktor Orban's government continuously threatens to end the support to Kiev and to block the collective EU aid to Ukraine. More recently, the new prime minister of Slovakia, Robert Fico, joined this rhetoric. In this respect, see Reuters, 'Most EU Leaders Back New Ukraine Aid; Hungary, Slovakia Voice Doubts' (October 2023) <https://www.reuters.com/world/europe/eu-broadly-supports-more-cash-ukraine-needs-time-work-out-details-2023-10-27/> accessed 1 November 2023.

tematic transfer of arms to Ukraine. With no intention of following the 'appeasement logic' that military aid to Ukraine equals a further escalation of the conflict and no chance for peace between Ukraine and the Russian Federation, the Czech Republic sent the first train carriage loaded with military aid to Ukraine already on 27 February 2022, three days after the beginning of the armed conflict.[65] Since then, the Czech Republic, Slovakia and Poland have provided Ukraine with hundreds of pieces of heavy military equipment and with billions of euros in financial aid.

The second rationale for the voluntary commitment of the CEE Member States in protecting millions of Ukrainians could in the long run be of a *purely* political nature – especially in relation to the proposed New Pact on Migration and Asylum. There are in fact signs that this argument is not just of hypothetical value. When the recent news about the achieved political agreement[66] between the Member States on the New Pact on Migration and Asylum spread in the Czech news, the prime minister Petr Fiala and the minister of the interior Vít Rakušan soon had to respond to accusations formulated by the Czech parliamentary opposition labelling the general acceptance of the New Pact on Migration and Asylum by the current government to be 'unthinkable treason'.[67]

It would make no sense to reproduce the whole parliamentary debate on this issue. Most importantly, the minister of the interior stressed in reply to these remarks that solidarity among the Member States within the New Pact on Migration and Asylum would take the form not just of relocations, but also of alternative measures, including the financial contributions or capacity building of frontline Member States, and that the Czech Republic and other CEE Member States would seek to secure certain exceptions within this new framework, considering the number of Ukrainians residing in their territories. In his later TV appearance, the minister reiterated that mandatory relocations remain a 'red-line' for the Czech government. Most curiously, the prime minister and the minister of the interior also noted that after the temporal end of temporary protection, the Czech Republic would become a 'clear' beneficiary of solidarity funds within the New Pact, suggesting that many Ukrainian nationals would probably enter asylum procedures after they cease to be protected

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[65] iRozhlas, 'První vlak se zbraněmi a municí dorazil z Česka na Ukrajinu. Vláda chystá další' (February 2022) <www.irozhlas.cz/zpravy-domov/ministerstvo-obrany-zbrane-na-pomoc-ukrajine-cernochova-armada-cr_2202270755_jgr> accessed 31 May 2023.

[66] Commission, 'Statement on the Political Agreement on the New Pact on Migration and Asylum' (June 2023) <https://ec.europa.eu/commission/presscorner/detail/en/statement_23_3183> accessed 12 June 2023.

[67] iDnes, 'Zrada občanů, řekl Babiš k dohodě o migraci. Fiala jí hájil, podržel Rakušana' (June 2023) <www.idnes.cz/zpravy/domaci/snemovna-mimoradna-schuze-migrace-ano-rakusan.A230614_140922_domaci_kop> accessed 15 June 2023; for further information regarding the Czech experience of providing temporary protection and its national temporary protection legislation, see Věra Honusková and Enes Zaimović, 'Temporary Protection as a Bridge between Ukraine and Czechia: An Unexpected Choice of Where to Stay and How' in Jakub Handrlica, Liliia Serhiichuk and Vladimír Sharp (eds), *Ukrainian Law and the Law of the Czech Republic: An Unexpected Encounter* (ADJURIS 2023) 59–66.

by the framework of the Directive.[68]

These are somewhat confusing statements, especially for hundreds of thousands of Ukrainian nationals who are with growing uneasiness awaiting a 'decision' on the type of durable solution to be applied in their situation. Does the end of temporary protection suppose the return of its former beneficiaries to their country of origin,[69] or will these once again be given *free choice* as was in most instances the case of temporary protection provided to individuals fleeing conflicts in former Yugoslavia?[70] The answer to this question is most probably still unresolved by a number of Member States, but the argument of the already depleted reception capacities of the CEE Member States after the Russian invasion will most probably resonate in the future more often.

The third way to understand the approach taken by the CEE Member States is by also acknowledging that these countries had in fact no other option. The framework of the Directive only formalised the already existing effort and gave it the hallmark of a common response. This argument leads us back to the remarks of Meltem Ineli-Cigler at the very beginning of the armed conflict in Ukraine.[71] Unlike many others fleeing their homes in despair, Ukrainian nationals were, legally speaking, *able to seek refuge* in the Member States of the European Union from day one of Russian aggression due to the existing visa waiver regime. One can only recognise the importance of this singular aspect when looking at the plight of Syrian Refugees undertaking dangerous paths to reach Europe at the cost of 'irregularly crossing' the external EU borders and being subject to the Dublin procedure.[72] With no physical or regulatory barrier between Ukraine and the Member States on the eastern frontiers of the Union – especially no *safe third country* in between – hardly anything could have stopped the Ukrainian mass influx.[73]

For the Czech Republic and Slovakia, being two of the EU Member States with some of the largest and most significant Ukrainian diasporas in the EU,[74] time was obviously of a crucial importance. And considering the staggering hundreds of thousands of individuals crossing the

[68] Twitter account of the Czech Minister of Interior, Vít Rakušan (June 2023) <https://twitter.com/Vit_Rakusan/status/1666888162235277323?s=20> accessed 8 June 2023.

[69] Temporary Protection Directive, Art 20.

[70] Honusková (n 6).

[71] Meltem Ineli-Ciger (n 60).

[72] On legal constraints in securing legal paths to the EU for asylum seekers without entry visas or any other residence permit in light of the Court of Justice's decision C-638/16 (*X & X v État belge*) and the ECtHR's decision in *MN and Others v Belgium* (Appl No 3599/18), see Thomas Spijkerboer, 'Coloniality and Recent European Migration Case Law' in Vladislava Stoyanova and Stijn Smet, *Migrants' Rights, Populism and Legal Resilience in Europe* (CUP 2022).

[73] Meltem Ineli-Cigler (n 60).

[74] Eurostat, 'Ukrainian Citizens in the EU' (November 2022) <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Ukrainian_citizens_in_the_EU> accessed 30 May 2023.

EU-Ukrainian border only days after the beginning of the Russian invasion, reliance on individualised asylum procedures was implicitly out of the question. Rather, both the Czech Republic and Slovakia immediately resorted to the use of alternative group-oriented measures with a legal basis in their respective national legislations.

The Slovak government did not even hesitate to wait for the Council Implementing Decision and activated its national variant of temporary protection under the Slovak Act on Asylum.[75] Similarly, the Czech Republic started as early as on 26 February 2022 with the process of granting temporary leave to stay visas to Ukrainian nationals on a group basis.

While the Czech Act on the Residence of Aliens still presupposes the existence of an individualised thirty-day procedure in which the existence of reasons preventing the alien's return to the country of origin is examined,[76] the proceedings concerning applicants from Ukraine took after 24 February 2022 a completely different form, despite the explicit wording of the law. The long-term visa option was later in fact even widely promoted in the public by the Czech Ministry of the Interior at the price of implicitly neglecting the possibility of entering the asylum procedure separately. And while providing its holders with a less favourable standard of rights[77] than in the case of subsidiary protection status,[78] the irresistible technical advantage of providing Ukrainian nationals with only a stamped visa instead of a biometric residence permit card[79] was the apparent ef-

[75] Government of Slovakia, 'Proposal for a declaration of temporary refuge pursuant to § 29 para 2 of Act no 480/2002 Coll on Asylum' (February 2022) <https://rokovania.gov.sk/RVL/Material/26992/1> accessed 15 June 2023.

[76] Act no 326/1999 Coll on the Residence of Aliens in the Territory of the Czech Republic, § 33 (1) (a) read in conjunction with § 169t (3) of the Act on the Residence of Aliens in the territory of the Czech Republic.

[77] Holders of a temporary leave to stay long-term visa (dlouhodobé vízum za účelem strpění) in the Czech Republic are not allowed to engage in any gainful activity without the permission of the Czech Labour Office, they are not part of the public health or social security system, nor are they eligible for housing assistance.

[78] I use the status of subsidiary protection as a point of reference here primarily for reasons connected to the definition of a risk of *serious harm*, a prerequisite for granting subsidiary protection. Article 15(c) of the Qualification Directive provides that serious harm means a 'serious and individual threat to civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict'. Considering the well-known scale of the conflict in Ukraine and the continuous 'presence' of Russian bombing attacks also in distant parts of western Ukraine, I believe that the majority of Ukrainians would satisfy the threshold for the granting of subsidiary protection. The situation could, however, be different with respect to refugee (asylum) status. A number of doctrinal works raise the question of whether individuals fleeing the armed conflict fall under the grounds of persecution by the Refugee Convention. Another issue is represented by the infamous and disputed *individualisation* criterion. Nevertheless, some authors argue that Ukrainians fleeing the armed conflict in their country of origin may fulfil the definitions of refugee. In this respect, see eg Hugo Storey, 'Are Those Fleeing Ukraine Refugees?' in Sergio Carrera and Meltem Ineli-Ciger (eds), *EU Responses to the Large-Scale Refugee Displacement from Ukraine. An Analysis on the Temporary Protection Directive and Its Implications for the Future EU Asylum Policy* (European University Institute 2023).

[79] Act no 325/1999 Coll on Asylum, § 59a.

fectiveness of the whole process. When the capacity of the Czech MoI's Immigration Offices reached a peak, visas were issued in public libraries or special reception centres all over the country, demonstrating that solutions can be found within a short time.[80]

As already noted, the long-term visa option was far from comparable to the rights provided by the Qualification Directive and the status of subsidiary protection, and there are good reasons to believe that the Czech Republic would, without the activation of the Directive, still push for an alternative *prima facie* (national) protection regime instead of relying on an individualised international protection procedure, making the final standard of treatment even more uncertain and dependent on its discretion. But precisely this changed with the inaugural activation of the Directive and with the late March 2022 entry into force of the new Act on Certain Measures in Connection with Armed Conflict in Ukraine Caused by the Invasion of the Russian Federation:[81] the so-called Czech *Lex Ukraine* which implemented the Council Implementing Decision, including the definition of *displaced persons* within the Czech legislation. All visas granted to Ukrainian citizens, starting from 24 February 2022, were from then on considered to be temporary protection, effectively levelling the content of protection for all Ukrainian long-term visa/temporary protection holders.

5 Crisis regulation. A way forward?

To conclude the previous part, the Directive's rules related to solidarity and responsibility-sharing among the Member States evidently did not play a significant part in defining the help provided to Ukrainian citizens in 2022 and 2023. Put in slightly different words, it is not the Directive's notion of voluntary protection and solidarity that should be credited for persuading even the *naysayers* to assume a significant role in the EU's current response to the largest displacement of people since World War II. As demonstrated above, there are apparent extra-legal reasons at stake here which should be given primary consideration when speaking of reasons behind the activation of the Directive in 2022. For many, this was in fact hardly surprising.[82] Indeed, some speak of the increased politici-

[80] František Trojan, 'V pražském kongresovém centru začalo fungovat centrum pro ukrajinské uprchlíky' (*Respekt*, 4 March 2022) <www.respekt.cz/agenda/v-prazskem-kongresovem-centru-zacalo-fungovat-centrum-pro-ukrajinske-uprchliky> accessed 30 May 2023.

[81] Act no 65/2022 Coll on certain measures in connection with the armed conflict on the territory of Ukraine caused by the invasion of the Russian Federation.

[82] Meltem Ineli-Cigler, 'Reasons for the Activation of the Temporary Protection Directive in 2022: A Tale of Double Standards' (Asile Project, October 2022) <www.asileproject.eu/reasons-for-the-activation-of-the-temporary-protection-directive-in-2022-a-tale-of-double-standards/> accessed 13 May 2023.

sation of access to protection within the EU,[83] and the current response to the 2022 mass influx could indeed become a testament to this observation. But, on the other hand, such a conclusion itself does not render the framework of the Directive *a priori* useless. Even recent events have demonstrated the practical validity of the Directive and that there are lessons to be learned from its inaugural activation, although not on the pressing issue of solidarity.

What turned out to be of particular relevance with regard to the mass influx of Ukrainians was, as demonstrated above, a *prima facie* or a group-based approach to protecting those in need. The Directive remains the only group-oriented protection scheme within the CEAS and from its beginning had been meant to cope with situations where the 'fair weather' instruments of CEAS would fail to work properly. This proved to be true in February 2022. But if this was the only added value of the Directive, then one could rejoice when seeing the Commission's proposal for the Crisis Regulation: the only group-protection instrument was intended to be replaced by another one, albeit with a different name. However, when speaking of the Commission's proposal for the Crisis Regulation, one has to be aware of the more fundamental changes the Crisis Regulation introduces in EU law.[84]

Not surprisingly, the proposal for the Crisis Regulation has already been subject to the criticism of scholars and NGOs.[85] However, the Crisis Regulation was, at least in its form as a Commission proposal, far from bringing only negative changes to EU asylum law. There were, in fact, several areas and concepts of the Crisis Regulation's framework and the proposed immediate protection status which attempted to remedy some of the well-known shortcomings of the current Directive.[86] First, the Com-

[83] Lucas Rasche, 'Ukraine: A Paradigm Shift for the EU's Asylum Policy?' (Delors Centre, March 2022) <www.delorscentre.eu/en/publications/detail/publication/ukraine-a-paradigm-shift-for-the-eus-asylum-policy> accessed 13 May 2023.

[84] Note that the Crisis Regulation is still under legislation process which could dramatically change its final normative content. This equally applies to the novel status of immediate protection which was originally proposed by the Commission in its proposal. In fact, the very recent legislative changes to the Commission's proposal no longer contain provisions on the status of immediate protection. This could, however, change in the future. In this respect, see Council of the European Union, 'Proposal for a Regulation of the European Parliament and of the Council addressing situations of crisis and force majeure in the field of migration and asylum – Mandate for negotiations with the European Parliament' 2020/0277 (COD).

[85] ECRE, 'Alleviating or Exacerbating Crises? The Regulation on Crisis and Force Majeure' (2021) <https://ecre.org/wp-content/uploads/2021/03/ECRE-Policy-Note-32-Crisis-February-2021.pdf> accessed 13 May 2023; Amnesty International, 'Position Paper: The Proposed Crisis Regulation' (March 2021) <www.amnesty.eu/wp-content/uploads/2021/03/AI-position-paper-on-Crisis-Regulation-.pdf> accessed 13 May 2023.

[86] H Deniz Genç and Aslı Şirin Öner, 'Why Not Activated? The Temporary Protection Directive and the Mystery of Temporary Protection in the European Union' (2019) 7(1) International Journal of Political Science & Urban Studies 15; Meltem Ineli-Ciger, 'Has the Temporary Protection Directive Become Obsolete? An Examination of the Directive and Its Lack of Implementation in View of the Recent Asylum Crisis in the Mediterranean' in Celine Bauloz and others (eds), *Seeking Asylum in the European Union: Selected Protection Issues Raised by the Second Phase of the Common European Asylum System* (Brill 2018) 245.

mission's proposal for the Crisis Regulation employed a gradually less abstract definition of a triggering event for granting immediate protection: a *situation of crisis*.[87] The Regulation made it clear that the existence and scale of a mass influx rendering Member States' asylum, reception or return system non-functional is to be measured in relation to the population and the GDP of the Member State concerned, providing therefore at least certain interpretation guidelines missing within the current Directive.[88]

Obviously, the definition of the triggering event was and still remains far from clear. The follow-up aspect lay therefore in the activation mechanism as this is an equally crucial part of the process. Until recently, it was deemed virtually impossible to secure a qualified majority within the Council to activate the framework of the Directive by declaring the existence of a mass influx. Now, the responsibility for the issuing of the implementing decision for the purpose of activating the framework of the Crisis Regulation and granting immediate protection was to be shifted to the Commission, arguably making the prospect of applying the framework of the Crisis Regulation more feasible in the future.[89]

The third aspect concerns the rights secured by the Crisis Regulation and the status of immediate protection. To some extent, this was the moment when the offer met the demand. The very concept of temporary protection and the Directive itself were often criticised for taking part in the gradual erosion of the refugee protection regime.[90] One can see the relevance of these claims in the suspension of access to asylum procedures for up to three years (with the Crisis Regulation, the suspension of the asylum procedure pending the duration of immediate protection could occur only for up to six months with the possible extension of immediate protection not exceeding one year) and in providing temporary protection beneficiaries with a less favourable set of rights that come with the status.

There are a couple of ways to sort out this problem. One could either think of adapting the existing asylum procedures and international protection proceedings to a *prima facie* approach in granting protection – and there are precedents for this in the practice of States outside Europe,[91] or at least by making use of a *prima facie* approach within individualised (but accelerated) international protection procedures.[92] In fact, a number

87 Crisis Regulation Proposal, Art 1(1).

88 ibid, Art 1(2).

89 ibid, Art 11.

90 Esin Küçük, 'Temporary Protection Directive: Testing New Frontiers?' (2023) 25(1) European Journal of Migration and Law, 29.

91 Jean Francois Durieux, 'The Many Faces of "Prima Facie": Group-Based Evidence in Refugee Status Determination' (2008) 25 Refuge: Canada's Journal on Refugees 2.

92 Nikolas Feith Tan and Meltem Ineli-Ciger, 'Group Based Protection of Afghan Women and Girls Under the 1951 Refugee Convention' (2023) 72 International and Comparative Law Quarterly 816.

of EU Member States resorted in 2015 and 2016 to applying *prima facie* procedural modalities within individual status determination procedures in response to the arrivals of Syrian and Eritrean nationals onto their territories.[93] The second route could consist of securing a higher protection standard while making access to asylum procedures more accessible for its beneficiaries.

The latter was the case of immediate protection as a proposal for the Crisis Regulation providing beneficiaries of immediate protection with an equal set of rights provided to subsidiary protection beneficiaries[94] under the proposal for the Qualification Regulation.[95] This is a higher standard than the one provided to temporary protection beneficiaries.[96] Other than that, the framework of the proposed Crisis Regulation is, generally speaking, hardly comparable to the existing Directive, especially on the issue of solidarity. The Crisis Regulation was from the start intended to operate specifically within the framework to be established by the New Pact and its proposal for the Asylum and Migration Management Regulation with the 'mandatory but flexible' solidarity mechanism it introduces. In fact, the framework of the Crisis Regulation and both of the exceptional situations it addresses, the already mentioned situation of crisis and the situation of force majeure,[97] are still envisaged to constitute a system of rather serious derogations to rules established by the instruments proposed by the New Pact on Migration and Asylum.[98] However, where one can see apparent differences between the two are in the personal scope of both protection instruments. The initially proposed group-protection status of immediate protection established a far narrower definition of displaced persons. Under Art 10(1) of the Commission's proposal, protection was to be applied to those who are facing a high degree of risk of being subject to indiscriminate violence in exceptional situations of armed conflict. Considering the potential challenges arising in the future from, for example, mass migration caused by climate change,[99] this was

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93 In this respect, see also UNHCR, 'Discussion Paper Fair and Fast: Accelerated and Simplified Procedures in the European Union' (July 2018) <www.refworld.org/docid/5b589eef4.html%20> accessed 31 October 2023.

94 Crisis Regulation Proposal, Art 10(2).

95 Commission, 'Proposal for a regulation of the European Parliament and of the Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents' COM/2016/0466 final, 2016/0223 (COD) (Qualification Regulation).

96 Meltem Ineli-Ciger, 'Immediate Protection in the New Pact on Migration and Asylum' in Thym (n 33) 157.

97 Crisis Regulation Proposal, Art 7(1).

98 ibid, Art 2 and Arts 4–9.

99 Frank Biermann and Ingrid Boas, 'Preparing for the Warmer World: Towards Global Governance Systems to Protect Climate Refugees' (2010) 10(1) Global Environmental Politics 74.

already back in 2020 a missed opportunity to have a broad protection instrument combining a *prima facie* approach to granting protection with a broad definition of potential reasons forcing the individual to leave his or her country of origin.

The question of personal scope was, obviously, not a controversial issue when defining the current response to the mass influx of Ukrainians, but it could in fact be of significant relevance in the future. After all, considering the scale of the present conflict, the majority of Ukrainian citizens would still be eligible for a different kind of protection on the grounds of the existence of armed conflict in their country.[100] This, on the other hand, would not apply vice versa to individuals fleeing their homes for any other reasons related to, say, endemic violence in the country of origin or general or systematic violence of human rights, reasons for flight already described by the Directive more than two decades ago. With the Proposal for the Crisis Regulation, individuals with a legitimate need of protection are left unprotected due to the protection gap created by the Crisis Regulation's limited personal scope of protection. These and many other categories of forced migrants would therefore have to seek protection within (exclusively national) statuses prescribed by the legislations of each Member State, making their prospects of obtaining the protection needed even more dubious.[101] The broad personal scope of temporary protection is the aspect of the Directive far ahead of its time, while the newly limited scope of immediate protection makes the latter apparently unfit for the future.

Where temporary protection keeps its relevance is the still-silent issue of temporariness of protection. I am well aware that this argument might seem controversial at first sight, but one of the temporary protection's fundamental aims was, at least in the past, to seek paths for the repatriation of each individual once protection is no longer needed.[102] Why is this aspect of the Directive worth mentioning? Because this is not a new approach in providing protection to those fleeing their countries of origin and one could expect at least some States to resort to this logic of

[100] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (Qualification Directive) OJ L337, Art 15(c).

[101] I will use the Czech legislation here as an example. The Czech Act on the Residence of Aliens in the Territory of the Czech Republic lists in its § 179 reasons for not enabling an alien to depart to his country of origin. The inability to depart to a country of origin under this provision is a prerequisite for granting the discretionary status of long-term temporary leave to stay visa. Pursuant to § 179 (2) of the Act, the return of an alien is deemed to be in violation of law if it contradicts Article 2 to 6 ECHR. The scope of protection here goes far beyond the scope of subsidiary protection. However, in practice, a temporary leave to stay visa has rarely been granted by the Czech authorities. Moreover, no judicial remedy is available to unsuccessful applicants. In this respect, see § 171 (1) (a) of the Czech Act on the Residence of Aliens in the Territory of the Czech Republic.

[102] Matthew J Gibney, 'Between Control and Humanitarianism: Temporary Protection in Contemporary Europe' (1999) 14(3) Georgetown Immigration Law Journal 690-691.

protection at some point. The aspect that temporariness reiterates here – only if possible in the situation of the individual concerned – a consequence already predicted by the Refugee Convention's cessation clauses: part of the definition of refugee was long neglected in the European context as the price of pushing for the permanency of refugee protection.[103]

There are in fact reasons to believe that the temporariness of protection could become a strategy on how to bring on board all States – even the least cooperating ones embracing national identity arguments in the field of migration – when providing protection in situations of a mass influx. This is, perhaps, the realistic 'counterweight' needed when balancing the needs of individuals seeking refuge outside their countries with the seemingly opposed needs of States, trying until now to escape their international law obligations on many occasions. This was the original aim of temporary protection, and the Directive is far from being ill-equipped in this regard. As put more generally by J Fitzpatrick, temporary protection 'may assist democratic states in mediating competing public demands that asylum not be a back door to immigration but that humanitarian ideals be sustained'.[104] Focus on the repatriation of individuals formerly protected is not an illusionary aspect of temporary protection. On the contrary, the framework of the Directive makes it clear that the durable solution anticipated here is the repatriation of an individual (whether voluntary or mandatory),[105] notwithstanding the general rule of the Directive saying that the general laws of Member States on protection and on aliens apply once the protection ends.[106]

Looking at the issue more systematically, one can also see that EU law makes a clear distinction between beneficiaries of temporary protection and individuals protected within the framework of the Qualification Directive. Article 34 of the Qualification Directive explicitly ensures access to integration facilities for beneficiaries of international protection.[107] The aspect of integration is also legally facilitated through the possibility of refugees and subsidiary protection holders to apply for long-term resident status.[108] None of these paths apply to temporary protection beneficiaries. At the same time, nothing here can be understood as definitively concluding that the current episode of temporary protection will need to be resolved with the repatriation of Ukrainians when the Directive's regime hits its temporal three-year limit. Considering the number of Ukrai-

[103] Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) Art 1 C.

[104] Joan Fitzpatrick, 'Temporary Protection of Refugees: Elements of a Formalized Regime' (2000) 94(2) American Journal of International Law 280.

[105] Temporary Protection Directive, Arts 21–23.

[106] ibid, Art 20.

[107] Qualification Directive (n 99) Art 34.

[108] See Art 3(2)(b) of Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (Consolidated text) OJ L132 as amended by Directive 2011/51/EU of the European Parliament and of the Council of 11 May 2011 OJ L132/1.

nians protected, their family and private ties to Member States' societies and the enduring risks stemming from the ongoing armed conflict in Ukraine, 'free-choice' might once again be an inevitable solution.

The idea of temporariness is, however, far from being illegitimate, especially in the context of Ukraine's post-war reconstruction needs. Without a significant portion of its population, Ukraine will hardly be able to rebuild itself as a normal state. The example of Bosnia and Herzegovina illustrates how hard it is for a country to seek the proper organisation and functioning of its institutions thirty years after the war in the former Yugoslavia without its most valuable aspect, people.

6 Conclusion: the enduring relevance of temporary protection?

The question of temporariness deserves the attention of academia not only because of the Directive or the way temporary protection is conceived in EU law. Temporariness seems to be gaining new momentum even with the proposal for the Qualification Regulation and its new provisions obliging national authorities to systematically carry out reviews of refugee and subsidiary protection status.[109] Apparently, the Commission follows here identical logic: the proposal aims to ensure that protection is granted only for as long as the grounds for persecution or serious harm persist and the legal background consists of cessation clauses until now not systematically used in practice by the Member States.[110]

Saying this, the future of temporary protection in EU law remains largely uncertain. But even if there was no future for temporary protection and for the Temporary Protection Directive, there seems to be at least a future for the temporariness of protection. The practices of cessations or *group* cessations are well known to States outside Europe. And so are their implications for the human rights of the individuals affected. In the European context (and, especially, in the context of the European regional system of protection of human rights), these questions have not yet been tackled properly. Precisely because of this, there should be additional focus on the identification of the potential legal limits of temporariness, arising not only from the standards applied when assessing the change of circumstances in countries of origin, but also from the perspective of the utmost importance of human rights instruments protecting the rights of individuals to private and family life. Current European discourse still largely misses out this aspect despite its chances to set the scene. Considering that each application for international protection lodged by Ukrainian citizens will have to be processed once the protection ends, the effect of temporariness could actually be postponed. But if no other durable solution is found for temporary protection holders, the current experience with temporary protection might be the first to challenge these boundaries on a larger scale.

[109] Proposal for a Qualification Regulation, Art 15, 21.

[110] Qualification Regulation Proposal 4.

Formally putting aside the highly theoretical issue of temporariness of protection, the use of the Directive in 2022 and 2023 has proven to be a highly effective step in dealing with the largest migratory flow in Europe since World War II. The solutions offered by the 'old' Directive demonstrated the validity of the long-neglected instrument which was also rightly described as a 'living dinosaur' of EU secondary legislation:[111] the *prima facie* approach in granting protection as well as the broad personal scope of temporary protection are two of the Directive's positive features that should – one way or another – be reflected in the EU's legislation for the future. Formally, the usefulness of the Directive was also acknowledged by the Commission which is now considering keeping the Directive as part of the EU's asylum toolbox.[112] Be that as it may, the more pressing issue will now concern the end of the Directive's regime in 2025. Time is ticking for temporary protection. And the same applies to finding an appropriate answer to what should come after it.

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[111] Thym (n 32).

[112] Commission, 'Communication from the Commission to the European Parliament and the Council: Temporary Protection for Those Fleeing Russia's War of Aggression Against Ukraine: One Year On' COM (2023) 140 final, 24.

A EUROPEAN SYSTEM OF COERCIVE MEASURES: A STUDY IN PROPORTIONALITY AND EFFECTIVENESS*

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Abstract: The European instrument for judicial cooperation in criminal matters, the European Supervision Order, represents an unexploited potential of application that could provide an alternative to the leading cooperation instrument, the European arrest warrant. The use of non-custodial measures may not only strengthen cooperation between Member States, but also increase the dynamics of the whole procedure. Current judicial cooperation is assessed in this Article in the light of the principle of proportionality of the use of preventive measures in general. An important interpretative guide in this respect is the rule tightening the criteria for recognising the possibility of enforcing a custodial measure developed by the Court of Justice of the European Union in the Aranyosi & Căldăraru case. This judgment is of great importance for the principle of mutual recognition, the application of which seems to be strengthened in the judgments of the Tribunal issued in the dispute over the reform of the Polish judiciary system. Therefore, non-custodial measures that form the core of the European Supervision Order, according to the authors, can be a remedy for the challenges that have arisen. The instrument will also be discussed from the point of view of the criterion of efficiency, interpreted, inter alia, as ensuring equal implementation of the objectives of the procedure.

Keywords: European arrest warrant, judicial cooperation in criminal matters, criminal proceedings, European Supervision Order, non-custodial measures.

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1 Introduction

The Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States[5] (hereinafter: EAW Framework Decision) authorises refusal of the executing judicial authority to execute the European arrest warrant (EAW) in specifically set-out cases defined by mandatory[6] and optional[7] grounds for such. However, one can hardly fail to notice a change in case law regarding the interpretation of the principle of mutual recognition of judicial decisions.[8] The cause for the change, a provision of the EAW Framework Decision, holds that it does not modify the obligation to respect fundamental rights.[9]

Council Framework decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on coercive measures as an alternative to provisional detention[10] (hereinafter: ESO Framework Decision) enables the transfer of coercive measures from the Member State in which a person not being a resident is suspected of committing an offence to the Member State in which he or she resides. The supervision measures that should be transposed to the legal systems of Member States belong to a closed catalogue and include the obligation of the person concerned to inform the competent authority in the executing State of any change of residence, an obligation to report at specified times to a specific authority, or an obligation to avoid contact with specific persons in relation with the offence(s) allegedly committed. The ESO Framework Decision sets out also an open catalogue of measures that may exist in the legal system of a Member State, such as an obligation to deposit a certain sum of money or give another type of guarantee, which may either be provided through a specified number of instalments or entirely at once.

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5 Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and surrender procedures between Member States [2002] OJ L190/01.

6 See Art 3 of the EAW Framework Decision.

7 See Art 4 of the EAW Framework Decision.

8 The initial approach of the EU legislator – exemplified in the EAW FD – which promoted automatic recognition based on 'blind trust' with little or no room for fundamental rights scrutiny by the executing agency was met with resistance by national legislators and courts. This prompted the slow evolution of CJEU case law, which, following direct and indirect dialogue with national courts, finally made a decisive move from blind to earned trust in its ruling in *Aranyosi*, which introduced a mechanism for the meaningful scrutiny of respect for fundamental rights before the individuals concerned are surrendered. Valsamis Mitsilegas, 'Mutual Recognition and Fundamental Rights in EU Criminal Law' in Sara I Sánchez and Maribel G Pascual (eds), *Fundamental Rights in the EU Area of Freedom, Security and Justice* (CUP 2020) 270.

9 See Art 1(3) of the EAW Framework Decision.

10 Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention [2009] OJ L294/20.

The major purpose of this article is to examine in what other way than by an automatic execution of the EAW proper can cooperation in the EU in criminal matters and greater effectiveness and efficiency of the entire proceedings be achieved. It needs to be verified, therefore, whether the imperative to scrutinise the proportionality of a coercive measure by the judicial authority of an executing State is not at odds with the principle of mutual recognition of judicial decisions. If the two principles are found not to contradict one another, it will be possible to examine further legal issues such as whether the law as it stands now allows judicial authorities to apply the European Supervision Order (ESO) in response to the issued EAW.[11] Furthermore, this study will attempt to examine – by either proving or disproving – the hypothesis that an alternative use of the ESO instead of the EAW ensures a higher effectiveness of proceedings.

The aim of this article can be perceived from two angles. Firstly, it addresses the international perspective of cross-border cooperation, which involves contemplating the essence and boundaries of the principle of mutual recognition of judgments. Secondly, considerations revolve around the analysis of metrics such as effectiveness and efficiency, which are parameters that are often studied by economic scientists and representatives of various fields of law in relation to national proceedings. The significance of these criteria cannot be underestimated, as the EAW procedure begins with the presumption of a properly and lawfully issued EAW decision. This leads to some questions regarding the legitimacy of such a presumption and its compatibility with the common goal of nations to put an end to impunity. Consequently, it becomes evident that the two perspectives are closely intertwined, with the latter being closely related to the very essence of the principle of mutual recognition of judgments. The decision to elaborate on this issue is motivated by the exceptional nature of EAW proceedings, wherein procedural success is determined by the actions of two national judicial authorities, each acting in accordance with their national law systems.

This article will discuss the main issues related to the EAW issued for the purpose of conducting criminal proceedings, with special emphasis on the preparatory proceedings and pre-trial stage. It must be stressed that an assessment *de lege lata* as to whether the use of the ESO as an alternative to the EAW is legitimate does not take into account the political consequences of the choice made. What the formal-doctrinal method applied here examines is the law in force as reflected in both authoritative juristic literature and judicial decisions. The latter are of particular relevance if courts, having received an EAW to execute, applies to suspects other non-custodial measures.

[11] It seems that citing a discretionary reason for refusal, which is not explicitly provided for in the Framework Decision, may result in a conflict between the principles of mutual recognition and proportionality.

2 Proportionality check by the EAW executing authority: a way to enhance the protection of individual rights?

The principle of proportionality is meant to protect not only Member States against encroachments upon their sovereignty, but also individuals against excessive EU measures.[12] The scrutiny of proportionality is supposed to bring about a situation where the same objective can be achieved, using less onerous measures. Any test of the proportionality of a coercive measure should thus answer three questions: (1) is the objective of the measure applied sufficiently important to justify limiting a fundamental right? (2) is the measure designed to meet the legislative objective? (is it rationally connected to it?) and (3) is the measure used to restrict a right or freedom no more than is necessary to accomplish the objective?[13] A given measure therefore must be rationally connected to the objective and may not be arbitrary, unjust, or based on irrational considerations. In other words, it should be applied in accordance with the law, and any potential infringement of rights must be proportional to the objective.

The requirement of a prior check of the proportionality of an EAW is justified by criticism made in the Commission Report of 11 April 2011.[14] Most Member States have limited the proportionality principle to scrutiny by the warrant-issuing authority. One example of this may be the Polish regulation of the Code of Criminal Procedure (hereinafter: CCP), Article 607b, under which issuing an EAW is inadmissible, unless the interest of the administration of justice calls for it.[15] The national court, when ruling on the issuance of the EAW, should not satisfy itself with only examining the formal legality of the EAW, but should also assess the reasonableness

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[12] Tomasz Ostropolski, 'Zasada proporcjonalności a europejski nakaz aresztowania' (2013) 3 Europejski Przegląd Sądowy 14.

[13] In determining whether a limitation is arbitrary or excessive, it is said that the Court would ask itself whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective. *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 (PC), para 25.

[14] Several aspects should be considered before issuing an EAW, including the seriousness of the offence, the length of the sentence, the existence of an alternative approach that would be less onerous for both the person sought and the executing authority, and a cost/benefit analysis of the execution of the EAW. There is a disproportionate effect on the liberty and freedom of requested persons when EAWs are issued concerning cases for which (pre-trial) detention would otherwise be felt inappropriate. In addition, an overload of such requests may be costly for the executing Member States. It might also lead to a situation in which the executing judicial authorities (as opposed to the issuing authorities) feel inclined to apply a proportionality test, thus introducing a ground for refusal that is not in conformity with the Council Framework Decision or with the principle of mutual recognition on which the measure is based. Report from the Commission on the implementation since 2005 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2007] COM/2007/407 final.

[15] See the Polish Code of Criminal Procedure (Kodeks Postępowania Karnego Dz U 1997 Nr 89 poz 555), Art 607b.

of surrendering the requested person in terms of the nature and gravity of the offence he or she committed.[16]

Importantly, the EAW Framework Decision does not provide for the explicit power to check proportionality by the authority of the executing State. The EAW Framework Decision deals with proportionality checks by the authority of the executing State with respect to the national decision on arrest and not to the EAW that it is based on. An example of the application of the EAW Framework Decision, Article 12(1), comes from a ruling by a court in Stuttgart of 25 February 2010,[17] in which the court held that the principle of proportionality of offences and punishments was not only part of national law, but also constituted a general principle of EU law pursuant to Article 49(3) of the EU Charter of Fundamental Rights (hereinafter: the Charter).[18] Thus, a national decision on arrest is disproportionate when the offence charged is negligible and the expected punishment is not proportional to the negative consequences brought about by the arrest itself. In this context, a German court, assessing proportionality, took into account the right of the requested person to freedom and safety, the cost of formal proceedings, the interest of the issuing Member State in prosecution, and any other measures alternative to the EAW.

For this study, the CJEU decision in *Aranyosi & Căldăraru* is crucial. In it, the Court for the first time went beyond the closed list of grounds for refusing to execute the EAW.[19] The decision put the burden of checking proportionality also on the executing State. While remanding a person in custody by virtue of Article 6 of the Charter,[20] it is argued that it should be ensured that proceedings in the matter of executing a penalty are conducted with due care and that the period of imprisonment is not excessively long.[21] Furthermore, the decision stated that the judicial authority of the executing State should proactively look for measures ensuring the

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[16] Rafał Czogalik, 'Odmowa wydania europejskiego nakazu aresztowania ze względu na interes wymiaru sprawiedliwości' (2018) 2/18 Kwartalnik Krajowej Szkoły Sądownictwa i Prokuratury 81.

[17] As an arrest under German law must conform to the requirements of German constitutional law and since the principle of proportionality forms part of that law, any arrest order must comply with that principle. OLG Stuttgart, 25 February 2010 – 1 Ausl (24) 1246/09.

[18] See Charter of Fundamental Rights of the European Union [2012] OJ C326/405, Art 49.

[19] In Joined Cases *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen*, the Court observed that Art 3 of the Convention confirms the absolute character of Art 4 of the Charter and additionally imposes a positive obligation on the authorities of the issuing State to make sure that every prisoner is deprived of liberty under conditions respecting human dignity. What is more, the authorities need to make certain that the manner the measure is executed does not cause any harm to the prisoner. Hence, respect for Art 4 of the Charter calls for a two-stage test. Joined Cases C404/15 and C659/15 *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen* ECLI:EU:C:2016:198, para 90.

[20] See Art 6 of the Charter.

[21] See Art 52(1) of the Charter.

protection of the rights of the individual.[22] The *Aranyosi & Căldăraru* decision therefore represents a watershed in the CJEU approach to the concept of mutual trust. This judgment confirms a transition from the automatic recognition of decisions based on blind mutual trust to one relying on trust earned in the individual assessment of potential consequences of surrendering the person concerned under specific circumstances. Moreover, the decision stresses the need to assess not only the law, but also how fundamental rights are protected with respect to the requested person.[23]

The requirement of a tailor-made two-stage test developed in *Aranyosi & Căldăraru* was upheld in another CJEU decision announced on 25 July 2018.[24] The Court yet again observed that under special circumstances the principle of mutual recognition of decisions could be limited because the executing judicial authority may refuse to execute an EAW pursuant to Article 1(3) of the EAW Framework Decision. Its refusal has to be based on specific and thorough scrutiny of the case at hand, leading to the conclusion that there is a real risk of infringing the right of the requested person to an independent court. It must be noted, however, that in the Opinion to the decision, the Court did not explicitly refer to the principle of proportionality.[25] However, by invoking the conclusions of the Court's decisions of 17 December 2020[26] and 22 February 2022,[27] the executing judicial authority may refuse to surrender the person concerned if it has evidence of systemic irregularities affecting the judiciary in the issuing Member State.

Having regard to the case law and the position taken by authoritative juristic literature, one tends to favour the view that to strike the right balance in the application of the principle of mutual recognition of decisions, it is necessary to check proportionality in every case by both the issuing

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[22] Ermioni Xanthopoulou, *Fundamental Rights and Mutual Trust in the Area of Freedom, Security and Justice: A Role for Proportionality?* (Bloomsbury Publishing 2020) 71.

[23] Mitsilegas (n 4) 266.

[24] Case C-216/18 *LM Minister for Justice and Equality* ECLI:EU:C:2018:586.

[25] The Court only referred to the Charter, Art 52(1), mentioned earlier, under which any limitation to the exercise of the rights and freedoms recognised by this Charter must be provided for by law and must respect the essence of those rights and freedoms. For more on this, see Xanthopoulou (n 18) 74.

[26] Joined Cases C-354/20 and C-412/20 *L and P v Openbaar Ministerie* ECLI:EU:C:2020:1033, para 51.

[27] In April 2021, Polish courts issued two EAWs against two Polish citizens residing in the Netherlands. The Dutch Court observed that since 2017 there had been systemic or general irregularities in Poland, affecting the right to a fair trial, in particular the right to be heard. In *X and Y v Openbaar Ministerie*, the Court observed that having regard to the collected evidence the judicial authority involved should find that in the circumstances of the case, there was serious and hard evidence to assume that the fundamental right of the person concerned to a fair trial before an independent and impartial tribunal defined in the Charter, Art 47 (second para), had been violated. Joined Cases C-562/21 and C-563/21 *X and Y v Openbaar Ministerie* ECLI:EU:C:2022:100.

and executing judicial authorities.[28] Hence, the principle of proportionality of a measure should be understood more broadly than merely as a requirement to be fulfilled in the issuing State. As part of cross-border cooperation, authorities should be obliged to consider alternative ways of cooperation when the application of the original measure stands in contradiction to the protection of fundamental rights and the rule of law.[29] Thereby, all interests will be safeguarded, being both a part and foundation of the cross-border EU Criminal Justice Area.

3 Leveraging the ESO to mitigate risks arising from restrictions of cooperation in criminal matters

Another step in reinterpreting the operation of the principle of mutual recognition of decisions is viewing it in a tense international context brought about by the reform of the Polish administration of justice. The reform has aroused a great deal of emotions in international juristic discourse. So much so that extreme[30] opinions have arisen, calling the in-

[28] The court then considered the extradition arrest and began by invoking Art 12, first sentence of the Framework Decision. This means that such a decision, even if made in furtherance of an EAW, remained a sovereign act, being unaffected by the Framework Decision. Therefore, any such arrest must be in full conformity, not simply with the implementing statutory provisions, but also with German constitutional norms which include the principle of proportionality. Therefore, a proportionality test of the 'extradition arrest' was also necessary. That the overall process involves two distinct steps is of some importance, as the court was anxious to emphasise, when it said that the proportionality check of a German extradition arrest warrant must not be confused with a proportionality check of the underlying European arrest warrant itself. Many experts hold that, due to the principle of mutual recognition, it is not possible for the executing Member State to check the proportionality of an EAW. However, it must be noted that the Council of the European Union assesses the problem of disproportional EAWs to be a 'priority'. It quoted the Final Report on the Fourth Round of Mutual Evaluations prepared by the Council on 28 May 2009 in support of the emphasised quote. Supreme Court, *Minister for Justice & Equality v Ostrowski* [2013] IESC 24, para 84.

[29] Under an integrative approach, national authorities would be required to consider alternative options to cooperate in cases in which the way originally foreseen would be at odds with the sufficient safeguarding of fundamental rights and the rule of law. Thereby, cooperation is more likely to satisfy the legitimate wish to combat crime and prevent impunity, also across national borders, while at the same time fair account is taken of the rights of the individual involved. See Jannemieke Ouwerkerk, 'Are Alternatives to the European Arrest Warrant Underused? The Case for an Integrative Approach to Judicial Cooperation Mechanisms in the EU Criminal Justice Area' (2021) 29(2) European Journal of Crime, Criminal Law and Criminal Justice 87.

[30] The cited opinion appears to overlook the research findings of global geopolitical institutes examining the level of democracy in individual countries. In this regard, it is important to refer to reports such as the Democracy Index 2021 <https://pages.eiu.com/rs/753-RIQ-438/images/eiu-democracy-index-2021.pdf?mkt_tok=NzUzLVJJUS00MzgAAAGLi-_cxgdOtysN9OdFZg_O-Dpwb0ekf8bErT3YLTijdFNGxbtlQ8QVp3mEzHKzRilRFUJNWizWVyVIxo7Yuy3ZywRtFubczblZP4h5dpz8zg9jjg> accessed 24 July 2023; Freedom in the World 2023 <https://freedomhouse.org/sites/default/files/2023-03/FIW_World_2023_DigtalPDF.pdf> accessed 24 July 2023; or Democracy Report 2023 <https://www.v-dem.net/documents/30/V-dem_democracyreport2023_highres.pdf> accessed 24 July 2023. Taking into account the criteria arising from the constitutional systems of both countries and conducting a preliminary analysis, a significant difference in the classification of Poland and Belarus can be identified.

troduced changes as 'authoritarian backsliding'[31] or a 'Belarusinisation'[32] by reason of disdain for fundamental values, assuming that 'the essential presumption behind the core of the Union do not hold any more'.[33] Such a stigmatising[34] attitude is hugely worrying because if it is adopted by the majority of jurists, it may result in wasting all the EU legal achievements of recent years and, consequently, cause cooperation in criminal justice to collapse.[35] If it comes to that, fleeing abroad from Polish law enforcement agencies will thwart the efforts of judicial authorities to apprehend and punish offenders. Since such an opinion continues to be strongly voiced by some scholars, ignoring it may favour its gradual confinement to the European line of legal thinking.

It follows from CJEU case law that the principle of the rule of law as a value cannot be interpreted only in its substantial aspect, but also in a formal one. The evolution that started with the judgment in *Granaria* of 13 February 1979, in which the Court said that 'that principle also imposes upon all persons subject to Community Law the obligation to acknowledge that regulations are fully effective',[36] and recently continued with judgments concerning Poland unequivocally indicates that the principle of rule of law is ever more widely viewed from the perspective of Community standards. There is no doubt therefore that the CJEU does not perceive the principle of rule of law as an individual fundamental right to judicial protection but also sees it as an obligation to reconstruct hierarchically tied legal norms so that they constitute an overall system

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[31] Monika Nalepa, Georg Vanberg, and Caterina Chiopris, 'Authoritarian Backsliding'. Unpublished manuscript, University of Chicago, Conference: Constitutional Crises and Human Rights (2018) https://www.researchgate.net/publication/326272047_AUTHORITARIA> accessed 25 July 2023.

[32] Dimitry Kochenov and Petra Bárd, 'Rule of Law Crisis in the New Member States of the EU' (2018) Reconnect, Working Paper No 1, July 2018, 24 <https://reconnect-europe.eu/wp-content/uploads/2018/07/RECONNECT-KochenovBard-WP_27072018b.pdf> accessed 8 March 2023.

[33] ibid 25.

[34] Due to significant selectivity, discussing the politics and legal system of a particular country in this manner is likened to a 'rhetorical bubble', ultimately leading to the re-evaluation of the form of further cooperation with the Member State affected by such a flaw. Csaba Varga, 'Rule of Law. Contesting and Contested' (2021) 2 Central European Journal of Comparative Law 245.

[35] Currently, the sole consequence of such actions is the exclusion of Poland from the European Network of Councils for the Judiciary, which is significant in terms of achieving consensus in cooperation regarding constitutional matters, rather than in criminal matters. 'Poland Becomes First Country to Be Expelled from European Judicial Network' (*Notes from Poland*, 29 October 2021) <https://notesfrompoland.com/2021/10/29/poland-becomes-first-country-to-be-expelled-from-european-judicial-network/> accessed 24 July 2023.

[36] Case 101/78 *Granaria v Hoofd produkts chapvoor Akkerbouw produkten* ECLI:EU:C:1979:38.

of formal-procedural guarantees.[37] Accordingly, to this end, the principle of rule of law is called an *umbrella constitutional principle* in accordance with which 'the central moral purpose of the EU rule of law is to guarantee the existence of a legal order where natural and legal persons subject to this order, as a matter of principle, are judicially protected against any eventual arbitrary or unlawful exercise of Community/Union power'.[38]

CJEU decisions concerning the application of custodial coercive measures under the EAW Framework Decision have significantly affected national judiciaries in Member States. For the purpose of further discussion, relying on the established body of thought, two major aspects of this impact will be discussed in detail.

The first is the necessity to apply the modified test set up in *Aranyosi & Căldăraru.*[39] The modification was meant to adjust it to a specific situation so that scrutiny could be 'carried out in the possibly most concrete manner'.[40]

It may seem that for a long time the 'rule-of-law test' in CJEU case law evolved towards creating more grounds for limiting the use of the EAW. The reason for this was the clear risk of a serious breach of the values listed in Article 2 of the Treaty on European Union (TEU) involved in the execution of the EAW. The judgment of the Grand Chamber in Joined Cases C-562/21 PPU and C-563/21 PPU seems to tighten the test criteria. The independence of judges and the impartiality of courts must therefore be examined by answering the question about whether or not the court is established by law, as well as by scrutinizing its composition, member appointment and tenure principles, and the reasons for the recusal or dismissal of its members.[41] The Court observed that the administration of the test:

> presupposes an overall assessment, on the basis of any evidence that is objective, reliable, specific and properly updated concerning the operation of that Member State's judicial system, in particular the general context of appointment of judges in that Member State.[42]

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[37] Laurent Pech, 'The Rule of Law as a Constitutional Principle of the European Union' (2009) New York University School of Law, Jean Monnet Working Paper 04/09, 52–53 <https://jeanmonnetprogram.org/paper/the-rule-of-law-as-a-constitutional-principle-of-the-european-union/> accessed 8 March 2023.

[38] ibid 54.

[39] Theodore Konstadinides, 'Judicial Independence and the Rule of Law in the Context of Non-execution of a European Arrest Warrant: LM' (2019) 56(3) Common Market Law Review 743.

[40] Maciej Taborowski, *Mechanizmy ochrony praworządności państw członkowskich w prawie Unii Europejskiej. Studium przebudzenia systemu ponadnarodowego* (Wolter Kluwer Polska 2019) 393.

[41] Joined Cases C-562/21 and C-563/21 *X and Y v Openbaar Ministerie* ECLI:EU:C:2022:100, para 69.

[42] ibid, para 77.

The already demanding criteria of Stage II were tightened further as it is on the person who is the subject of an EAW that the burden of adducing concrete worrying circumstances was placed. They must show that systemic irregularities will affect the hearing of his or her case. The authority executing an EAW, in turn, should ask the issuing authority for all necessary information.[43] However, already in the LM case, a positive result of the second stage of the test was very difficult to achieve.

> From the perspective of defence lawyers the test is rather disappointing: they must invest too much effort to provide the respective material evidencing potential fair trial violations against the client in the issuing State, with little effect.[44]

The second aspect is the protection of the rule of law in the EU as its fundamental and overriding principle that encompasses the general principles of EU law.[45] In line with the approach aimed at strengthening European ties, the principle of rule of law, as an institutional ideal, should be additionally safeguarded:

> Not only the reform of the enforcement mechanisms, but the reform of the Union as such, as the supranational law should be made more aware of the values it is obliged by the Treaties to respect and also, crucially, to aspire to protect at both the national and supranational levels.[46]

In the face of this approach, it seems rational to believe that:

> Since the State that systemically violates the rule of law needs not be treated equally to other States with respect to the EU law, such an extraordinary reaction in matters involving an EU element would be consistent with this approach.[47]

This leads to the conclusion that the judicial authority whose organisation infringes EU standards will thus issue documents having a systemic flaw. Taborowski observes that '[i]f the judicial authority that issues an EAW does not satisfy the requirement of independence, the document it issues will not be an EAW as defined in the EAW Framework Decision'.[48] However, some controversial ways of reasoning seem to create a deductive thread between the catalogue of sanctions set out in Article 7(3) and Article 7(1) TEU, thus obliterating the difference between the steps distinguished in the TEU.

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43 ibid, paras 83–84.

44 Thomas Wahl, 'Refusal of European Arrest Warrants Due to Fair Trial Infringements' (2020) 4 eucrim 321 <https://eucrim.eu/articles/refusal-of-european-arrest-warrants-due-to-fair-trial-infringements/> accessed 8 March 2023.

45 Konstadinides (n 35).

46 Kochenov and Bárd (n 28) 26.

47 Taborowski (n 36) 411.

48 ibid 405.

The effects produced by the CJEU understanding of the principle of rule of law vis-à-vis the Polish administration of justice reform are noticeable in the cited decisions. Regardless of how they are judged, they create incontrovertible juridical facts, making up the so-called position of European courts and tribunals. However, any limitation of international cooperation seems to be adequate only in the event of a serious and persistent breach (Article 7(2) TEU) as a sanction therefor (Article7(3) TEU):

> As long as the European Council does not decide that there has been a 'serious and persistent' breach of the rule of law as the second step of the Article 7 procedure, execution of an EAW can only be refused in exceptional circumstances, namely if the executing authority acknowledges a real risk of violation of the essence of the right to a fair trial on account of a specific and precise examination of the individual case.[49]

The category of 'exceptional circumstances' thus marks the borderline that, if it is not crossed, makes 'the mechanisms of cooperation between the courts of Member States operate normally'.[50]

The two aspects discussed above represent a departure from the principle of mutual recognition. The judgment in *Aranyosi & Căldăraru* already substantially undermined the principle: '[it] raised the thresholds for cooperation between the Member States by creating more formalities, causing delay and without strengthening legal remedies for the citizen'.[51] In its wake, new grounds for refusal developed, going beyond the EAW Framework Decision, Articles 3 & 4, that had constituted the only limit to the applicability of the EAW until then.[52] The CJEU's attempt to maintain balance by indicating that 'execution of the European arrest warrant constitutes the rule, refusal to execute is intended to be an exception which must be interpreted strictly'[53] does not resolve the impasse. Therefore, this may create a situation where the EAW will no longer be an effective coercive measure.

The EAW has been widely criticised by scholars. Awareness of how vital its application is – to secure a proper course of proceedings – may make one conclude that the developments in the matter undermine the fundamental ideological assumptions, guiding the designers of the area of freedom, security and justice. At this juncture, the ESO should be considered a possible substitute for the EAW. The ESO would reconcile legalism with mutual recognition. A study of decisions of Polish courts may shed new light on the issue.

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[49] Wahl (n 35).

[50] Taborowski (n 40) 383.

[51] André Klip, 'Eroding Mutual Trust in a European Criminal Justice Area without Added Value' (2020) 28(2) European Journal of Crime, Criminal Law and Criminal Justice 109.

[52] Case 123/08 *Netherlands v. Wolzenburg* ECLI:EU:C:2009:616, para 57.

[53] Joined Cases C-354/20 and C-412/20 *L and P v Openbaar Ministerie* ECLI:EU:C:2020:1033.

It should be noted that, consistently with established Polish case law, the execution of an EAW issued in preparatory proceedings does not have to cause detention. This is clearly illustrated by the Supreme Court decision of 26 June 2014 (I KZP 9/14). In that case, the Court rightly found itself incompetent to examine the evidence for issuing the warrant. It observed, however, that a decision to apply provisional detention in connection with an issued EAW was subject to the general principles that guide judicial authorities when imposing a coercive measure. Moreover, the Court invoked Article 257(1) CCP, under which detention in the course of preparatory proceedings is an *ultima ratio* measure.[54] In turn, the Court of Appeal in Katowice in the decision of 8 September 2010 (II AKz 502/10) observed that 'although harmonious cooperation with other EU Member States requires mutual recognition of judicial decisions, including decisions to detain a person, any automatism in such matters is out of the question',[55] thereby allowing the possibility of applying a non-custodial coercive measure. This is of particular importance in the context of mandatory and optional grounds for refusing to execute an EAW. The reasoning cited here is copied in other decisions, for instance in the decision of the Court of Appeal in Kraków of 20 June 2018 (II AKz 291/18), which said that the execution of an EAW did not have to entail detention but that it was possible 'also to apply only a non-custodial coercive measure or not to apply any coercive measure on condition that, despite a non-application of any coercive measure, the surrender of the requested person to a foreign state be possible'.[56] Another decision relevant to this line of argument is the one rendered by the Court of Appeal in Wrocław on 26 April 2021 (II AKz 276/21). The court decided to apply conditional provisional detention in lieu of a financial guarantee. It based its argument on the wording of Article 607k(3) CCP, which states that *a district court may apply provisional detention*. Hence, it has no obligation to do so in view of the fact that '[i]t is a principle of the Polish criminal trial and any such other trial that a suspect answers charges against him/her as a free person, while provisional detention may be applied only exceptionally'.[57]

A closer look at these judicial decisions makes one believe that courts have instruments at their disposal, allowing them to apply a non-custodial measure to non-residents. This option is available also when the judicial authorities of a Member State have issued an EAW. However there is uncertainty as to whether the position adopted by courts means they in fact apply the ESO, without being aware of its execution, or whether this is the application of conditional provisional detention in lieu of a financial guarantee, following from the construction of the EAW in the light of criminal procedure principles. In the next step, it must be considered

[54] Supreme Court Decision (7) of 26 June 2014, I KZP 9/14, para 60.

[55] Decision of the Katowice Court of Appeal of 8 September 2010, II AKz 502/10.

[56] Decision of the Kraków Court of Appeal of 20 June 2018, II AKz 291/18.

[57] Decision of the Wrocław Court of Appeal of 26 April 2021, II AKz 276/21.

whether the ESO can also be applied by adjusting a coercive measure when an EAW has been issued by the prosecuting Member State.

An affirmative answer to the above issue coincides with the principle of minimising coercive measures, formulated in Article 5 of the European Convention on Human Rights.[58] At the procedural stage, this principle is connected to the principle of free appraisal of evidence by the court, which follows also from Polish case law and is seen in the fact that the application of a coercive measure results from an order to apply it and not from an order to issue it.[59] Owing to this, the right to defence is not limited because in the opposite situation, when the EAW is applied automatically, the defence counsel is faced with a *fait accompli* that leaves only the possibility to appeal against the measure ordered without being able to suggest an alternative measure, one securing the proper course of preparatory proceedings.

Yet, it can be seen that the ESO and EAW are two separate legal instruments. They differ in their underlying principles and scope of application.[60] Nevertheless, it is recommended that 'issuing authorities thoroughly consider the application of other available measures'.[61] Neither can it be ignored that the grounds for non-execution of the EAW enumerated in the EAW Framework Decision refer only to special and exceptional situations, where the respective decision cannot be executed. Thus, they are an exception to the rule, restricting the latitude of the executing judicial authority in applying a coercive measure.

Keeping in mind these findings and working on the proposition that non-custodial measures provided for in the ESO Framework Decision should be alternatively applied, when carrying out the obligations imposed by an EAW-issuing authority, jurists need to consider a hypothetical situation. This would involve a Member State judicial authority detaining a suspect and thereby executing an EAW issued by a prosecuting judicial authority in another Member State, one subjected to the procedure provided for in Article 7 TEU. Then, the application of an ESO instead of an EAW, instead of carrying out the two-stage test or refusing to execute the EAW, would be mutually advantageous.[62]

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[58] Louisa Martin and Stefano Montaldo, *The Fight Against Impunity in EU Law* (Bloomsbury Publishing 2020) 164.

[59] Decision of the Kraków Court of Appeal of 5 November 2015 II AKz 415/15.

[60] For more on this subject see Andrea Ryan, 'The Interplay Between the European Supervision Order and the European Arrest Warrant: An Untapped Potential Waiting to Be Harvested' (2020) 5/3 European Papers 1532.

[61] Commission Notice 'Handbook on how to issue and execute a European arrest warrant' [2017] OJ C335/01.

[62] The Federal Constitutional Court (Ger *Bundesverfassungsgericht*) on two occasions refused to execute an EAW issued by a Polish judicial authority, citing the 'rule-of-law crisis': OLG Karlsruhe, 27 November 2020 – Ausl 301 AR 104/19, OLG Karlsruhe, 07 January 2019 – Ausl 301 AR 95/18.

By not interfering so strongly with the sphere of individual freedom, a non-custodial measure, unlike the EAW, is not as strongly affected by the principle of mutual trust. By reason of its subtler nature, a non-custodial measure lays less responsibility on judicial authorities. Hence, one may speculate that the rigorous rules for carrying out the two-stage independence test may not be applicable. Perhaps the ESO could be a reasonable solution when trust in the Polish administration of justice is being eroded and whose status is questioned in the decisions of European courts. Non-custodial measures could be a remedy for the EAW, preventing also offender impunity as there is a danger of offenders trying to take unfair advantage of Poland's judicial crisis.

The undermining of trust in the Polish administration of justice by the decisions of European courts should not carry negative consequences for the functioning of the area of security, freedom and justice. The principle of legalism, being the foundation of the proper operation of law-enforcement and prosecuting agencies within the EU, should be safeguarded regardless of the political situation in a given Member State. This certainly is an integrative approach towards cross-border cooperation in criminal justice that to some extent lessens the deleterious effects of present-day political turmoil concerning Poland:

> Under an integrative approach national authorities would be demanded to consider alternative options to cooperate in cases in which the way originally foreseen would be at odds with a sufficient safeguarding of fundamental rights and the rule of law.[63]

Consequently, instead of 'writing this instrument of cooperation off',[64] the ESO should become a bond guaranteeing the better protection of victims of crime and the public at large.

4 Perspective on the effectiveness and efficiency of the criminal procedure and international cooperation in the context of applying the EAW and ESO

The application of the ESO may also be viewed from the angle of efficiency. It is a cliché to say that effectiveness played a major role in the origins of the measures of cooperation in criminal matters between EU Member States. Effectiveness thus continues to be taken into account in the current application of these measures as a parameter to assess the specific mechanism and its operation.

To analyse the effectiveness of the ESO and EAW respectively, it is necessary first to establish the meaning of the term 'effectiveness' in European legal culture. Its Oxford English Dictionary definition reads: 'The

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[63] Ouwerkerk (n 25).

[64] The European Supervision Order for Transfer of Defendants: Why Hasn't It Worked? <https://www.penalreform.org/blog/the-european-supervision-order-for-transfer-of-defendants/> accessed 7 December 2022.

degree to which something is successful in producing a desired result; success'[65] or, according to Cambridge Dictionary, 'the degree to which something is effective'.[66] In other words, efficiency is about achieving the intended outcome in the right way. Effectiveness is also the principal parameter for assessing various phenomena, actions, or mechanisms. The term is close to efficiency, but there is an essential difference between these two notions, as efficiency is a measure of quality and, on the other hand, effectiveness is a productivity (economic) metric. This difference is clearly recognised in the economic sciences and the use of these terms is scrupulously adhered to, which cannot be said so emphatically of the legal sciences in Europe where these terms happen to be used interchangeably. These linguistic shortcomings often result from frequent translations from European national languages into English and vice versa.

Since the enactment of the first laws, effectiveness, alongside efficiency, has been the principal parameter for assessing the operation of law, which, as a rule, is teleological. The enactment of specific prohibitions and prescriptions was aimed at achieving the effect of eliminating specific types of behaviour by individuals subject to a given authority. The measure of the effectiveness of a law is the degree to which it produces the intended effect, in the right way, with particular attention to the final result, which must realise the entirety of the principles and rules. However, the way law understands effectiveness is not unequivocal and the study of this element often yields to a strictly economic analysis of efficiency. One elaborate theory dealing with the effectiveness and efficiency of law was developed in the philosophical trend known as law and economics.[67] A key claim of this trend is that a law that does not meet minimum efficiency criteria in fact ceases to be law *per se*.[68]

Moreover, law and economics theory is also helpful as it represents efficiency as a component of effectiveness. The former designates the actual possibility of the realisation and application of law, and accordingly achieving an effect.[69] The crucial difference between the two terms based on this theory is that effectiveness ignores the outlay of resources on achieving the right effect in the right way (objective), while efficiency treats it as a critical aspect.

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[65] Oxford Dictionary Online – meaning of 'effectiveness' in English <https://www.oed.com/dictionary/effectiveness_n?tab=meaning_and_use> accessed 3 March 2022.

[66] Cambridge Dictionary Online – meaning of 'effectiveness' in English <https://dictionary.cambridge.org/dictionary/english/effectiveness> accessed 3 March 2022.

[67] Jarosław Bełdowski and Katarzyna Metelska-Szaniawska, 'Law & Economics – geneza i charakterystyka ekonomicznej analizy prawa' (2007) 10 Bank i Kredyt 51.

[68] Jerzy Stelmach, 'Efektywne prawo' in Stanisław Grodziski (ed), *Vetera novis augere. Studia i prace dedykowane Profesorowi Wacławowi Uruszczakowi* (vol 2 Wydawnictwo Uniwersytetu Jagiellońskiego 2010) 958.

[69] Richard Zerbe Jr., *Economic Efficiency in Law and Economics* (Edward Elgar Publishing 2001).

The current development of legal culture and legal doctrine in Europe is paying increasing attention to the parameter of effectiveness in order to examine legal processes in relation to their quality and the achievement of the intended effect (eg in EU law).[70] Therefore, the measure of effectiveness may be applied to the whole legal system or particular regulations and sets of provisions constituting a law institution, mechanism, or process. The EAW and ESO, as part of the body of regulations transposed to national legal systems, belong to trial regulations and directly affect the effectiveness of a criminal trial, as it can influence the execution of all the laws and rules of the process, thus partly creating the final outcome.

In spite of the fundamental nature of this issue, the effectiveness of a criminal trial is not consistently defined. The principal manner in which it is understood gives pride of place to effectiveness with only adequate use of law and economics theory (dominance of efficiency over effectiveness). In this approach, effectiveness is judged chiefly by actual trial efficiency, speed, and economy, and can certainly be called pragmatic. The criminal trial in a broad sense has specific objectives which in the European legal tradition include detection of a crime, identification of its perpetrators, and bringing them to account, ones that also form the foundation of European Criminal Procedure.[71]

The degree to which these objectives are achieved should serve as a main measure of criminal trial effectiveness, ie effectiveness in the strict sense. The criminal trial is an exceptional element of the legal system of any democratic state as it regulates the manner in which the state invades the rights and freedoms of the individual.[72] It is for this reason that criminal trial effectiveness can be viewed differently. The criminal trial, apart from the fundamental universal objectives mentioned earlier, has also secondary objectives and specific axiological values, which ought to be respected.[73] Therefore, the effectiveness measure proves to be more appropriate for this area of law, as it is based on achieving the right outcome – which must meet all the objectives of the process and not just the basic ones.

An example of the recognition of such values is Article 2 CCP, forming part of the Polish criminal procedure.[74] Besides giving expression to the universal objectives in the national context, this provision says that one

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[70] Petra Bárd, 'In Courts We Trust, or Should We? Judicial Independence as the Precondition for the Effectiveness of EU Law' (2022) 27/1-3 The European Law Journal 185.

[71] Roberto E Kostoris, *Handbook of European Criminal Procedure* (Springer Link 2018).

[72] Sarah J Summers, *Fair Trials. The European Criminal Procedural Tradition and the European Court of Human Rights* (Bloomsbury Publishing 2007).

[73] Jerzy Skorupka, 'Znaczenie naczelnych zasad procesu karnego' in Jerzy Skorupka (ed) *Proces karny* (Wolters Kluwer Polska 2022) 124–126; Jerzy Skorupka, 'Cele procesu karnego' in Jerzy Skorupka (ed), *Proces karny* (Wolters Kluwer Polska 2022) 42.

[74] Michał Kurowski, 'Przepisy wstępne – Komentarz do Art. 2 Kodeksu Postępowania Karnego' in Dariusz Świecki (ed), *Kodeks postępowania karnego. Tom I. Komentarz* (Wolters Kluwer Polska 2022).

of the objectives of criminal proceedings is to prevent an innocent person from bearing any responsibility and to ensure that a proper use is made of legal measures provided for in the statute. The protection therefore of innocent persons is a major task of criminal proceedings that judicial authorities should engage in as much as the objectives directly related to the efficiency and economy of the trial. The protection of innocent persons thus is not limited merely to the prevention of a wrongful conviction but includes also adherence to the due process of law.[75] The proper use of measures provided for by law in this context is closely related to respect for the rights of the individual and the adjustment of actions taken to the circumstances of the case. Considering the axiological values of the criminal trial when judging its effectiveness can be viewed as effectiveness in the broad sense. With this approach to effectiveness, all the objectives and values of criminal proceedings should be equally respected in order to make the proceedings generally effective.

This means that one may not sacrifice one objective for another.[76] By way of example, detection of a crime and identification of its perpetrators may not violate due process of law. A criminal trial that would focus chiefly on establishing objective truth may, admittedly, be effective and economically efficient in the eyes of law enforcement agencies, but because it sacrifices specific axiological values, it should not be considered effective in the broad sense. A departure from the pragmatic understanding of criminal trial efficiency and a focus on effectiveness allow judicial authorities to uphold and satisfy the due process of law such that the accused should enjoy, and respect, the interests and dignity of the victim.

Effectiveness is a vital assessment measure also in respect of international judicial cooperation in criminal matters and judicial protection in EU law.[77] Cooperation between EU Member States prior to the enactment of the EAW and ESO was based on traditional instruments regulated by international agreements. This form of cooperation was highly inefficient and was not compatible with the realities the EU functioned in, especially the free movement of persons, goods, and services. The enactment of a new measure was a necessity to which attention had been drawn in EU politics on many occasions.[78]

On 13 June 2002, a framework decision enacted a new cooperation measure – EAW – based on the mechanism of mutual recognition and signified a new simplified form of extradition between the EU Member

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[75] Paweł Wiliński, *Zarys teorii konfliktu w prawie karnym* (Wolter Kluwer Polska 2020) 146.

[76] Jerzy Skorupka, 'Kolizja zasad procesu karnego' in Jerzy Skorupka (ed), *Proces karny* (Wolters Kluwer Polska 2022) 129.

[77] Andrea Biondi, 'Rapports: European Court of Justice: Effectiveness Versus Efficiency: Recent Developments on Judicial Protection in EC Law' (2000) 6(3) European Public Law 311.

[78] Andrzej Górski and Adam Sakowicz, 'Geneza i istota europejskiego nakazu aresztowania' in Piotr Hofmański (ed), *Europejski nakaz aresztowania w teorii i praktyce państw członkowskich Unii Europejskiej* (Wolters Kluwer Poland 2008).

States. The new mechanism was founded on completely different principles as a remedy for the inefficient, inconsistent, and lame earlier methods of cooperation. It was the force of the EAW Framework Decision binding on all Member States as far as its objectives were concerned and the mechanism of mutual recognition built into it that became key to efficient and effective cooperation. Article 1(2) of the EAW Framework Decision clearly said that any EAW had to be executed in accordance with the provisions of the Decision.[79]

It should be noted that the change to uniform cooperation across the EU has greatly improved both effectiveness and efficiency, while the imposition of time limits for the execution of an EAW have significantly contributed to its improvement.[80] Since the early years of the EAW, the time necessary to surrender a requested person has considerably shortened; with traditional extradition, it was about a year. Statistics for late 2005 and early 2006[81] show that the average time for surrendering a requested person after issuing an EAW was 43 days, and if the requested person consented to his or her surrender, this fell to 11 days. An increase in the number of issued warrants,[82] which peaked at 20,226 in 2019 (including 5,665 executed ones), did not cause any significant change of efficiency in this respect. The 2019 statistics show that the average time for surrendering a detainee was 55.75 days and if he or she consented to surrender – 16.7 days. There is no doubt that the EAW brought about a marked increase in the efficiency of international cooperation.[83] Moreover, the EAW made the work of law enforcement agencies far easier, owing to the decentralisation, simplification, and unification of the surrendering procedure of requested persons. Furthermore, the streamlining of a traditionally protracted procedure by introducing and replacing it with the EAW improved effectiveness by enhancing the fundamental guarantee of the right to a hearing within a reasonable time (based on the ECHR and national laws).[84] All in all, the EAW became a remedy for the problems of bringing suspects before prosecuting authorities because under the previous law

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79 See Art 1(2) of the EAW Framework Decision.

80 See ibid, Art 17.

81 Report from the Commission to the European Parliament and the Council on the implementation of Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2020] COM/2020/270 final.

82 The number of issued EAWs grew from about 7,000 in 2005 to 15,500 in 2009 (of which 4,400 were executed). After 2009, the number dropped to 10,000 to 13,000 on average per year in 2010–2014 only to grow again, first in 2015–2018, to 17,000 on average per year. However, in 2020 the number reached as many as 20,226. <https://e-justice.europa.eu/90/EN/european_arrest_warrant/> accessed 02 January 2023.

83 Report from the Commission to the European Parliament and the Council on the implementation of Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2020] COM/2020/270 final.

84 Caroline Savvidis, *Court Delay and Human Rights Remedies. Enforcing the Right to a Fair Hearing 'Within a Reasonable Time'* (Routledge 2016) 95.

in force extradition procedures were limited.[85]

The origins of the EAW lie in the need for efficient international co-operation in criminal matters. Such a strong need, however, did not arise in the case of the ESO. The purpose of this measure was not the need to make substantial improvements to proceedings, but rather to reduce the number of pre-trial detentions. While being a very intrusive measure, pre-trial detention is nonetheless the foundation of the EAW and has contributed to prison overcrowding. The 2004 Hague Programme and 2009 Stockholm Programme recognised the problem of overuse of detention and set the objective of increasing the use of alternative measures as a major EU policy. This means that the origins of the new measure bear a relationship to criminal trial effectiveness. Both overcrowded prisons and overuse of pre-trial detention, being closely interrelated, pose a serious risk to effectiveness by affecting its key aspects such as the use of resources and the achievement of trial objectives. In this case, the objectives ensure the law is obeyed and the due process of law is adhered to.

As explained earlier, the assessment of effectiveness takes into account the outlay of resources, one of them being the use of administration of justice measures in a criminal trial. The EAW system, providing for detention as a default measure for executing a request, has its overuse as a direct consequence. The overuse of custodial coercive measures in the EU Member States is of course a much greater problem that has many causes, but the overuse of pre-trial detention due to the EAW is yet another one that exacerbates the above problem.[86]

The EAW Framework Decision does not formulate any independent reasons for applying pre-trial detention in the course of executing a request. In turn, transpositions made by Member States vary greatly, from considering the EAW as an independent ground for pre-trial detention, through invoking grounds already known to their legal systems, to enacting special grounds (either positive or negative).[87] No matter how the transposition of the EAW Framework Decision is followed, pre-trial de-

[85] Most EU Member States forbade extraditing their citizens to another State, eg in Poland the ban was laid down in the Constitution, Art 55; now, it has been amended to allow for the EAW. Austrian legislation, specifically, *1979 The Austrian law on Extradition and Mutual Assistance in Criminal Matters (Auslieferungs und Rechtshilfegesetz) (ARHG)*, Art 12(1), theoretically still forbids the extradition of Austrian citizens.

[86] Poland is one example. The problem was raised on many occasions in 2002: Memorandum to the Polish Government: Assessment of the progress made in implementing the 2002 recommendations of the Council of Europe Commissioner for Human Rights [2002] CommDH(2007)13, Report of the Commissioner for Human Rights on a visit to Poland 18–22 November 2002 for the Committee of Ministers and Parliamentary Assembly [2003] CommDH(2003)4. The current data also show also that pre-trial detention is overused, which is mentioned in Bartosz Pilitowski, 'Aktualna praktyka stosowania tymczasowego aresztowania w Polsce. Raport z badań empirycznych' (2019) <https://courtwatch.pl/wp-content/uploads/2019/12/tymczasowe_aresztowania_FCWP.pdf/> accessed 8 March 2023.

[87] Andrzej Górski, 'Implementacja europejskiego nakazu aresztowania w państwach członkowskich Unii Europejskiej' in Piotr Hofmański (ed), *Europejski nakaz aresztowania w teorii i praktyce państw Unii Europejskiej* (Wolters Kluwer Poland 2008).

tention in the case of the EAW is overused. One of the major causes may be the profile of the requested persons, many of whom purposefully hide abroad from justice. Such persons, often having no permanent residence, by the very fact they may flee abroad, raise the risk of fleeing from justice, which is a reason for applying provisional detention, for instance in the Polish CCP, to name but one.

Furthermore, there are tendencies in the case law of national courts to lower the requirement threshold for applying pre-trial detention in the case of the EAW (both during its execution and after the surrender of a requested person).[88] This means in turn that under the same circumstances a person subject to an EAW request is in a much worse situation than one for whom an application for pre-trial detention is considered along national principles. The degree to which the Convention principle of minimising coercive measures is observed is highly unsatisfactory in the case of a request for an EAW. The result is an uneven standard of fundamental rights and freedoms applied to people taking advantage of the right of free movement and residence within the EU.

However, the worst situation is that of those who are not residents of either the issuing Member State or the executing Member State. Such individuals will always meet the criteria for applying a custodial measure, regardless of the gravity of their offence or other circumstances of their case, because non-custodial measures are difficult to apply then. This, in turn, argues against the principle of minimising coercive measures and interferes with the due process of law, following from national legal systems and the Convention. At the same time, to uphold the fair trial principle is one of the objectives of the criminal trial whose achievement is a measure of its effectiveness. Consequently, if an objective is achieved only to a lesser degree, trial effectiveness inevitably drops since the result differs from what was originally intended.

The overuse of pre-trial detention is seen not only in the execution of the EAW. The immediate consequences of surrendering the requested person to the issuing State shed a different light on the problem. It is common practice to apply a custodial coercive measure to the person surrendered under an EAW also in the issuing State. Persons surrendered under an EAW, frequently residing permanently in a different State than the issuing State, as a rule cannot have other coercive measures applied to them.

Another threat to both the effectiveness and efficiency of a criminal trial is the procedure for refusing to execute an EAW. In recent years, among grounds for the non-execution of an EAW, a possible infringement of Article 3 of the Convention in the issuing State has come to the fore. This is illustrated by the case of Ireland where many EAWs issued by

[88] Witold Klaus, Justyna Włodarczyk-Madejska and Dominik Wzorek, 'In the Pursuit of Justice: (Ab)Use of the European Arrest Warrant in Polish Criminal Justice System' (2021) 10(1) Central and Eastern European Migration Review 95; Ouwerkerk (n 25).

Greece or Lithuania have been rejected for this reason.[89] These refusals were made possible by judgments of the CJEU which broke the inviolability of the principle of mutual recognition (eg the *Aranyosi and Căldăraru* case), which was strongly protected in the earlier line of case law.[90] Uneven standards of treatment afforded to inmates and the overcrowding of prisons, and the deteriorating conditions in them, have posed new risks to criminal trial effectiveness. A refusal to execute an EAW in such circumstances practically paralyses the administration of justice in a given case. After a refusal to surrender, the person requested by the issuing State acquires immunity of sorts as long as he or she stays in the Member State that has refused to surrender him or her. A criminal trial of such a person becomes completely inefficient and, consequently, ineffective.

An identical problem to the one described above has arisen in some Member States due to a rule-of-law crisis.[91] As mentioned earlier, the infringement of the rule of law by the issuing State is yet another ground for refusing to execute an EAW. In this case, too, the non-execution of an EAW blocks the criminal trial.

The challenges presented above and their impact on the effectiveness of international cooperation and the criminal trial have become serious risks in recent years. The position of the EAW as a very effective means of cooperation has been weakened. In this situation, it is necessary to find ways to solve this problem and a remedy for the undermining of the principle of mutual trust. A natural step forward is to consider a newer and far less common instrument, namely the ESO. To analyse thoroughly whether it can constitute a remedy for the ineffectiveness of the EAW when its execution has been refused and if it will remain an effective means of international cooperation, it is necessary to trace its origins.[92]

The enactment of the ESO was not exactly related to the need to find new and effective means of international cooperation in criminal matters. Certainly, these means had been introduced earlier by the EAW, and neither was the objective of the ESO to improve the EAW substantially, but rather to solve the problem of the overuse of custodial coercive measures.[93]

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89 Ryan (n 51).

90 Tomasz Ostropolski, 'The CJEU as a Defender of Mutual Trust' (2015) 6(2) New Journal of European Criminal Law 166.

91 Examples are offered by the German OLG Karlsruhe, 27 November 2020 - Ausl 301 AR 104/19, OLG Karlsruhe, 7 January 2019 - Ausl 301 AR 95/18. A standard of no-execution of the EAW, a so-called 'LM test', emerged as a spin-off of a CJEU judgment concerning prejudicial questions of an Irish court later elaborated and improved in the matter of prejudicial questions of a Dutch court. See Joined Cases C-562/21 and C-563/21 *X and Y v Openbaar Ministerie* ECLI:EU:C:2022:100.

92 Raimundas Jurka and Ieva Pentolite, 'European Supervision Order: Is It the Ballast for Law Enforcement or the Way Out of the Deadlock' (2017) 2017 J E-Eur Crim L 3.

93 European Parliament legislative resolution of 29 November 2007 on the proposal for a Council framework decision on the European supervision order in pre-trial procedures between Member States of the European Union [2007] COM(2006)0468 – C6-0328/2006 – 2006/0158(CNS).

The ESO was thus a response to the abuse of remand when applying the EAW whereby unnecessary or protracted pre-trial detention and uneven standards of applying and executing custodial measures had been branded by EU institutions on many occasions as serious risks that lower the level of trust between Member States, possibly threatening EU residents' rights and freedoms. Already in 2004 in the Hague Programme[94] and in 2009 in the Stockholm Programme,[95] the overuse of pre-trial detention was identified as a serious risk to the EU. Moreover, an objective was set to increase the use of alternative non-custodial measures as a major EU policy. At the same time, the EAW, giving new grounds for applying custodial measures, aggravated the existing problem of overusing the imprisonment of suspects, a problem to which attention had been drawn before the new instrument was introduced.

A new instrument of cooperation – the ESO – offers an alternative for Member States prosecuting persons residing abroad. The ESO has been developed to make efficient prosecution possible without the need to turn to the EAW. The ESO, allowing judicial authorities to use a variety of non-custodial coercive measures in respect of wanted persons residing abroad, was supposed to solve the problem of resorting to the EAW in cases that did not warrant it. Undoubtedly, the possibility of securing the course of proceedings without turning to a request for surrendering the wanted person, and without recourse to pre-trial detention, is a way to even up, so to speak, the situation of detainees. This is regardless of whether they avail themselves of freedom of movement or whether they are residents or not. A reduction in the application of custodial measures was meant to improve the situation in overcrowded prisons and help respect fundamental rights, at the same time securing the course of proceedings. Judicial authorities, owing to the new mechanism, could use all the available means at the national level in the administration of justice, thereby making it possible to use their resources in common and better adjust their responses to an offence. More options for securing the course of proceedings, therefore, and raising the set standard of the right to a fair trial may considerably contribute to improving criminal trial effectiveness.

Further, the ESO may undeniably be a non-custodial and also an efficient alternative to the EAW by favourably affecting the effectiveness of international cooperation and the criminal trial.[96] The problem of a refusal to apply an EAW, mentioned earlier, due to the risk of breaching Article 3 of the Convention (or later Article 4 of the Charter), by the issuing State, may be an opportunity for the ESO to replace the rejected

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[94] The Hague Programme: Strengthening Freedom, Security and Justice in the European Union [2005] OJ C53/01.

[95] The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens [2010] OJ C115/01.

[96] Libor Klimek, *Mutual Recognition of Judicial Decisions in European Criminal Law* (Springer Link 2016) 393.

measure and thereby ensure effective criminal proceedings. The problem of EAW non-execution in Member States, it should be noted, is caused by discrepancies in prison standards and non-compliance in the treatment of inmates with the standard set by the European Convention on Human Rights[97] (hereinafter: ECHR, Convention) and the decisions of the European Court of Human Rights (ECtHR). Many EU Member States have struggled with prison system problems for decades, which have grown in magnitude as a result of a progressive rise in the standards of treatment of prison inmates brought about by ECtHR decisions.[98] Poor living conditions, overcrowding, cells too small for the number of inmates, poor sanitary facilities, insufficient heating and ventilation or access to light are only some shortcomings that the ECtHR has decried in its comprehensive case law concerning the infringements of human rights listed in the ECHR.[99]

A risk of infringing Article 3 of the ECHR is considered by the court executing an EAW and, as mentioned earlier, may constitute grounds for refusing to execute it. The court, by refusing to execute an EAW, suspends the principle of mutual trust (mutual recognition) in this single instance due to the high risk of infringement of fundamental rights provided for by the Convention. In the situation of a pre-trial application of the EAW, turning to the ESO may provide a solution to the problem of a criminal trial being completely blocked by the inability to have the suspect brought in for the trial. At the same time, the ESO, being a non-custodial measure of international cooperation in criminal matters, does not carry the risk of infringing fundamental rights since the person concerned is not surrendered to the issuing Member State. With the execution of an EAW being refused, having recourse to the ESO thus secures the due course of criminal proceedings in the issuing State and helps to prosecute effectively serious offences. Surprising as it may seem, the advantages of the ESO are not one-sided. A State considering an ESO, owing to the possibility of applying a (non-custodial) coercive measure, can supervise a potential offender. Without applying an ESO, the executing Member State, to extend coercive measures to a potential offender, must apply for a transfer of prosecution and risks a much more difficult procedure and has to pay all the costs of the proceedings.

It can be seen that the non-execution of an EAW due to a rule-of-law crisis in the issuing State brings the same consequences for effectiveness. The difference lies in the grounds for refusal to execute an EAW.[100]

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97 The European Convention on Human Rights [1950].

98 Nasiya Ildarovna Daminova, 'The ECHR Preamble vs the European Arrest Warrant: Balancing Human Rights Protection and the Principle of Mutual Trust in EU Criminal Law?' (2022) 49(2) Review of European and Comparative Law 125.

99 Bojana Zimonjić, 'The Problem with Implementation of Human Rights in the Execution of European Arrest Warrant' (2015) 2(1) International Journal Vallis Aurea 97.

100 Theodore Konstadinides, 'Judicial Independence and the Rule of Law in the Context of Non-execution of a European Arrest Warrant: LM' (2019) 56(3) Common Market Law Review 743.

These are the general and systemic shortcomings of the administration of justice and their actualisation in a given case. General flaws in the administration of justice, having a bearing on a given case, are grounds for suspending the automatism of mutual trust (mutual recognition). A court, after performing a suitable test in accordance with CJEU guidelines, finds that surrendering the person concerned will violate his or her right to a fair trial.[101]

When this case of refusal to execute an EAW is analysed, the question ought to be asked if the application of the ESO (granting the request) in this situation is admissible – if it will ensure that the rights of the individual are sufficiently protected. Undoubtedly, it may be argued that an EAW issued by a State in a rule-of-law crisis is defective. Taking a very restrictive view of the guarantee of a fair trial, one can claim that since the circumstances of a given case carries a high risk of breaching the law while executing an EAW, a breach will occur also while executing an ESO. Adopting this view, a judicial authority suspends the execution of any measure interfering with the freedom of the person concerned because the person's rights may be infringed.

This view, however, ignores a fundamental difference between the EAW and ESO. The two measures interfere with the rights and freedoms of the individual in a markedly different manner. The ESO, being a considerably more lenient, non-custodial measure to secure the course of proceedings, in principle interferes less with the rights and freedoms of a citizen. When this difference is taken into account, one may take a different view on the possibility of applying the ESO as an alternative. Owing to its different degree of intrusiveness, the judicial authority considering it may differently assess the risk of infringing fundamental rights in the given circumstances. Thus, the risk of violating the right to a fair trial, when a non-custodial measure is executed, will obviously be reduced. Therefore, the preclusion of the principle of mutual recognition would be disproportionate to the risk.

If a request for an ESO is thus treated in the manner suggested above, it becomes a much sought-after alternative to an EAW that is impossible to execute. An additional advantage of making use of the ESO in similar circumstances is the opportunity for local judicial authorities to supervise the criminal trial of the person concerned. In this context, information accumulated during cooperation on an ESO between the judicial authorities of both States may become valuable when it comes to considering another EAW for executing punishment. Making such a use of the ESO ensures that the trial will be effective and fair, and guarantees the right of citizens to safety (by supervising a potential offender).

[101] Patricia Popelier, Giulia Gentile and Esther van Zimmeren, 'Bridging the Gap between Facts and Norms: Mutual Trust, the European Arrest Warrant and the Rule of Law in an Interdisciplinary Context' (2021) 27(1-3) European Law Journal 167.

The ESO, in spite of the fact that in theory it seems to be a remedy for EAW dysfunctions, is neglected in international cooperation in criminal matters. The number of issued EAWs continues to grow while the problem of excessive pre-trial detention remains. The reason behind this state of affairs is the strong reluctance of Member States to cooperate more closely in the application of measures based on the mutual recognition of decisions. One also needs to bear in mind that the ESO Framework Decision was transposed to the legal systems of Member States over many years due to prolonged consultations.[102] In fact, in many States it is only in recent years that the ESO has been transposed.[103] Certainly, this state of affairs has been largely brought about by the huge success of the introduction of the EAW whereby law enforcement agencies regard it as highly effective, while Member States have grown accustomed to this form of cooperation through practice in recent years. Many Member States, no doubt, go along with the lameness of the EAW, but appreciate its effectiveness, absolute nature, and the opportunity it affords to secure the course of a trial to a maximum.

5 Ensuring effective judicial protection in EAW proceedings

By virtue of Article 47 of the Charter[104] and Article 13 of the Convention,[105] the Court of Justice has found the right to an effective remedy before a tribunal to be a general principle of the law of the European Union.[106] However, the EAW Framework Decision does not enact any specific remedy against a decision to issue an EAW. The case law, in turn, opines that the EAW Framework Decision should be interpreted to mean that the requirement of an effective remedy before a tribunal is met if the grounds for issuing an EAW, in particular its proportionality, are subject to judicial review in the issuing Member State.[107]

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[102] In 2019, in a presidency report, some Member States argued for another round of consultations.

[103] An example of a late transposition of the ESO Framework Decision to a national legal system is Ireland where the ESO was transposed only in 2019. Irish Criminal Justice (Mutual Recognition of Decisions on Supervision Measures) (Bill 63 of 2019).

[104] See Art 47 of the Charter.

[105] See Art 13 of the Convention.

[106] EU Agency for Fundamental Rights: Article 47 – Right to an effective remedy and to a fair trial <https://fra.europa.eu/en/eu-charter/article/47-right-effective-remedy-and-fair-trial> accessed 8 March 2023.

[107] Framework Decision 2002/584 must be interpreted as meaning that the requirements inherent in effective judicial protection that must be afforded any person in respect of whom a European arrest warrant is issued in connection with criminal proceedings are fulfilled if, according to the law of the issuing Member State, the conditions for issuing such a warrant, and in particular its proportionality, are subject to judicial review in that Member State. Joined Cases 566/19 and 626/19 *JR and YC v Parquet général du Grand-Duché de Luxembourg* ECLI:EU:C:2019:1077, para 74; See also Adriano Martufi, 'Effective Judicial Protection and the European Arrest Warrant: Navigating Between Procedural Autonomy and Mutual Trust' (2022) 59 Common Market Law Review 1379.

Since the EAW Framework Decision does not provide for a sufficient remedy against a decision to issue an EAW, the right to a remedy is supplemented to a lesser or greater degree by national legislations. Accordingly, the law in individual Member States, as a matter of principle, allows the requested person to question only the decision on his or her surrender.[108] The right to appeal only after surrender, however, appears not to ensure full protection of the procedural rights of the requested person because it may unduly prolong detention. He or she has to wait for surrender only to challenge an *ab initio* wrong and the disproportionate application of the EAW in the issuing Member State.

A promising and more effective solution would be one allowing the requested person to challenge the EAW prior to the decision on his or her surrender. For example, Greek legislation allows the requested person to challenge his or her detention in the executing judicial authority prior to surrender. The executing judicial authority may then revoke the decision on detention or replace it with suitable alternative measures such as an ESO.[109] A special solution is the right of a detainee to have it verified if the detainee's case is not one of mistaken identity. Once the detainee files an appeal, the competent court holds a hearing at which the detainee and his or her defence counsel may submit their arguments.[110] The mandatory hearing of the detainee and defence counsel guarantees the detainee's right to defence. Having regard to the speed of proceedings, it appears, however, that every regulation of the rights of the requested person should be counterbalanced by an obligation to take action within a strict time limit.

A study of the case-law opinion mentioned earlier justifies the conclusion that the remedy against a decision to issue an EAW is consistent with the two-stage test of proportionality. Such a review does not undermine the principle of mutual trust, but instead aims at protecting the rights of the requested person.[111] Arguably, an appeal from a decision to issue an EAW should concern primarily the grounds for, and propor-

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[108] Fair Trials: Protecting Fundamental Rights in Cross-border Proceedings: Are Alternatives to the European Arrest Warrant a Solution? (2021) <https://www.fairtrials.org/app/uploads/2021/11/EAW-ALT_Report.pdf> accessed 8 March 2023.

[109] See Greek statute του N 4307/2014, Art 12(1).

[110] See Greek statute του N 3251/2004, Art 15(4).

[111] A proportionality-based analysis here would act as a shield protecting fundamental rights, and not mutual trust or mutual recognition, which are methodological principles and means, not objectives. This will not entail ceasing all transfers that have implications for fundamental rights. If the principle of proportionality is properly applied, and the balancing criteria are developed by the Court, transfers would be allowed as the interference is proportionate as remediable or because an equivalence has been determined. A proportionality-based analysis in qualified mutual trust would not extinguish already challenged mutual trust but would seek for equivalences and remedies in a continuing process of challenging, preserving, and remedying evolving and active cooperation. This is based on treating mutual trust as an evolving organism rather than as static norms. Ermioni Xanthopoulou, 'Mutual Trust: From Blind to Gained Trust' (2018) 55(2) Common Market Law Review 44.

tionality of, the measure applied. To deprive the requested person of this right appears to be unreasonable, provided that the remedy is lodged by the person concerned in the right form and within an applicable time limit. To allow the remedy is not at odds with the principles of mutual trust or mutual recognition of judicial decisions because they should not be applied automatically and in an overly literal manner. The principle of mutual recognition of judicial decisions therefore should be commensurate with the necessity to achieve the objective of the decision rendered.[112] Hence, filing an effective remedy against a decision to issue an EAW, invoking legitimate grounds, does not stand in the way of achieving its objective, namely to identify and punish the right offender.

Guaranteeing the requested person the right to challenge the proportionality of the EAW respects his or her right to defence. The guarantee thus implements a proceedings directive, empowering the requested person to defend his or her interests, making use of a set of procedural rights, against the legal consequences that may threaten the person. This definition, it can be seen, is not only consistent with the right to defence in national proceedings, but also corresponds to the objectives of cross-border proceedings.

6 Conclusion

It is not without reason that a growing number of executing judicial authorities invoke grounds for refusal not expressly listed in the EAW Framework Decision, such as the need to protect the rule of law. The result of a proportionality test[113] performed by the executing judicial authority influences the assessment of how defective or correct a decision to issue an EAW is. However, obligating courts to perform a two-stage proportionality test each time may provoke abuse in this field. If executing judicial authorities are granted inordinate powers, there is a risk that the persons who have actually broken the law will try to prolong the procedures related to their detention. Therefore, the application of an ESO may resolve the problem of the non-execution of an EAW, giving infringement of Article 3 of the Convention as the grounds for it:

The proportionality principle in criminal matters requires that coercive measures, such as pre-trial detention or alternatives to such detention, are only used when this is absolutely necessary and only for as long

[112] Therefore, a complete normative reconceptualisation of mutual trust must take into account the role of fundamental rights in the AFSJ and their position in relation to constitutional values. Mutual trust is a state of mind that Member States need if they are to cooperate, with reference to a specific situation, rather than a dogmatic principle that should be blindly followed. Mutual recognition is the outcome of mutually trusting each other. Its role in the AFSJ is to promote cooperation among Member States with different rules without having to dispense with legal diversity. As such, it is a method or a means of judicial cooperation in criminal matters or cooperation in asylum matters. Despite its importance, its position in the constitutional mosaic of the AFSJ should not be overestimated, to the detriment of the protection of fundamental rights. ibid 44.

[113] The two-stage proportionality test described in *Aranyosi & Căldăraru*.

as required. It falls to the national judicial authorities to ensure that, in a given case, the pre-trial detention of an accused person does not exceed a reasonable time and complies with the principle of the presumption of innocence and the right to liberty whilst meeting the necessities of the investigation of criminal offences.[114]

It is thus crucial on what grounds and in what legal circumstances a judicial authority refuses to execute an EAW. The grounds for refusing to execute an EAW determine further powers of the authority, which, after meeting certain conditions, should be empowered to apply a coercive measure closest to the one applied by the issuing State. The power to substitute one measure for another, however, is not to be enjoyed as a default in any circumstance, but rather should be taken under consideration, taking into account a number of factors such as proportionality, the due process of law, the rule of law, and ensuring a proper course of proceedings.

In conclusion, one may opine that the proportional granting of more powers to the executing judicial authority and empowering it to substitute an ESO measure for an EAW in strictly defined situations may not only prevent the excessive application of the EAW, but also contribute to greater trial effectiveness in general.[115] It appears that such an extension of powers of the executing judicial authority should have its consequence in granting the individual the right to a remedy against a decision to issue an EAW. This right would relieve, to a degree, the need for the administration of justice to test the proportionality of an issued EAW and, as a consequence, make cooperation in criminal matters in cross-border proceedings more effective and efficient.

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[114] Green Paper Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention [2011] COM/2011/327 final.

[115] See Joanna Beata Banach-Gutierrez, 'The Surrender of Prosecuted Persons under the EAW Procedure: Issues of Transposition of EU Criminal Policy to the National Level' (2020) 11 New Journal of European Criminal Law 54. The author comes to interesting conclusions in this regard, highlighting that there is a need to avoid the use of isolating measures and penalties.

BANK RESOLUTION IN CROATIA: INFLECTION POINTS, INSTITUTIONAL RESETTLING, AND GOVERNANCE PERSPECTIVES*

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Abstract: The establishment of the second pillar of the Banking Union (BU) unquestionably confirmed the social and economic significance of appropriate bank resolution and crisis management regimes as one of the core components of prudential frameworks. In this regard, the Croatian experience offers an intriguing case study in terms of institutional arrangements, regulatory approaches, and policy decisions that construct an appropriate resolution and crisis management regime in the context of a post-transition economy. Therefore, this paper examines bank resolution in Croatia from an evolutionary standpoint, focusing on economic complexities and institutional entrepreneurship as the primary drivers of the convergence of a crisis-forged system into a larger resolution and stabilisation framework represented by the BU's Single Resolution Mechanism. Despite episodes of exceptional market disruptions, the paper identifies 'success factors' in banking sector restructuring, macroeconomic stabilisation, and institutional empowerment in Croatia through a qualitative, documentary analysis of a variety of primary and secondary sources. Furthermore, based on an analysis of actions taken in the resolution of 'Sberbank', the paper sheds light on recent issues in bank resolution governance within the broader BU framework.

Keywords: bank crisis, prudential regulation, bank resolution, Single Resolution Mechanism, Croatian National Bank.

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1 Introduction

As undesirable as they may be, given the enormous social and economic costs, there are lessons to be learned from (systemic) banking crises in terms of early risk detection, institutional capacities, bail-in techniques, and overall prudential strategies. Given the rising rate of their occurrences over the last half century, which is significantly higher than the rate of the Bretton Woods and classical gold standard periods,[1] one would expect that the abundance of experience has significantly upgraded and finessed resolution regimes, which are specifically designed to deal with the inherent riskiness of banking. A quick look at banking statistics around the world appears to confirm this, at least from the economic standpoint. More specifically, the global benchmark reference database by Laeven and Valencia identified 151 banking crises, along with 236 currency crises and 75 episodes of sovereign debt crises during the period between 1970 and 2017. During the observed period of almost 50 years, most countries underwent one systemic banking crisis, many have experienced two, very few had three, while Argentina remains 'infamously famous' for having experienced four systemic banking crises. The statistics further confirm that systemic banking crises are mostly regional incidents (eg in Latin America, Asia, and the Nordic countries).[2] Aside from the 'cleansing effect' of these crises, where inefficient actors are simply expelled from the banking market,[3] such crises exerted profound effects on how idiosyncratic banking risks were dealt with in bank restructuring – for example, in Argentina the government opted for rigorous financial and operational restructuring (only of solvent banks) in addition to strengthening bank internal governance.[4] The crisis resolution management in the Nordic countries, handling one of the worst banking crises of advanced economies, focused on restructuring the banking system containing moral hazard and refining risk control mechanisms.[5]

When the aforementioned global statistics are viewed through the lens of the EU, the results call for strategic prudence with strong emphasis on bank recovery and resolution regimes from economic, prudential, and institutional standpoints. Indeed, the EU accounts for roughly 20%

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1 M Bordo, B Eichengreen, D Klingebiel and M Soledad, 'Is the Crisis Problem Growing More Severe?' (2001) 16(32) Economic Policy 72.

2 L Laeven and F Valencia, 'Systemic Banking Crises Revisited' (2018) Working Paper 18/206, International Monetary Fund, Washington, DC 8–12.

3 V Saadi, S Ongena, J Rocholl and R Gropp, 'The Cleansing Effect of Banking Crises' (2020, 7 August) VoxEU-CEPR Columns <https://cepr.org/voxeu/columns/cleansing-effect-banking-crises> accessed 2 March 2023.

4 S Claessens, 'Experiences of Resolution of Banking Crises' (1999) BIS Policy Papers 7, Bank for International Settlements, Basel 287.

5 C M Reinhart and K S Rogoff, 'This Time is Different: Eight Centuries of Financial Folly' (2009) Princeton University Press, New Jersey, 206; C Borio, B Vale and G von Peter, 'Resolving the Financial Crisis: Are We Heeding the Lessons from the Nordics?' (2010) BIS Working Papers 311, Bank for International Settlements, 2–5 <https://www.bis.org/publ/work311.pdf> accessed 7 February 2023.

of global banking crises.[6] The ECB/ESRB's financial crises database specific to the EU Member States detected a total of 48 systemic financial crises in the analogous period between 1970 and 2016.[7] The data should not surprise us considering that in the 2000s, Europe's banking system grew colossally, not only in comparison to its economic peers such as the US and Japan, but also in comparison to Europe's economic output and wealth.[8] Moreover, the largest European banks have become more concentrated and leveraged,[9] leaving Europe with a weak track record of following the principles of good governance and sound risk management in banking.[10] What distinguished the EU from other world countries was the fact that a quarter of the identified crises were associated with Member States located in the Central and Southeast European (CSEE) region, which endured an uncomfortable transition from centrally planned to market-based economies during the 1990s, including the transformation of inadequate banking systems.[11] In practice, 'transition' entailed a hastily and synthetically induced shift from a centrally planned to a market-based economy through a controversial privatisation process and the haphazard establishment of business infrastructure, ie a legal and institutional framework. These were the 'raw materials' for future episodes of banking instabilities.

In this respect, the case of Croatia provides an interesting viewpoint on the evolutionary trajectory of bank resolution and crisis management in the banking sector in the context of a post-transition economy, where foreign-owned banking assets typically score highly in comparison to to-

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6 It is interesting to mention that the EU's stake in supplementary crises is much lower; for example, only around 5% of the worlds' currency crises occurred in the EU over the last half century, while approximately 10% of sovereign debt crises in the world are attributed to the EU Member States. Our calculations are based on the Laeven and Valencia database, L Laeven and F Valencia, 'Systemic Banking Crises Revisited' (2018) 30–33.

7 The new database for financial crises in European countries was first published in July 2017 and updated in December 2021. While it covers a similar period, 1970–2016, it is methodologically incompatible for direct comparison with the Laeven and Valencia database (2013, 2008), due to the different approach in classification of the crisis events. For more on the methodology comparison between the two datasets, see M Lo Duca and others (eds), 'A New Database for Financial Crises in European Countries – ECB/ESRB EU Crises Database' (2017, July, updated 2021, December) Occasional Paper Series 194, European Central Bank 17–20 <https://www.ecb.europa.eu/pub/pdf/scpops/ecb.op194.en.pdf> accessed 10 January 2023. For the purpose of this paper, the authors' calculations exclude Norway's dataset (a non-EU country) from the original ECB/ESRB EU crises database while maintaining the UK's.

8 M Pagano (ed), 'Is Europe Overbanked?' (2014, June) Reports of the Advisory Scientific Committee 4, European Systemic Risk Board, European System of Financial Supervision 3–6 <https://www.esrb.europa.eu/pub/pdf/asc/Reports_ASC_4_1406.pdf> accessed 10 January 2023.

9 ibid 6–9.

10 T Philippon and A Salord, 'Bail-ins and Bank Resolution in Europe: A Progress Report' (2017) International Center for Monetary and Banking Studies 10 <https://www.cimb.ch/uploads/1/1/5/4/115414161/geneva_special_report_4_bailin.pdf> accessed 26 March 2023.

11 Lo Duca (n 7) 16.

tal financial system assets as well as the percentage of domestic GDP. Indeed, the Croatian case is intriguing because of the two 'inflection points' which propelled the domestic regulatory and institutional framework for crisis management and bank resolution on an upward slope.

The first inflection point was the two banking crisis episodes during the 1990s and was therefore endogenous to banking market conditions. The first banking crisis deconstructed the old centrally planned banking system and its crisis management, whereas the second one dramatically altered the structure of the banking sector in favour of foreign ownership. Furthermore, the total fiscal cost of rehabilitating the Croatian banking system after two banking crises amounted to an astounding 31% of GDP, comparable to only a few other countries in the world (eg Chile).[12] Instead of becoming a 'cautionary tale', Croatia chose a radical change in the regulatory and supervisory framework and the institutional empowerment of the Croatian National Bank (CNB).[13] The second inflection point, which was more exogenous in nature, was Croatia's membership in the Banking Union, quickly followed by the country's eurozone accession. Arguably, the convergence process with the BU's second pillar, the Single Resolution Mechanism, triggered a comprehensive regulatory re-calibration and institutional re-establishing of bank resolution in Croatia.

Against this backdrop, the paper examines bank resolution in Croatia from an evolutionary perspective, highlighting economic complexities and institutional entrepreneurship as the main drivers of the convergence of a crisis-forged system into a larger, EU resolution and stabilisation framework represented by the BU's Single Resolution Mechanism. The Single Resolution Mechanism, along with the well-established Single Supervisory Mechanism and the prospective European Deposit Insurance Scheme, is one of the founding pillars of the BU. What distinguishes this mechanism from the other two administrative structures is its high level of centralisation in terms of functionality and governance,[14] two characteristics that foster institutional engagement and proactivity at Member State level in order to meet harmonisation requirements in the resolution domain.

The analytical framework of this paper is based on a qualitative anal-

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[12] Lj Jankov, 'Banking Sector Problems: Causes, Solutions and Consequences' (2000, March) Croatian National Bank Surveys S 1, Zagreb, 7–8 <https://www.hnb.hr/documents/20182/121876/s-001.pdf/1259b535-60ea-472c-b2cd-03effb8f291c> accessed 9 January 2023.

[13] T Galac, 'The Central Bank as Crisis-Manager in Croatia: A Counterfactual Analysis' (2010, December) Working Papers W 27 <https://www.hnb.hr/documents/20182/121366/w-027.pdf/6fd92667-38f3-4486-9fec-c584007ecf57> accessed 10 January 2023; E Kraft, 'Post-Socialist Bank Crises and the Problems of Institution-Building' (1995) 5(38) Privredna kretanja i ekonomska politika (Economic Trends and Economic Policy) 15–58 <https://hrcak.srce.hr/en/33745> accessed 10 January 2023.

[14] A Smoleńska, 'Multilevel Cooperation in the EU Resolution of Cross-Border Bank Groups: Lessons from the Non-Euro Area Member States Joining the Single Resolution Mechanism (SRM)' (2022) 23 Journal of Bank Regulation 42.

ysis of a variety of primary sources, primarily EU and national legislation, which is then supplemented by relevant scholarship in the broader field of bank bail-in, resolution and crisis management, intersecting the fields of economy, political economy, and financial regulation. Drawing on a documentary and descriptive examination of these sources, the paper uncovers how the Croatian bank resolution and crisis management regime evolved from an institutional standpoint when reaching the two inflection points, as well as shed light on how the future of this regime appears in the context of a revamped resolution authority with new resolution tools based on the analysis of the action taken in the resolution of Sberbank.

The arguments are organised as follows; after the introduction, the paper provides a comprehensive examination of the scholarship on resolution frameworks established in response to major bank market disturbances, focusing in particular on the literature reviewing the CSEE region. Section 3 sheds light on the Croatian experience, examining the regulatory and institutional impact of the two inflection points which propelled this crisis-forged system from a national to an EU perspective in resolution management. Section 4 fleshes out the operative division of different policy capacities within the CNB's internal governance, while section 5 points to recently emerged legal and institutional questions in the context of resolution governance within the wider Single Resolution Mechanism framework. Section 6 concludes.

2 Bank performance and the significance of appropriate resolution regimes in post-transition countries: a literature review

Scholarship on EU bank crisis management and resolution frameworks is well established, with particular focus over the last decade on the convergence of national resolution regimes in the broader context of BU and its Single Resolution Mechanism. In this respect, one of the more interesting studies in terms of real-life effects of regulatory convergence in resolution is the World Bank Group 2016 case study which provides a useful source of reference on the transformative effects that the implementation of the Bank Recovery and Resolution Directive[15] exerted on national resolution regimes, and bail-in features in particular.[16] Other related studies were especially interested in resolution from an institutional standpoint, thus assessing the optimal design of the BU's transnational

[15] European Parliament and Council Directive 2014/59/EU of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012 of the European Parliament and of the Council [2014] OJ L173 (hereinafter: BRRD).

[16] P Lintner and J Lincoln, 'Bank Resolution and "Bail-in" in the EU: Selected Case Studies Pre and Post BRRD' (2016), The World Bank Group <https://documents.worldbank.org/pt/publication/documents-reports/documentdetail/731351485375133455/bank-resolution-and-bail-in-in-the-eu-selected-case-studies-pre-and-post-brrd> accessed 28 March 2023.

regime of bank resolution, as well as the treatment of regime variation at Member State level, understanding whether centralised bank resolution (and supervision) based on close and intensive 'multilevel administrative cooperation'[17] would 'provide credible solutions to financial crisis management'.[18] At the same time, despite the fact that these countries were more vulnerable to banking sector vulnerabilities than other EU Member States, only a minor strand of scholarship focuses on the resilience of the resolution frameworks of post-transition economies in the CSEE region. This is surprising given that this region was the scene of a quarter of the European continent's bank crises,[19] as well as considering that during the 1990s, 'banks from the founding EU countries became major shareholders' in these countries, which in turn means that because of this 'interlinkage, spillovers of distress are likely to impact bank survival' in the region.[20]

Looking at the banking market in the CSEE region, which can roughly be characterised as 'host-markets', they are less developed and institutionally less diversified (ie, fewer non-bank deposit institutions) than those of Western European countries. The last two decades were turbulent for CSEE banking markets, with loan growth increasing in the early 2000s, aided by easy access to international funding and bank loans from western banks to CSEE subsidiaries, but resulting in macroeconomic imbalances and, more specifically for the banking sector, an increase in the share of non-performing loans in bank assets.[21] Arguably, this highlighted the importance of sound prudential policies and their consistent application in the CSEE banking markets. Yet, coupled with other several adverse circumstances in the CSEE region, such as political instability, a history of hyperinflation, or war – as in Croatia – banking sector stability has been particularly difficult to maintain in post-transition countries,[22] which explains the concentration of bank crisis-events in this specific region of Europe as well as points to the prominence of bank recovery and resolution strategies.

This narrative of the CSEE banking market emanates from the descriptive and empirical studies of the period of the dissolution of banks as financial institutions supporting the central planning economy through bank privatisation in favour of foreign investors, which assess post-transition bank performance and its relationship with regional economic

[17] Smoleńska (n 14) 42.

[18] A Georgosouli, 'The Transnational Governance of Bank Resolution and the Treatment of National Regulatory Variation in the EU' (2021) 80(1) The Cambridge Law Journal 74.

[19] Lo Duca (n 7) 16.

[20] E Kočenda and I Iwasaki, 'Bank Survival in Central and Eastern Europe' (2020) 69 International Review of Economics & Finance 1.

[21] A Kolev and S Zwart (eds), 'Banking in Central and Eastern Europe and Turkey: Challenges and Opportunities' (2013) European Investment Bank.

[22] M Petkovski and J Kjosevski, 'Does Banking Sector Development Promote Economic Growth? An Empirical Analysis for Selected Countries in Central and South Eastern Europe' (2014) 27(1) Ekonomska istraživanja (Economic Research) 56.

growth.[23] According to these studies, the main economic factors supporting bank resilience are the bank legal form and corporate governance, which, when combined with sensible, government-imposed prudential requirements, are all conducive to banking sector soundness in the long run.[24] In fact, ownership structure appears to be a preventive factor of bank failure, particularly for banks with low solvency or return-on-assets (ROA) ratios, which some authors explain by the foreign bank group's solid reputation reflecting on the financial strength of the subsidiary in the host country.[25] In terms of corporate governance, larger and more diverse boards appear to result in more bank management expertise and prudent bank governance.[26]

The issue of a proper prudential framework is closely related to the corporate governance debate. It is true that for the banking sector to function in an orderly way, particularly during times of economic transition, it must rely on a sound legal framework that ensures appropriate levels of regulatory capital, proactive internal risk assessment techniques, and it must discourage refinancing from the central bank, and, finally, establish reasonable procedures for bank recovery and resolution.[27] In this respect, literature confirms that some post-transition countries matured from largely ineffective initial attempts to resolve banking sector weaknesses due to the inexperience of the authorities and political interferences with bank restructuring, to more comprehensive and successful attempts to deal with banking crises.[28] According to the evidence given in the literature, several 'success factors' of bank restructuring and resolution can be identified:

- first, the success of banking sector restructuring extends beyond privatisation strategies, and is heavily reliant on consistent adherence to the 'fit-and-proper' criteria in bank governance and appropriate post-privatisation business behaviour;
- second, successful bank resolution regimes entail a holistic approach to the banking system (and its weaknesses) that goes be-

[23] See, for example, J P Bonin, K Mizsei, I Székely, and P Wachtel, 'Banking in Transition Economies: Developing Market Oriented Banking Sectors in Eastern Europe' (1998) 27 Journal of Comparative Economics; S Claessens, A Demirgüc-Kunt and H Huizinga, 'How Does Foreign Entry Affect the Domestic Banking Market?' (2001) 25(5) Journal of Banking and Finance, 891; J P Bonin, I Hasan and P Wachtel, 'Privatisation Matters: Bank Performance in Transition Countries' (2005) 29(8-9) Journal of Banking and Finance, 2155.

[24] S Fries and A Taci, 'Banking Reform and Development in Transition Economies' (2002) EBRD Working Paper 71, 4 <https://www.ebrd.com/downloads/research/economics/workingpapers/wp0071.pdf> accessed 16 April 2023.

[25] Kočenda and Iwasaki (n 20) 16.

[26] ibid.

[27] Fries and Taci (n 24) 4.

[28] C Enoch, A-M Gulde and D Hardy, 'Banking Crises and Banking Resolution: Experience in Some Transition Economies' (2002) IMF Working Paper 56, 57 <https://www.imf.org/en/Publications/WP/Issues/2016/12/30/Banking-Crises-and-Bank-Resolution-Experiences-in-Some-Transition-Economies-15694> accessed 16 April 2023.

yond prudential measures, necessitating broad social or, better still, political agreement on how resolution costs will be distributed, especially given that intervention measures in aid of failing banks can be detrimental to government debt and thus economic stability;

- thirdly, the effectiveness of bank resolution systems is critically dependent on the development of a pragmatic institutional framework, one in which resolution responsibility is delegated to an expert authority capable of closely coordinating with the government, the central bank, and the supranational level, in the case of EU Member States.

With this in mind, the following sections detail the establishment of the bank recovery and resolution regime in Croatia, offering important lessons on 'success factors' in banking sector restructuring, macroeconomic stabilisation and institutional empowerment despite episodes of exceptional market disruptions.

3 Developing bank resolution in Croatia: a system forged by crisis and politics

3.1 From a bleak macroeconomic outlook to banking stabilisation

Similarly to the experiences of other EU Member States in the CSEE region, the 1990s in Croatia represent a period of intense construction of an institutional framework for banking resolution that arose from the simple necessity of managing a decade with two large scale banking crises. At the time, Croatia was in the midst of a hostile divorce from Yugoslavia, which was war-like and economically devastating. Formally, half of its 28 operating commercial banks were insolvent,[29] but practically the entire banking system was too, and the economy was in decline due to high inflation and unemployment, alongside accumulative expenditures for financing the war for independence.[30]

Against this dramatic backdrop, the first banking crisis of the early 1990s serves as an inflection point, marking the first phase of the deconstruction of the old centrally planned banking system and the modest attempts at bank crisis management. After separation from the Yugoslav monetary system, Croatia was practically left with no foreign currency reserves and a paralysed deposit balance sheet. The recovery and resolu-

[29] Jankov (n 12) 3.

[30] M Škreb, 'Iskustvo tranzicije u Hrvatskoj: Pogled iznutra' (Croatian Transition Experience: View from Within) (1998) Surveys, Croatian National Bank, Zagreb 1–3 <https://www.hnb.hr/documents/20182/121657/p-000.pdf/7a9ac40a-c244-439f-949e-893e36fed2c5> accessed 10 January 2023; V Šonje and B Vujčić, 'Croatia in the Second Stage of Transition 1994 – 1999' (1999) Croatian National Bank Working Papers W 1, 10-13 <https://www.hnb.hr/documents/20182/121552/w-001.pdf/73c5064b-17b7-4f78-9168-7cf09874ad52> accessed 10 January 2023.

tion process consisted of two steps: first, initiating a comprehensive deposit insurance scheme by converting the so called 'old foreign currency deposits' into public debt, and, second, issuing restructuring bonds for non-performing assets in the banking sector.[31]

As mentioned earlier, the transition from a centrally planned to a market-based economy entailed a contentiously transparent privatisation process as well as the building of business infrastructure, or, in other words, a legal and institutional framework across economic sectors. The privatisation of the Croatian banking sector followed two tracks. On the one hand, the accumulated public debt was neutralised through a privatisation process in which government-owned real estate and securities were purchased with 'old foreign currency savings', and, on the other, banks were privatised. In reality, this meant that the first banking crisis did not set in motion radical transformations of the prudential framework for banking; Croatia was just buying time and amplifying the conditions that led to the perfect storm of the second banking crisis of the late 1990s.[32]

Regardless of the juncture the banking industry was facing, the toxic nexus of moral hazard was flourishing in an inadequate institutional and legal framework that was unable to impose and enforce prudent governance measures. The matrix included weak corporate governance principles and practices, for example tainted bank managers with misaligned incentives advocating market efficiency through liberal market policies such as relaxed banking establishment and licensing provisions combined with minimal capital requirements, resulting in excessive credit growth supported by aggressive interest rate policies and exposure concentration.[33] The resolution process of the second banking crisis encompassed the privatisation of three large banks after recapitalisation from public resources as well as bankruptcy proceedings for eight banks in the period from 1998 to 1999.[34] The aftermath was a drastic change in the ownership structure, shifting to an increase in foreign ownership from 6.7% to over 90% in the period from 1998 to 2002.[35]

The second banking crisis marked the completion of the first inflection point in the transition of Croatia's banking sector. The severe aftershocks of the two crises helped bring about widespread agreement among industry, policymakers – and society – that a radical shift in the regulato-

[31] Kraft (n 13) 15–58; M Škreb and E Kraft, 'Financial Crises in South East Europe: Causes, Features and Lessons Learned' (2002) Bank of Albania Working Paper 15–22 <https://www.bankofalbania.org/rc/doc/markoSkreb_evanKraft_ang_218_1_12983.pdf> accessed 10 January 2023.

[32] ibid.

[33] Škreb and Kraft (n 31); Šonje and Vujčić (n 30) 13–16.

[34] A detailed overview of financial crisis episodes of specific EU Member State is available in the ECB/ESRB Database. See Lo Duca (n 7) 3.

[35] Croatian National Bank, 'Annual Report for 2000' (2001) 85; Croatian National Bank, 'Annual Report for 2002' (2003) 84.

ry and supervisory framework and policies was required. Lessons learned during the 1990s financial crises installed macroprudential measures that shielded Croatian taxpayers from the fiscal burden of bank resolutions during the global financial and eurozone sovereign debt/banking crises. Subsequently, when the new vendors/eurozone bankers stepped into the Croatian financial market with yet another round of excessive credit growth ambitions to meet the elevated demand for borrowing from both the public and the private sector, the CNB was decisive in containing the situation through a combination of countercyclical monetary and macroprudential policy, which, during the early 2000s, a period of economic growth and credit expansion, was considered quite an unorthodox policy mix. However, the 'cooling' measures were essential for the future macro-stability of the sector; they aimed at increasing the banking system's liquidity reserves, which meant that the CNB imposed marginal and special reserve requirements to contain domestic banks' direct and indirect foreign borrowings from the parent institutions. Additionally, to limit banks' balance sheet growth, the CNB imposed a limit on growth in bank placement at 12%, sanctioning excessive placements with counterweight measures (mandatory purchase of low yielding CNB bills).[36]

Because of the CNB's hawkish approach, the Croatian financial system and the exchange rate remained stable during the global financial crisis of 2007-2009 thanks to a well-capitalised banking system and accumulated liquidity buffers. Furthermore, the CNB started to gradually release previously established defensive measures in order, firstly, to provide the foreign currency liquidity of the financial sector and maintain stability of the monetary system, and, secondly, to assist with the increased financial needs of the government and corporate and household sectors while attempting to navigate a sustainable restart of economic activities.[37]

3.2 From national to EU bank resolution perspectives

The institutional impact of the two crises was also evident; indeed, the CNB graduated from a decade of 'case-study training' in crisis management and bank resolution protocols, mastering supervisory capacities and gaining operational independence.[38] Regarding the evolution of Croatia's bank resolution system, it is worth noting that the CNB only recently became the sole national resolution authority (NRA) for banks, as a result of Croatia's EU membership and subsequent participation in the Banking Union (BU). Prior to that date Croatia had two NRAs for banks: the CNB and the State Agency for Deposit Insurance and Bank Resolution (hereinafter: State Agency), with the CNB primarily responsi-

[36] A detailed overview of the EU Member States' central banks' financial crises management policies is available in the ECB/ESRB Database. See Lo Duca (n 7) 3 <https://www.esrb.europa.eu/pub/fcdb/esrb.fcdb20220120.en.xlsx> accessed 10 January 2023.

[37] ibid.

[38] Galac (n 13); Kraft (n 13) 15–58.

ble for tasks related to resolution planning, whereas the State Agency was responsible for tasks pertaining to the execution of resolution.

The State Agency was established in 1994, shortly after Croatia declared independence in accordance with the then valid State Agency for Deposit Insurance and Bank Resolution Act. At the time, the State Agency was also in charge of banking resolution tasks. Even though banking resolution was regulated at the national level in Croatia during the 1990s, when several cases of banking resolution were associated with numerous controversies and litigation, the legal institute of resolution was removed from the Croatian legal framework. This complex situation lasted until the adoption of Directive 2014/59/EU[39] (hereinafter: BRRD) and the adjustment of the Croatian bank resolution regime to an EU-wide resolution framework upon BU membership. Namely, when the BRRD was first introduced, Croatia was not a participating Member State and thus Regulation (EU) No 806/2014[40] (hereinafter: SRM Regulation) did not apply in Croatia, so it made sense to assign the role in banking resolution to the State Agency that had had previous experience in similar matters.

However, on 1 October 2020 the CNB established close cooperation with the ECB,[41] making Croatia 'a participating Member State' within the meaning of the SRM Regulation and the CNB part of the Single Resolution Mechanism (SRM). As a result, responsibility for credit institutions in Croatia has been divided between the Single Resolution Board (SRB) and the CNB in accordance with the SRM Regulation since the beginning of this close cooperation. The CNB, on the other hand, has no resolution powers over investment firms because such powers are vested in the Croatian Financial Services Supervisory Agency (Cro. 'Hrvatska agencija za nadzor financijskih usluga', or 'HANFA'), which is the official NRA for investment firms.[42]

Following the institutional resettling of resolution powers, the State Agency changed its name to the Croatian Agency for Deposit Insurance (Cro. 'Hrvatska agencija za osiguranje depozita' or 'HAOD', hereinafter:

[39] Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council Text with EEA relevance [2014] OJ L173.

[40] Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (SRM Regulation) [2014] OJ L225/1.

[41] Decision (EU) 2020/1016 of the European Central Bank of 24 June 2020 on the establishment of close cooperation between the European Central Bank and Hrvatska narodna banka (ECB/2020/31) [2020] OJ L224I/4.

[42] Both the CNB as well as the HANFA have been notified to the European Banking Authority as NRAs within the Croatian financial system; see the list of Resolution Authorities published on EBA's website <https://www.eba.europa.eu/about-us/organisation/resolution-committee/resolution-authorities> accessed 31 May 2023.

Agency) in order to better reflect the recalibration of the institution's responsibilities. In addition to its deposit insurance powers, the Agency currently performs important tasks related to specific national insolvency proceedings, such as the compulsory liquidation of banks or credit institutions regulated by the Act on Compulsory Liquidation of Credit Institutions. The Agency obtained these competencies on the same day it lost its role as an NRA in Croatia.[43] Notwithstanding the fact that the CNB is currently the only NRA for banks in Croatia and that the Agency no longer serves in that capacity, the Resolution Act still calls for its involvement in banking resolution. The Agency, for example, manages the national resolution fund,[44] and this has been the case since the introduction of the BRRD in Croatia.

Finally, the Ministry of Finance is an important stakeholder in banking resolution and the 'competent ministry' within the meaning of the BRRD. Both the Agency and Ministry of Finance support the CNB in its role as an NRA. Building on the previously cited 'success factors' of an effective bank resolution regime, both the Agency and the Ministry of Finance support the CNB in its role as an NRA. This close coordination of key actors in bank resolution ensures timely exchange of prudentially relevant information as well as of facts essential to appraise or adopt key resolution decisions.

Other specific tasks for these stakeholders are outlined in the Resolution Act, such as the Agency's management of the (national) resolution fund (Article 130(3) of the Resolution Act) and the Ministry of Finance's notification of the European Commission of the resolution authorities in the Republic of Croatia, including a detailed description of their powers (Article 8(12) of the Resolution Act). These additional responsibilities, however, do not change the fact that the CNB is currently the sole resolution authority for banks, or, to be normatively precise, credit institutions in Croatia. One of the reasons the CNB became the sole NRA is that joining the SRM added complexity and increased the need for cooperation and coordination between the SRB and NRA(s). Having more than one NRA added to the complexity, as it requires coordination not only within the SRM but also at the national level. Because time is of the essence in resolution matters, and since efficiency is critical, consensus among relevant institutions was reached to introduce novelty in the new Resolution Act by declaring the CNB the only NRA in Croatia for credit institutions. Moreover, because having only one NRA is common in other EU Member States, the establishment of close cooperation with the ECB contributed to harmonisation of the Croatian institutional setup with the institutional setup in other EU Member States.

[43] Compulsory liquidation can be connected with the insolvency of a credit institution, but this is not always the case. Compulsory liquidation can occur when a credit institution is solvent but fails to meet other regulatory requirements. According to the Agency's website, there has only been one case of compulsory liquidation up to this point <https://www.haod.hr/en/compulsory-winding-up> accessed 18 October 2022.

[44] Article 130(2) of the Resolution Act.

Nonetheless, the institutional shifting of resolution competencies necessitated a targeted division of operative responsibilities in the CNB's internal governance in order to effectively separate resolution from other policy functions at the CNB, particularly the supervisory one. The following section fleshes out the specifics of these arrangements.

4 The Croatian National Bank as the sole national resolution authority: some institutional considerations

The CNB is the key institution for prudential policymaking and enforcement in Croatia, overseeing both banking supervision (albeit under the auspices of the Single Supervisory Mechanism/SSM) and bank resolution. As the name implies, the CNB is the national central bank and, as Croatia's monetary authority, it is mentioned in the Croatian Constitution[45] (Article 53). Details of its legal setup and its tasks are further detailed in the Act on the Croatian National Bank (hereinafter: Act on the CNB),[46] which to an extent mirrors the provisions of the Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank (hereinafter: Statute of the ESCB and of the ECB).[47]

While the tasks of the CNB are regulated in the Act on the CNB, the modalities of the CNB's accomplishment of its NRA function are further elaborated in the SRM Regulation and the Act on Resolution of Credit Institutions and Investment Firms[48] (hereinafter: Resolution Act) which represents the legal instrument of national transposition of the BRRD.

In addition to its resolution responsibilities, the CNB is in charge of banking supervision. Article 89 of the Act on the CNB also mentions the tasks of the CNB in banking supervision. The Credit Institution Act, which represents a national transposition of Directive 2013/36/EU (the Capital Requirement Directive, hereinafter: CRD), elaborates on the CNB supervisory function. According to the Credit Institution Act, the CNB is also the national competent authority (NCA) for banking supervision in Croatia, along with the details about the organisational – and operational – separation of the resolution and supervisory mandates. As in any other central bank with multiple responsibilities in the prudential domain, it was crucial to establish this separation to ensure that policy conflicts and trade-offs are mitigated between the CNB's supervisory and resolution arms. Differences of opinion between the supervisory and resolution arms can happen, for example on when to trigger resolution because the supervisory arm views potential resolution as its own, supervisory fail-

[45] Croatian Constitution (Official Gazette No 56/90, 135/97, 8/98 – official consolidated version, 113/00, 124/00 – official consolidated version, 28/01, 41/01 – official consolidated version, 76/10, 85/10 – official consolidated version, 5/14).

[46] Act on the Croatian National Bank (Official Gazette No 75/08, 54/13, 47/20).

[47] Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank [2016] OJ C 202/230.

[48] Act on Resolution of Credit Institutions and Investment Firms (Official Gazette No 146/20, 21/22).

ure, whereas the resolution arm wants to intervene as soon as possible to preserve bank value. Then, typically, the supervisory and resolution arms have misaligned horizons: supervision is concerned with the 'ongoing scenario' whereas resolution is concerned with the 'gone scenario'.[49] Therefore, the Bank has a distinct internal organisational structure that ensures the practical separation of these two mandates in its daily activities,[50] with the resolution function performed by the CNB's Credit Institutions Resolution Office (hereinafter: CNB's Resolution Office). However, decisions in the CNB's capacity as the NRA, on the other hand, are adopted by the CNB's two decision-making bodies – either by the CNB's Council, which is the CNB's collegial decision-making body, or the Governor[51] – rather than the CNB's Credit Institutions Resolution Office.

The most important CNB decisions related to the initiation of resolution proceedings must be approved by its Council. In this context, it is apposite to mention that meetings of the Council of the CNB are valid if two-thirds of all the members of the Council of the CNB attend.[52] Participation can be ensured through physical presence or via video and/or audio conference.[53] Decisions are taken with a two-thirds majority of the members present at the meeting.[54] These rules apply to all meetings and decisions taken by the Council of the CNB, not only to those related to the banking resolution.

The separation of resolution and supervisory functions is ensured *inter alia* through, for example, different vice-governors being responsible for coordinating and managing organisational units in charge of supervisory and resolution tasks. As a result, the staff involved in carrying out resolution tasks and functions in accordance with the relevant resolution framework is structurally separated from, and subject to, separate reporting lines from the staff involved in carrying out the supervisory tasks, in accordance with Article 3(3) of the BRRD. The same principle applies to the separation of other tasks performed by the CNB, such as the separation of the monetary policy function and the consumer protection function from the supervisory function.

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[49] S Kirakul, J Yong and R Zamil, 'The Universe of Supervisory Mandates: Total Eclipse of the Core?' (2021) FSI Insights on Policy Implementation 30 <https://www.bis.org/fsi/publ/insights30.pdf> accessed 18 April 2023.

[50] Croatian National Bank, 'Organization: Internal Organization of the Croatian National Bank' (2023) <https://www.hnb.hr/en/about-us/functions-and-structure/organisation> accessed 12 September 2022.

[51] The Council comprises the governor, deputy governor and six vice-governors, with each vice-governor coordinating and managing different central bank function(s). Therefore, in addition to participating in the collegial decision-making body, each vice-governor performs a managerial function in the CNB and is involved in the daily workload of the Bank.

[52] Article 47(4) of the Act on the Croatian National Bank and Article 8(2) of the Statute of the Croatian National Bank.

[53] Article 8(3) of the Statute of the Croatian National Bank.

[54] Article 47(5) and Article 8(4) of the Statute of the Croatian National Bank.

Although all vice-governors (including the vice-governors responsible for prudential supervision and resolution of credit institutions) participate in the same collegial decision-making body (the CNB's Council), which is in charge of adopting many decisions related to resolution and supervisory tasks, such decisions are always prepared by a specific organisational unit within the CNB, and the draft decision must be affirmed by its vice-governor, while the affirmation of the vice-governor responsible for the other function (resolution/supervision) is not required. Namely, draft resolution decisions do not require confirmation by the vice-governor in charge of banking supervision, and, *vice versa*, draft supervisory decisions do not require confirmation by the vice-governor in charge of banking resolution.

While the CNB has organisational measures in place to ensure the separation of its supervisory and resolution functions, these tasks will invariably overlap at some point. For example, one of the prerequisites for initiating the resolution procedure is the completion of the *Failing-or-Likely-to-Fail* Assessment, which is performed (at least for the less significant credit institutions) by the supervisory arm of the CNB. Another illustrative example is the adoption of early intervention measures and the instigation of special administration, both of which are done by the CNB's supervisory arm (for less significant credit institutions).

Lastly, it is interesting to mention that the option envisioned in Article 3(12) of the BRRD[55] has been exercised in Croatia; indeed, Article 11 of the Resolution Act states that the CNB, employees of the CNB, and other persons authorised by the CNB are not liable for damage that may arise while carrying out their duties in accordance with the Resolution Act, SRM Regulation or other regulations governing recovery and resolution, unless it is proven that they acted or failed to act intentionally or as a result of gross negligence. Similar limitations of liability apply in the domain of supervision. Namely, in accordance with Article 325 of the Credit Institutions Act, the CNB, its employees, and persons authorised by the CNB are not liable for damage that may arise in the course of performing their duties under the Credit Institutions Act, the Act on the CNB, Regulation (EU) No 575/2013, or regulations adopted under these acts and Regulation, unless it is proven that they acted or failed to act intentionally or due to gross negligence.[56]

[55] Article 3(12) of the BRRD states: 'Without prejudice to Article 85, Member States may limit the liability of the resolution authority, the competent authority and their respective staff in accordance with national law for acts and omissions in the course of discharging their functions under this Directive'.

[56] These principles are further affirmed in the Act on the CNB, which states that the CNB, the members of its Council, and its employees cannot be held liable for any damage that may arise while exercising supervision, oversight and resolution unless the damage has been caused intentionally or by gross negligence. See Article 8(2) of the Act on the CNB.

5 The CNB's resolution governance within the wider EU resolution framework

5.1 Some thoughts on institutional coordination and implementation issues

As already mentioned, all tasks related to the resolution of credit institutions within the CNB are performed by the CNB's Resolution Office, which reports directly to the vice-governor. The Resolution Office is currently not subdivided into smaller organisational units (such as, departments, sections, or divisions), which differs from the CNB's prudential supervision organisational structure.

Prudential supervision is organised within the CNB's Prudential Supervision Area, which is further divided into four departments, three of which supervise credit institutions grouped on the basis of their similar characteristics (two of them supervise significant institutions and one supervises less significant institutions), while the fourth department is in charge of on-site inspections.

Normally, the CNB and its Resolution Office are mostly concerned with resolution planning and other similar daily tasks, including (but not limited to) drafting legislation, collecting relevant reports, developing methodologies, etc. At this point, it is worth noting that due to the crisis caused by the Russian-Ukrainian war in 2022, the CNB was forced to use its resolution powers in the context of resolution of Sberbank d. d. (hereinafter: Sberbank Croatia) and open resolution proceedings against Sberbank Croatia.

Sberbank Croatia was resolved in the first months of 2022, and at that time Croatia did not have the euro as its official currency. However, the CNB has been a member of the Single Supervisory Mechanism (as an NCA) and part of the Single Resolution Mechanism (as an NRA) since October 2020, when close cooperation between the CNB and the ECB was established, as described in section 3.2 of this paper.

The key consideration in distinguishing supervisory competences between the ECB and the NCAs is establishing whether a credit institution is to be deemed as a significant, or a less significant one. According to Regulation (EU) No 1024/2013[57] (hereinafter: SSM Regulation or SSMR), the significance of a credit institution is assessed based on its:[58] (i) size; (ii) importance for the economy of the Union or any participating Member State; or (iii) significance of its cross-border activities. Sberbank Europe AG, as well as its subsidiaries in Croatia and Slovenia, have been assessed as significant for the purposes of the SSM based on the aforementioned criteria.

[57] Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions [2013] OJ L287/63.

[58] Article 6(4) of the SSM Regulation.

Article 7(2) of the SRM Regulation, which makes a cross-reference to the criteria of the SSM Regulation, was used to establish the SRB's competence as the resolution authority for Sberbank Europe AG and its subsidiaries in the Banking Union (Croatia and Slovenia). To summarise, the SRB's jurisdiction over the Sberbank Group in the Banking Union was established on the basis of the ECB's assessment of the Sberbank Group as significant for the purposes of the SSM.

The resolution of Sberbank Croatia was the first and, to date, the only resolution of a Croatian bank within the Single Resolution Mechanism. It is worth noting that when a credit institution faces difficulties, resolution does not always occur. For many troubled credit institutions, insolvency proceedings remain the exit strategy of choice. However, bank resolution occurs when resolution authorities determine that, in contrast to normal insolvency proceedings, resolution would better protect financial stability, depositors, and minimise the recourse to public funds (this is the so-called public interest assessment). There are three conditions for resolution, which need to be met:[59] (a) it has been determined that the credit institution is failing or is likely to fail; (b) there is no reasonable prospect that any alternative private sector measures, taken in respect of the credit institution, would prevent the failure of the institution within a reasonable timeframe; and (c) a resolution action is necessary in the public interest.

The resolution objectives are defined in the BRRD[60] and they include: ensuring the continuity of critical functions; avoiding a significant adverse effect on the financial system; protecting public funds by reducing reliance on extraordinary public financial support; protecting depositors, investors, client funds and client assets.

The resolution tools are also prescribed, and they include the following:[61] (a) the sale of the business tool; (b) the bridge institution tool; (c) the asset separation tool; and (d) the bail-in tool. In the case of Sberbank Croatia, as well as in the case of Sberbank banka d. d. (Slovenia) the sale of business tool has been used.

It is important to assess the Sberbank case because the resolution of entities belonging to the Sberbank Group was also the first case in the SRB's practice to trigger the implementation of a moratorium under Article 33a of the BRRD prior to the adoption of the resolution scheme.[62]

Article 33a of the BRRD grants the NRAs the power to suspend any payment or delivery obligations pursuant to any contract to which a credit institution in question is a party, but only if all of the following conditions are met: (i) a determination that the credit institution is failing or

[59] Article 32 of the BRRD.

[60] Article 31(2) of the BRRD.

[61] Article 37(3) of the BRRD.

[62] The moratorium was introduced not only with regards to the Croatian entity, but in respect of the Slovenian entity as well.

likely to fail has been made; (ii) there is no immediately available private sector measure that would prevent the failure of the credit institution; (iii) the exercise of the power to suspend is deemed necessary to avoid the further deterioration of the financial conditions of the credit institution; and (iv) the exercise of the power to suspend is either necessary to reach the determination if the resolution action is necessary in the public interest or necessary to choose the appropriate resolution actions, or to ensure the effective application of one or more resolution tools.

On 27 February 2022, the SRB determined that Sberbank Croatia was failing or likely to fail. The decision in question was adopted on the basis of the ECB's assessment, which was made by the ECB as the competent authority for Sberbank Croatia.

On the same day, the SRB also decided to impose a moratorium on the three banks belonging to the Sberbank Group: Sberbank Europe AG (Austria), Sberbank Croatia, and Sberbank banka d. d. (Slovenia). For the first time in its practice, the CNB as the NRA enacted a moratorium decision based on its powers under national provisions enforcing Article 33a of the BRRD.[63]

In accordance with the SRB Decision on the moratorium (SRB/EES/2022/17),[64] the depositors were allowed to withdraw a daily allowance amount, determined by the respective national resolution authority. In Croatia that amount was set at HRK 7,280 as an amount corresponding to the average salary in Croatia in December 2021.

The moratorium was designed to provide the SRB with some breathing room while it considered the next step, which is whether the resolution action against Sberbank Croatia would be in the public interest.

In accordance with Article 33a(4) of the BRRD, the moratorium has to be as short as possible and in any event cannot exceed the period from the publication of the moratorium to midnight in the Member State of the resolution authority of the credit institution at the end of the business day following the day of the publication. Based on the said provision of the BRRD, the moratorium was set until 1 March 2022 at 23:59:59.

During that time, all payment or delivery obligations pursuant to any contract to which Sberbank Croatia was party, including eligible deposits above the daily allowance amount, were suspended, with the exception of payment or delivery obligations to the entities mentioned in Article 33a(2) of the BRRD. Furthermore, during the moratorium, creditors of Sberbank Croatia were restricted from enforcement. Termination rights of any party to a contract with Sberbank Croatia were suspended. Since Sber-

[63] Croatian National Bank, 'Rješenje' (Decision) (2022, 27 February) <https://www.hnb.hr/documents/20182/4127850/h-rjesenje-O-br-48-091-02-22-BV.pdf/045573d0-1615-0719-7fdb-a2026d5ba5c6?t=1646000574563> accessed 31 May 2023.

[64] Single Resolution Board, 'Decision' (2022, 27 February) SRB/EES/2022/17, <https://www.srb.europa.eu/system/files/media/document/ANNEX-Ib_SRB-Decision-SRB_EES_2022_17-dated-27-February-2022-Sberbank-dd.pdf> accessed 2 October 2023.

bank Croatia was under the SRB's direct jurisdiction, the CNB adopted both the moratorium decision and the decision to initiate resolution proceedings against Sberbank Croatia based on SRB decisions.[65]

All decisions taken by the CNB on matters within its jurisdiction are not appealable, but an administrative dispute may be instituted against such decisions.[66] However, judicial review is limited to the appropriate implementation of the SRB's decision for decisions adopted under the SRM. The national court is not permitted to question the legality of the SRB's decision and must limit its review only to determining whether the national decision correctly implements the SRB's decision.

This follows from Article 263 of the Treaty on the functioning of the European Union[67] (hereinafter: TFEU) as well as from the relevant jurisprudence of the CJEU[68] which clearly states that the 'Court of Justice of the European Union has exclusive jurisdiction to review the legality of acts adopted by the EU bodies, offices or agencies, one of which is the Single Resolution Board' and that 'in order for such a decision-making process to be effective, there must necessarily be a single judicial review, which is conducted, by the EU Courts alone'.

The task of a national court, namely, determining whether the national decision correctly implements the SRB decision, has the potential of being extremely difficult. The statutory deadline for filing an administrative dispute against the CNB's decisions is one month after the delivery of the contested decision,[69] and it is possible that the non-confidential version of the SRB's decision will not be available within such a short timeframe.

Article 339 of the TFEU, Article 2 of its Protocol (No 7),[70] and Article 88 of the SSMR provide specific rules for disclosing SRB's confidential information. However, the essential part of the SRB's decision is sometimes made public through press releases, etc. Even if this is the case, the remaining part of the decision, meaning the sensitive factual elements and legal reasoning, is not made public. The SRB documents are subject to Regulation (EC) No 1049/2001,[71] which follows from Article 90 of the SSMR. In accordance with Article 5(2) of the cited Regulation, documents

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[65] Single Resolution Board, 'Sberbank d. d. and Sberbank Banka d. d.' (2022, 1 March) Press Releases <https://www.srb.europa.eu/en/content/sberbank-dd-and-sberbank-banka-dd> accessed 31 May 2023.

[66] Article 69(1) of the Act on the Croatian National Bank.

[67] Treaty on the functioning of the European Union [2012] OJ C326/47.

[68] Case C-414/18 *Iccrea Banca SpA Istituto Centrale del Credito Cooperativo v Banca d'Italia* ECLI:EU:C:2019:1036, paras 37–48.

[69] Article 141(1) and 141(2) of the Resolution Act.

[70] Protocol (No 7) on the privileges and immunities of the European Union [2012] OJ C326/266.

[71] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents [2001] OJ L145.

originating from the SRB can only be disclosed by MS authorities only after consultation with the SRB, or the request to access documents can be referred to the SRB. In practice, MS authorities mostly opt for the latter possibility, since it has proven to be more efficient and expeditive.

The same is confirmed by Decision SRB/ES/2017/01,[72] whose Article 5 states: 'Documents that are in the possession of an NRA and have been drawn up by the SRB may be disclosed by the NRA only subject to prior consultation of the SRB concerning the scope of access, unless it is clear from a past consultation of the SRB that the document shall or shall not be disclosed. Alternatively, the NRA may refer the request to the SRB'.[73]

5.2 Summarising the key policy lessons and some still unresolved questions

Judging by the CNB's recent experience, there are several policy lessons that NRAs can draw on to foster a successful transition from an autonomous authority to being part of a larger system that retains some shared competencies yet relies on hierarchy in governance. The first policy lesson that is worth noting regards institutional features, and the importance of adequate operational arrangements for the division of supervisory and resolution tasks more concretely. Indeed, when a central bank performs multiple prudential functions, such as supervision and resolution, the primary goal of banking supervision, which is to ensure the safety and soundness of banks, can at times be affected. As a result, in addition to relying on separate organisational units, the supervisory and resolution arm should follow two distinct reporting lines through which they feed relevant information up the governance chain. This is not to say that the two units should not meet at the horizontal level of governance, such as in thematic working groups, to exchange views or to coordinate tasks in overlapping areas of expertise. The second important lesson relates to resolution planning and execution. Based on the CNB's recent experience in resolution matters with Sberbank Croatia that was resolved on the basis of the SRM legal framework, the importance of the decision-making procedure, or, in other words, smooth coordination be-

[72] Decision of the Executive Session of the Board of 9 February 2017 on public access to the Single Resolution Board documents (SRB/ES/2017/01).

[73] Furthermore, recent case law (Case C-316/19 *European Commission v Republic of Slovenia*, Archives de la BCE, para 75) concludes that the 'concept of "archives of the Union" within the meaning of Article 2 of the Protocol on privileges and immunities must be understood as meaning all those documents of whatever date, of whatever type and in whatever medium which have originated in or been received by the institutions, bodies, offices or agencies of the European Union or by their representatives or servants in the performance of their duties, and which relate to the activities of or the performance of the tasks of those entities'. What can be concluded from the jurisprudence is that SRB documents fall under the definition of the 'archives of the Union'. According to the aforementioned provisions, the SRB may deny access to its documents, even for the purpose of court proceedings. As a result, national courts may face difficulties in reaching a decision because their knowledge of SRB decisions is not necessarily comprehensive.

tween the central bank's resolution unit and its executive level, is paramount. In the case of the CNB, the Council has the authority to decide on the initiation of resolution proceedings as well as the appointment of resolution administration, and typically votes on these two decisions almost simultaneously. This implies a specific Council composition in terms of resolution expertise, as well as a fine-tuning of voting modalities. Finally, the third lesson addresses governance aspects of the SRM and concerns the revisability of SRB decisions as implemented by national courts more concretely. Indeed, considering the Croatian case where decisions taken by the CNB can be appealed through a specific procedure in a very narrow timeframe, judicial revisability in practice may become challenging and this is because of the availability of a non-confidential version of the SRB decision itself or the 'access to documents' practice of the SRB. Another interesting legal issue that remains to be seen in relation to both national proceedings and proceedings before the CJEU initiated in connection with the resolution of Sberbank Croatia is whether national courts will consider the legality of the SRB's resolution programme a preliminary issue and decide to stay the proceedings initiated before them against NRA implementing decisions, until the CJEU renders a decision on the legality of the SRB decision which gave rise to adopting contested national decisions. Given the nature of national implementing resolution decisions and their unquestionable dependence on the SRB decisions, such developments may not come as a surprise.

6 Conclusions

The EU views bank crisis management and resolution as one of the key components of a holistic prudential approach to bank regulation within Member States, or at least this is what can be concluded from the establishment of the BU's second pillar, the Single Resolution Mechanism. As straightforward as this conclusion may appear, designing a bank resolution system suitable for all EU Member States is no easy task; namely, this group of countries has a rather heterogeneous economic background (for example, transition v non-transition economies) to which the policy, operational, and procedural features of national crisis management and resolution systems have been tailored. Therefore, it is difficult to reconcile prudential divergences shaped by policy and institutional path dependencies in this area of bank regulation, as well as to achieve consistency in the implementation of crisis management and resolution strategies. Furthermore, this group of countries has had significantly distinct experiences with the causes, episodes, and management of bank distress, which complicates the harmonisation process. Given all of these differences, it is reasonable to ask how successful the integration of separate, national resolution regimes and the operation of NRAs within the larger framework of the SRM will be.

This paper has argued that the example of Croatia – one of the EU's youngest Member States and a recent eurozone addition – can teach im-

portant lessons about the legislative and institutional adaptability of post-transition economies, as well as about the main drivers of convergence to the common, EU framework for bank crisis management and resolution. Indeed, after carefully reviewing the relevant literature on resolution frameworks in post-transition economies as well as on the economic (fiscal) ramifications of their performance, the paper has argued how the case of Croatia perfectly depicts the maturing of a system that was hastily forged in times of bleak macroeconomic circumstances toward a carefully designed framework based on a robust legal one and anchored to an institutionally proactive (albeit policy hawkish) NRA – the national central bank. From the standpoint of Croatia, there were two inflection points on this evolutionary trajectory: the two banking crisis episodes of the 1990s and EU/BU membership, which encouraged a radical change in the national prudential framework and the institutional resettling of the CNB. As a result of these transformations, the CNB now serves as the sole resolution authority. This institutional empowerment highlights some important institutional, policy, and also legal considerations in terms of resolution policymaking and enforcement. These concern the functional divisions of competencies within an NRA that combines multiple policy responsibilities, as well as the modalities by which a resolution decision is enforced and by which the resolution scheme is implemented, which leads to an outstanding, critical legal issue whose manner of unravelling is difficult to predict at this time; namely, the complexities surrounding judicial review of an NRA's actions taken on the basis of an SRB resolution decision. These are all valuable lessons that other CSEE countries should consider when weighing the 'pros' and 'cons' of BU membership and of central banks serving as NRAs.

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RETHINKING THE PRIVILEGE AGAINST SELF-INCRIMINATION IN TERMS OF EMERGING NEURO-TECHNOLOGY: COMPARING THE EUROPEAN AND UNITED STATES PERSPECTIVE[*1]

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Abstract: This paper analyses new fact-finding methods in criminal proceedings, using state-of-the-art innovations in neuroscience and artificial intelligence (AI). It will outline the existing methods and explain their effects. Then it will address the criminal-law aspects of the use of such methods as evidence in criminal proceedings, with an emphasis on the assessment of their admissibility from the perspective of the right to a fair trial and the privilege against self-incrimination. This topic will be observed from the perspective of US and European law, highlighting the existing jurisprudence of the European Court of Human Rights (ECtHR) and the legal standards established by the court in relation to the privilege against self-incrimination. Based on this analysis, the authors will formulate a conclusion suggesting that the use of current AI technologies should be juxtaposed to the relevant benchmark of the privilege against self-incrimination as the requisite standard of the right to a fair trial.

Keywords: lie detector, fair trial, self-incrimination, truth, evidence, testimonial, artificial intelligence, neuroscience.

1 Introduction

The use of AI technologies for the enhancement of efficiency in criminal prosecution is entering a new era. Various forms of AI, which will most likely play a role as tools to assist law enforcement authorities in the performance of their duties, are currently being developed. However, despite the numerous advantages that such technology can provide, the question arises about whether the breakthrough of new scientific technologies, under the influence of the development of neuroscience and AI systems, could undermine the essence of the right to a fair trial.

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During the interrogation of a defendant, law enforcement in some parts of the world use certain examining tests (or assessment techniques), such as the Guilty Knowledge Test (GNT), the Implicit Association Test (IAT) and the Timed Antagonistic Response Alethiometer Test (TARA). GNT is based on the application of technologies such as electroencephalography (EEG) and functional magnetic resonance imaging (fMRI) and provides for the monitoring of blood flow in the brain. The scans obtained through these methods allow the recognition of certain physiological (not just psychological) reactions of the brain to the posed questions. The test is designed to determine whether or not the respondent recognises certain information connected to the criminal offence. If the information is recognised, then the brain will react differently than if the information is not recognised, and this will be visible on the screen.[1] TARA manufactures a situation in which, if respondents lie, they must perform two incompatible tasks, whereas if they tell the truth, they can perform two compatible ones. Both tasks involve repeatedly classifying target and control statements as true or false. The incompatible task combination, being more difficult, takes longer to complete correctly; hence, slower responses diagnose dishonesty.[2] IAT is a controversial assessment intended to detect subconscious associations between mental representations of objects in memory.[3] Some authors claim that it is suitable for detecting biases during *voir dire*.[4]

These techniques have the purpose of helping investigators distinguish truth from lies. At the same time, neuroscientists are developing supportive mechanisms for the purpose of enabling mind reading and improving accuracy in proving a distinction between truth and lies. After fMRI, the newest and most controversial of such mechanisms for mind reading is brain fingerprinting: an objective method to detect information stored in the brain by measuring EEG brainwaves through sensors placed on the scalp of the person who is being interrogated.[5]

These methods are already in use in different parts of the world, and courts have, from time to time, affirmed that a positive result in such a test can be used as proof of guilt in criminal proceedings. Although the described methodology can be very effective, it creates significant legal

[1] Gershon Ben-Shakhar and others, 'Trial by Polygraph: Reconsidering the Use of the Guilty Knowledge Technique in Court (2002) 26(5) Law and Human Behavior 529-530. See also Igor Vuletić and Tunjica Petrašević, 'Is It Time to Consider EU Criminal Law Rules on Robotics?' (2020) 16 Croatian Yearbook of European Law and Policy 234.

[2] Aiden Gregg, 'When Vying Reveals Lying: The Timed Antagonistic Response Alethiometer' (2007) 21(5) Applied Cognitive Psychology 621.

[3] See Madison Kilbride and Jason Iuliano, 'Neuro Lie Detection and Mental Privacy' (2015) 75 Md L Rev 163, 166-171.

[4] Dale Larson, 'A Fair and Implicitly Impartial Jury: An Argument for Administering the Implicit Association Test During Voir Dire' (2010) 3 DePaul Journal for Social Justice 139, 158.

[5] Lawrence A Farwell, 'Brain Fingerprinting: A Comprehensive Tutorial Review of Detection of Concealed Information with Event-related Brain Potentials (2012) 6(2) Cogn Neurodyn 115.

implications. One of these implications is that such interrogation methods violate the defendant's ability to exercise their right to remain silent. Another issue is the defendant's consent for the use of AI-based tests and the possibility of adverse inferences if the defendant refuses to give consent to the use of AI-based tests in criminal proceedings. These and other related legal issues have contributed to the establishment of a new branch of law: neurolaw.[6]

This paper will explore these issues more thoroughly. The specific contribution of this study lies precisely in a comparison of the European and American approaches to the subject matter. It is noteworthy that, in the existing literature, no such attempt has been made in this particular context. However, the primary purpose of the paper is not comparative, but instead normative in the sense of advocating a particular legal position on how AI technology should reflect on the privilege against self-incrimination. In this sense, the authors will endeavour to establish what they believe to be the most significant argument, which is that if the use of AI technology proves to be reliable and credible, then such a method must be applied in respect of the right to a fair trial as a well-established human rights standard in criminal proceedings.

The analysis is based on a systematic approach for clarity, and the presentation of this problem is divided into four further main sections. The first will briefly outline new AI questioning technologies. The next two sections will address the standards of the privilege against self-incrimination, as a part of the right to a fair trial as developed under the relevant jurisprudence of the US Supreme Court and the ECtHR. In the final section, before the conclusion, the authors will elaborate their standpoint.

2 An overview of innovative neuroscientific methods in criminal proceedings

The concept of lie detection technologies appeared as early as the 18th century, when the measurement of thieves' pulse during interrogations was introduced for the first time. The concept expanded from the 1920s, when the first polygraph testing began.[7] The development of neuroscience and artificial intelligence, which has accelerated and attracted close attention during the past two decades, has led to the creation of new technologies which were inconceivable until recently and which replace some otherwise typical human activities. This phenomenon is present in many fields, so it should come as no surprise that it did not leave out the criminal legal system. Criminal law is one of the fields that is receptive to significant improvements through new technologies, because it allows the removal, or at least reduction, of the deficiencies that inherently flow

[6] Leda Tortora and others, 'Neuroprediction and AI in Forensic Psychiatry and Criminal Justice: A Neurolaw Perspective' (2020) 11 Frontiers in Psychology 1–9.

[7] Robert Bradshaw, 'Deception and Detection: The Use of Technology in Assessing Witness Credibility (2021) 37(3) Arbitration International 708–709.

from human reasoning and thought processes (such as subjectivity, bias and prejudice, naivety, etc). In simple terms, it is much more difficult (if not impossible) to deceive a mechanism based on artificial intelligence, unlike humans, as a fact-finder. Therefore, the use of such supporting mechanisms contributes to the discovery of the truth of a certain event, which carries significant weight in the field of criminal law, in light of the severity and significance of the legal consequences of a conviction or exoneration. In this sense, it is clear that such technology has become more popular and desirable over time, at least from the perspective of the law enforcement authorities. The following sections will present the key features of the most sophisticated mechanisms of modern science and technology in the field of fact-finding in criminal proceedings.

It is well known that the traditional (conventional) polygraph is essentially based on the measurement of certain physiological indicators of stress during questioning related to a specific event. The so-called conventional control question polygraph test (CQT) measures peripheral responses, such as the sweating of the skin, cardiovascular activity and blood pressure, as well as breathing, in an effort to detect reactions that are typical of lying.[8] The assessment of the truthfulness of an individual's statements is made based on the prominence of one or more such indicators. As reactions to stress are highly individual and differ from person to person, the results of such testing are insufficiently reliable. This is among the primary reasons why, over the past two decades, polygraph testing has become largely inadmissible as legitimate evidence in most jurisdictions in the world.[9] Therefore, scientists are striving to devise lie detection mechanisms based on reliable and science-based criteria in order to obtain a credible outcome.

The most dominant technology of this kind today is functional magnetic resonance imaging (fMRI), which enables a neural imaging procedure for observing changes in the cerebral blood flow. This method is also aimed at the monitoring of reactions that are usually linked to untruthful statements. Unlike the previously described traditional lie detector, fMRI does not measure stress reaction to the questioning, but it observes certain cerebral processes which are considered to be connected with lying and internal conflicts. These cerebral processes cannot be consciously controlled, unlike some elements that are used in the old-fashioned polygraph test. The fMRI technology follows the delivery of oxygenated blood to neurons that have recently fired. Based on such observations, scientists can conclude which parts of the brain react to certain stimuli. In this sense, fMRI is considered to be more precise than the older scalp-recorded event-related potentials (ERPs) technique, which was measured

[8] William G Iacono and David T Lykken, 'The Validity of the Lie Detector: Two Surveys of Scientific Opinion (1997) 82(3) J Appl Psychol 426–433.

[9] ibid. See also Timothy B Henseler, 'A Critical Look at the Admissibility of Polygraph Evidence in the Wake of Daubert: The Lie Detector Fails the Test' (1997) 46(4) Cath U L Rev 1247. See also Ed Johnston, 'Brain Scanning and Lie Detectors: Implications for Fundamental Defence Rights' (2016) 22(2) Eur J Current Legal Issues 4.

by an EEG. Observance of the ERPs could not localise their source in the brain, which is possible with fMRI.[10] Therefore, the aforementioned Guilty Knowledge Test (GKT), which was traditionally used during classical polygraph questioning and consisted of an examination of the details of a criminal offence which can only be known to the perpetrator, has been used in combination with fMRI technology in the past two decades to ensure more reliable and science-based results.[11] These developments have made fMRI a recognisable and commercially viable mechanism on the market, so certain US companies have specialised specifically in the development of this technology in the context of questioning for the purpose of criminal prosecution.[12]

However, this technology is also not without its flaws. There are warnings that the technology should be optimised to give results that reflect real-life circumstances, and not to create results under controlled conditions. One example is a study in which the respondents were asked to steal an object and put it in a closet, and then they were shown certain photographs related to the event to monitor cerebral activity. The respondents had to respond truthfully to the control and neutral questions, but they were instructed to deny the event. As a motivation, they were promised an additional monetary amount if they managed to deceive the examiner and fMRI. Scholarly literature notes that this situation significantly differs from reality, because the respondents in this situation know that they will not be punished, while in reality they would do their all to defend themselves. Furthermore, this study highlighted other deficiencies of the method, including the fact that not everybody has the same neurological reaction to lying and deceit.[13] Therefore, the use of fMRI as evidence in criminal proceedings is still largely in its early stages.[14]

Considering the outlined deficiencies in the described techniques, neuroscientists have continued to develop and optimise lie detection mechanisms. This has led to the development of the currently most controversial technology called brain fingerprinting. In essence, it differs from all previous technologies because it is not aimed at determining whether a person is lying or telling the truth, but whether or not a piece of information is stored in their brain.[15] Hence the term 'fingerprinting': 'fingerprinting' allows for the establishment of an objective and science-based link between the fingerprint at the crime scene and the finger of the per-

[10] Scott A Huettel, Allen W Song & Gregory McCarthy, *Functional Magnetic Resonance Imaging* (2nd edn, OUP 2009).

[11] For a detailed results analysis of the first published fMRI use report, see Daniel D Langleben and others, 'Brain Activity During Simulated Deception: An Event-Related Functional Magnetic Resonance Study' (2002) 15(3) Neurimage 727–732.

[12] One such example is No Lie MRI, a San Diego based company that has been producing fMRI-based lie detectors since 2006.

[13] Jonathan G Hakun and others, 'Towards Clinical Trials of Lie Detection with fMRI' (2009) 4(6) Soc Neuroscience 518–527.

[14] Johnston (n 9) 12.

[15] Farwell (n 5) 128.

petrator. Similarly, DNA fingerprinting proves the objective link between the DNA sample taken from the crime scene and the DNA sample taken from the suspect. The term 'brain fingerprinting' seeks to emphasise that this method provides objective and science-based evidence of the link between the images from the crime scene and the memories stored in the brain of the suspect. It is important to emphasise that brain fingerprinting cannot provide information on whether the memory is real or accurate, but simply whether it is stored in the brain (ie whether the suspect recognises a certain motive as something corresponding to their memory).[16]

The brain fingerprinting method functions under the principle of measuring the EEG (electroencephalographic) brain waves through non-invasive sensors which are placed on the head of the examinee. The examinee is then presented with certain words, phrases or images detailing a specific event on a computer screen, along with other irrelevant information. This technology measures the cerebral responses to the presented material and helps detect certain characteristic brain wave patterns. If a person recognises something as significant in a specific context, they will experience the so-called 'Aha!' effect, which will be visible as a specific pattern of brain waves, which are known in neuroscience as P300-MERMER. This test helps answer the question whether certain information is present or absent from the examinee's brain, while the system calculates the statistical reliability of the obtained results. If, however, the statistical processing cannot provide a sufficiently high percentage of reliability of the results, the system will show the result as 'indeterminate'.[17]

The accuracy tests of brain fingerprinting, conducted under controlled conditions by the FBI, CIA and the US Navy shows that, in 97% of cases, the system was able to assess whether the information was stored in the examinee's brain with 100% accuracy. Only in 3% of the examined cases was the system unable to provide a statistical confirmation and gave an 'indeterminate' result.[18] Despite this, none of the above-mentioned agencies provided recommendations for further investments in the development of this technology, ultimately finding it uneconomical.[19]

In the US, where this method originated, there are still no judgments based on evidence obtained through brain fingerprinting. In other parts of the world, there have been cases in which evidence was obtained by such means. For example, India took the lead in a recent case in which a suspected rapist was subjected to examination by means of the Brain

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[16] Farwell (5) 128.

[17] ibid 115, 117, 128.

[18] ibid 139.

[19] See, for example, 'Investigative Techniques: Federal Agency Views on the Potential Application of "Brain Fingerprinting"' (GAO-02-22, 31 October 2001) 10 <www.govinfo.gov/content/pkg/GAOREPORTS-GAO-02-22/html/GAOREPORTS-GAO-02-22.htm> accessed 3 November 2022.

Electrical Oscillation Signature Profiling (BEOSP) method, which is a form of brain fingerprinting.[20] In some previous cases, Indian courts issued convictions on the basis of evidence obtained through brain scanning.[21]

It is clear from the analysis above that the combined development of neuroscience and AI-based technologies leads to the development of new supporting methods for the determination of the material truth in criminal proceedings. These technological advances should not be hindered, but should be subjected to clear legal criteria. These issues can also be observed from the perspective of the assessment of the authenticity of witness testimony. This paper will, however, focus only on the perspective of the deposition of the suspect and their right to the privilege against self-incrimination. The following analysis will study the scope and limitations of this privilege as a component of the right to a fair trial in cases of the application of the described technologies for the assessment of the truthfulness of the statements of the defendant in criminal proceedings. Both issues have been discussed in comparative literature and practice, but there has been no systematic comparison of US and European law. The following sections will present the legal standards developed under US and European law, shaped through the jurisprudence of the ECtHR. Based on this analysis, we will determine which of the two legal frameworks provides greater legal space for the future implementation of the described technologies, and others with similar features.

3 Neuro-science vs the privilege against self-incrimination: the US perspective

The privilege against self-incrimination is very significant in the Anglo-American legal tradition. Its emergence is considered as one of the most consequential milestones in the development of criminal law and is connected to the expansion of the accusatory type of proceedings from the late 18th century. In the preceding period, from the mid-16th century, the purpose of criminal proceedings was to enable the defendant to speak (and not remain silent) in their case, thus providing them with the opportunity to raise their defence. During that time, the defendant could not retain legal counsel. These conditions drastically changed in the late 18th and especially in the second half of the 19th century, when defendants gained the right to be represented by legal counsel, as experts who could test and assess the hypothesis of the indictment.[22] This new understanding at the core of criminal proceedings soon led to the recognition of the privilege against self-incrimination (along with the 'beyond

[20] Vaibhab Yha, 'The Accused in Hatras Rape Case Will Undergo Brain Fingerprinting. What Is It?' <https://indianexpress.com/article/explained/hathras-rape-case-brain-fingerprinting-7070587/> accessed 19 March 2022.

[21] See, for example, *State of Maharashtra v Sharma*, CC No 508/07 Pune, 12 June 2008 (India).

[22] John T McNaughton, 'The Privilege against Self-Incrimination' (1960) 51(2) J Crim L Criminology & Police Sci 139.

reasonable doubt' standard and the exclusionary rule) as an integral and central component of common law criminal proceedings. This approach has been sustained to date.

In order for any examination technology to be applied on defendants before US criminal courts, it has to meet certain minimal conditions, which ensure that the results can be treated as reliable. In this sense, the admissibility standards for the use of certain evidence before the court in criminal proceedings were established in the landmark *Daubert* case. In this case, the Supreme Court established a clear set of criteria on the basis of which the court should assess the admissibility of certain scientific evidence in the proceedings. Thus, it was determined that the evidence can be admitted if it cumulatively meets the following five criteria: 1) that the technology on which it is based can be scientifically tested; 2) that it was subjected to review and scientific (public) publication; 3) that the percentage of the accuracy of its results is known; 4) that there are clear standards for oversight and control of the functions of the technology; and 5) that the technology is accepted in the scientific community.[23]

Under US law, the privilege against self-incrimination is regulated by the Fifth Amendment to the US Constitution.[24] Thus, the US Supreme Court formulated clear criteria under which certain evidence could fall under the scope of the Fifth Amendment if it is cumulatively incriminating, testimonial and compelled.[25] Regarding the latter criterion, the key decision of *Griffin v California*[26] should be mentioned. In this case, the US Supreme Court held that a comment from the prosecutor or judge to the jury that the defendant's silence should be treated as incriminating evidence represented a violation of the Fifth Amendment of the US Constitution. The Supreme Court affirmed this position in subsequent decisions.[27]

The privilege against self-incrimination is viewed from different perspectives in US judicial practice today,[28] but it can be noted that both the theory and practice focus more on the scope of this privilege in the context of new digital technologies and evidentiary potential that such technologies entail by literally converting evidentiary materials from the

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[23] *Daubert v Merrel Dow Pharmaceuticals, Inc* [509 US 579] 1993.

[24] US Constitution, Fifth Amendment: 'no person [...] shall be compelled in any criminal case to be a witness against himself'.

[25] *Fischer v United States* [425 US 391, 408] 1976.

[26] *Griffin v California* [380 US 609] 1965.

[27] See, for example, *Mitchell v United States* [526 US 314] 1999.

[28] Debate on all potential aspects of privilege against self-incrimination is beyond the scope of this article. For a detailed insight on the issue of privilege against self-incrimination in the post-conviction phase, see Stephen Vance, 'Looking at the Law: An Updated Look at the Privilege Against Self-Incrimination in Post-Conviction Supervision' (2011) 75(1) Federal Probation Journal 33; for the issue of invoking this privilege due to the fear of foreign prosecution, see a detailed analysis in Gregory O Tuttle, '"Cooperative Prosecution" and the Fifth Amendment Privilege Against Self-Incrimination' (2010) 85(4) NYU L Rev 1348.

physical into the virtual sphere.[29] In this sense, increasing attention is being paid to the issue we are addressing in this paper.

Discussions on whether the use of examination technologies violates the defendant's privilege against self-incrimination mostly focus on the question of whether the results of neuro-testing are a 'testimonial' or 'physical' type of evidence. If the evidence is testimonial, under the condition that the defendant was directly or indirectly coerced, such evidence could not be used in the proceedings as it would fall under the scope of the privilege against self-incrimination. In the *Schmerber v California* decision, the court established the rule that the coerced drawing of blood from the defendant should be treated as physical evidence that would not violate their privilege against self-incrimination, and the same rationale should apply to all other types of testing.[30] However, the issue is that neither this decision nor those that followed established clear criteria for the distinction between physical and testimonial evidence, so practice in this area varies significantly.[31]

This issue is particularly complicated in relation to the use of sophisticated neuro-lie detection technologies. If it is the result of classical polygraph testing, then the answer is clear because these results can only be reached thorough an interaction with the defendant. Whenever there is direct communication, the evidence is testimonial, in accordance with the *Schmerber* standard,[32] which falls under the privilege. The situation is somewhat more complicated with technologies such as fMRI, since they are not based on classic verbal communication. However, given the fact that the examinee responds by pressing buttons on a device and that this is also a form of communication, such evidence may also be considered testimonial and thus protected by the privilege against self-incrimination.[33]

The biggest dilemma is created by sophisticated technologies such as brain-fingerprinting, because they do not require any communication with the examinee, so they cannot be subsumed under the classic concept of testimonial evidence. In this sense, and in light of the *Schmerber* criteria, such evidence would be inadmissible. If that is the case, some forms of neuro-technologies would be admissible in court, while others would not, which creates confusion. Some authors argue that all such technologies should be legally treated as images of cerebral waves, which would give them the same status as DNA evidence, which would no longer make it testimonial or covered by the privilege against self-incrimina-

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[29] Diego Wright, 'The Right Against Self-Incrimination in the Digital Age' <https://proceedings.nyumootcourt.org/2021/09/the-right-against-self-incrimination-in-the-digital-age/> accessed 19 March 2022.

[30] *Schmerber v California* [384 US 761] 1966.

[31] Kilbride and Iuliano (n 3) 174.

[32] See n 30, 764.

[33] Kilbride and Iuliano (n 3) 176.

tion.[34] However, other authors oppose this view, claiming that this type of evidence analyses the content of the defendant's mind and is based on the knowledge of the defendant. As such, the evidence is testimonial and the denial of the privilege against self-incrimination in such cases would be unjustified.[35] This position is criticised for being contrary to prevailing judicial practice that does not treat evidence as testimonial if it does not contain any acts or statements by the defendant. Therefore, these authors suggest that the focus of the discission should be diverted from the Fifth to the Fourth Amendment and the defendant's right to privacy.[36] Other authors advocate the abandonment of the traditional division of evidence into physical and testimonial and propose four categories of evidence: identifying, automatic, memorialised, and uttered. These authors consider that only such a categorisation of evidence can protect the right to cognitive freedom and mental privacy, within the framework of the Fourth and Fifth Amendments to the US Constitution.[37] However, such views remain in the minority for now and the issue is still primarily observed from the perspective of the Fifth Amendment and the privilege against self-incrimination and the traditional categorisation of evidence into testimonial and physical.

Although neuro-scientific examination is broadly present in criminal proceedings in US courts, it still predominantly relates to the determination of certain mental and neurological disorders which may impact liability.[38] However, with regards to neuro-lie detection technologies, it can be validly concluded that there are still legal doubts about their scientific basis in the US legal system and this is probably one of the main reasons that their evidentiary value is still not recognised in judicial practice. The case law remains modest to date. A noteworthy case is *United States v Semrau*,[39] in which the defendant passed the fMRI test, but the court refused to admit it because it considered it scientifically unreliable. However, the court left the door open for the future application of fMRI if it is scientifically affirmed through further research.[40]

The fMRI technique is still not considered up to par with the *Daubert* standards,[41] although there are positions that this judgment is unfair

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[34] Henry T Greely and Anthony D Wagner, 'Reference Guide on Neuroscience' in *Reference Manual on Scientific Evidence* (3rd edn, Federal Judicial Center 2011) 791 <www.nap.edu/read/13163/chapter/15#790> accessed 19 March.

[35] Michael S Pardo and Daniel M Filler, 'Neuroscience, Evidence, Legal Culture and Criminal Procedure' (2006) 33(3) Am J Crim L 316.

[36] Kilbride and Iuliano (n 3) 180–186, 193.

[37] Nita A Farahany, 'Incriminating Thoughts' (2012) 64 Stan L Rev 351.

[38] Darby Aono, Gideon Yaffe and Hedy Kober, 'Neuroscientific Evidence in the Courtroom: A Review (2019) 4 Cognitive Research: Principles and Implications 3.

[39] *United States v Semrau*, Court of Appeals for the Sixth Circuit, 693 F.3d 510 (2012).

[40] ibid 31.

[41] Isabella Sousa, 'fMRI v the Frye & Daubert Standards of Evidence: Re-searching for the Truth' (Columbia Undergraduate Law Review, 22 August 2021) <www.culawreview.org/journal/fmri-v-the-frye-amp-daubert-standards-of-evidence-re-searching-for-the-truth> accessed 19 March 2022.

since fMRI is no less reliable than some other technologies whose results are regularly admitted by the court, and that scientific confirmation can only be obtained through its broader use in the described context.[42] Some authors assert that the adoption of progressive procedural legislation in some states, such as Oklahoma, will enable a new approach to the interpretation of the *Daubert* criteria, which will create opportunities for the acceptance of fMRI as valid evidence for lie detection in the near future.[43]

In the USA, where the brain fingerprinting method was conceived, there have only been a few cases on record where evidence obtained in this manner was actually used in criminal proceedings (in the *James B Grinder* case, the *Terry Harrington* case, the *Jimmy Ray Slaughter* case). However, none of these cases was decided on the basis of evidence collected through the application of this method.[44] Therefore, it can be rightly concluded that the technique of brain fingerprinting is still far from accepted as a standard and as regular evidence of the veracity of testimony, at least in criminal proceedings.

4 Neuro-science vs the privilege against self-incrimination: the European perspective

The development and implementation of AI-based technologies in Europe is still significantly lagging behind the process in the US and Asia.[45] While the sight of AI-operated vehicles is commonplace in US and Asian cities, such innovations are exclusively experimental in Europe. However, Europe has recently tried to catch up with the competition, which has been reflected in strengthened legislative activity at the supra-national level in recent years, especially under the auspices of the EU.[46] It is worth mentioning the AI Act and the European Parliament Resolution of 6 October 2021 on artificial intelligence in criminal law and its use by the police and judicial authorities in criminal matters (2020/2016(INI)). In addition, some countries are developing technologies for the purpose of predicting crimes and reducing the crime rate. However, the actual prac-

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[42] Justin Amirian, 'Weighing the Admissibility of fMRI Technology Under FRE 403: For the Law, fMRI Changes Everything – and Nothing' (2013) 41(2) Fordham Urban L J 769, 770.

[43] Julie Elizabeth Myers, 'The Moment of Truth for fMRI: Will Deception Detection Pass Admissibility Hurdles in Oklahoma?' (2010) 6(1) Oklahoma J L & Tech 47.

[44] See details of those cases and their outcomes in Arpad Budahazi and others, 'The Options and Limitations of the Brain Fingerprinting Lie Detection Method in the Criminal Proceedings' (2018) 18(5) Magyar Rendészet 45-48.

[45] See more in Daniel Castro and Michael McLaughin, 'Who Is Winning the AI Race: China, the EU, or the United States? 2021 Update' (*Center for Data Innovation, January* 2021 <www2.datainnovation.org/2021-china-eu-us-ai.pdf> accessed 22 March 2022. See also Igor Vuletić and Tunjica Petrašević, 'Is It Time To Consider EU Criminal Law Rules On Robotics?' (2020) 16 Croatian Yearbook of European Law and Policy 227.

[46] Philipp Hacker, 'AI Regulation in Europe' (7 May 2020) <https://ssrn.com/abstract=3556532> or <http://dx.doi.org/10.2139/ssrn.3556532> accessed 22 March 2022.

tical efficiency of such technologies is still very questionable.[47]

Therefore, it is not surprising that the use of new fact-finding methodologies in criminal proceedings in European countries is somewhat more restricted than in the US. However, from the perspective of individual countries, there have been some interesting decisions related to different AI-related issues. For example, Italian courts have based their decisions on controversial scientific methods in two instances. In the first case, the court accepted the examination of the defendant's inability to form intent through the MMPI test and the Rorschach personality test, as well as the genetic test of predisposition for aggressive behaviour. The positive results of these tests were used as mitigating factors during sentencing. In the other case, the court verified the veracity of the testimony of a sexual harassment victim through IAT and TARA testing in order to determine the real memories. Since the results showed that her memories were natural, and the allegations of her manipulative character raised by the defence and attention seeking were scientifically unfounded, the court convicted the defendant.[48]

The use of modern neuroscientific technologies in European national legislation has so far focused on examinations of the defendant's personality and psycho-somatic capacities in order to enable a more favourable verdict for them. England and Wales, the Netherlands, Slovenia and Italy are leaders in this area.[49] In the context of this paper, it is particularly important to note a recent decision of the Supreme Court of the Netherlands which ruled that the defendant's privilege against self-incrimination was not violated because the defendant was forced to unlock his smartphone with his fingerprint.[50] The court based its decision on the interpretation of the ECtHR in the case of *Saunders v United Kingdom*, according to which there is a difference between evidentiary material which requires consent and that which can be collected independent of consent.[51] The latter material (such as fingerprints) can be taken by force,

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[47] See for example Dominik Gerstner, 'Predictive Policing in the Context of Residential Burglary: An Empirical Illustration on the Basis of a Pilot Project in Baden-Württemberg, Germany' (2018) 3 European Journal for Security Research 115. See also Sunčana Roksandić, Nikola Protrka and Markus Engelhart, 'Trustworthy Artificial Intelligence and Its Use by Law Enforcement Authorities: Where Do We Stand? in K Skala (ed) *Proceedings of the 45th Jubilee International Convention on Information, Communication and Electronic Technology (MIPRO)* 23-27 May 2022 <www.bib.irb.hr/1196746> accessed 20 August 2023.

[48] See details on both cases in Armando Simbari, 'N 9965 Nota a Ufficio Indagini Preliminari di Cremona' (2012) 2 Rivista Italiana di medicina legale 749–758.

[49] For the situation in England and Wales, see Paul Catley and Lisa Claydon, 'The Use of Neuroscientific Evidence in the Courtroom by Those Accused of Criminal Offenses in England and Wales (2015) 14(2) J L & Biosciences 510. For the situation in Slovenia, see Miha Hafner, 'Judging Homicide Defendants by Their Brains: An Empirical Study on the Use of Neuroscience in Homicide Trials in Slovenia (2019) 6(1) J L & Biosciences 226. For the Netherlands, see Peggy ter Vrugt, 'A Pragmatic Attitude: The Right to Silence in the Netherlands (2021) 12(3) New J Eur Crim L 389.

[50] Supreme Court of the Netherlands ECLI:NL:HR:2021:202.

[51] *Saunders v United Kingdom* [GC] 19187/91, 17 December 1996.

if it is otherwise impossible, and this is not an infringement of the privilege against self-incrimination.[52] The ECtHR has shaped certain legal standards through years of jurisprudence for the scope and limitations of the privilege against self-incrimination. However, it is notable that these standards have not always been consistent. The following sections will outline some of the more significant cases in this area and which have shaped the position of the ECtHR and as such have had a significant impact on national legislation.

Although it is not explicitly mentioned, it is held that the privilege against self-incrimination is a constitutive element of the right to a fair trial codified in Article 6 of the European Convention on Human Rights. Its purpose is to protect the defendant from the coercion of state authorities and to contribute to the realisation of the goals of Article 6.[53] Whether the statements of the defendant are coerced or not is subject to a case-by-case assessment, but the ECtHR has established some criteria for orientation. In this sense, a statement will be considered coerced if: 1) the defendant is threatened by consequences if they fail to give a statement;[54] 2) the defendant is subjected to physical or mental coercion for the purpose of soliciting the statement;[55] 3) the statement was obtained by the insertion of a notification that the law enforcement authorities were unable to collect in examination.[56]

The practice of the ECtHR shows that this privilege is not of an absolute nature because negative inferences can be derived from the defendant's silence in some instances if the circumstances are such that they clearly require their pleading.[57] In such cases, the court will have to weigh the interest of protecting the defendant and of a breakthrough in the criminal proceedings, taking into account the nature and degree of coercion faced by the defendant and the purpose of certain evidentiary material.[58] This exception to the privilege against self-incrimination will carry particular weight in jurisdictions with jury trials, because the courts there will have to give very clear and precise instructions to the jury about the possibility of drawing negative inferences from the defendant's silence.[59] However, it should be noted that, from the perspective of the national legislation of the member states of the Council of Europe, the

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[52] ter Vrugt (n 49) 394.

[53] *Bykov v Russia* [GC] no 4378/02, 10 March 2009, § 92; *John Murray v United Kingdom* [GC] no 18731/91, 8 February 1996 § 45; *JB v Switzerland*, no 31827/96, 3 May 2011 § 64.

[54] *Saunders v United Kingdom* (n 51).

[55] *Jalloh v Germany* [GC] no 54810/00, 11 July 2006; *Gäfgen v Germany* [GC] no 22978/05, 1 June 2010.

[56] *Allan v United Kingdom*, no 48539/99, 5 November 2002.

[57] *John Murray v United Kingdom* § 47.

[58] *Jalloh v Germany* § 101; *O`Halloran and Francis v the United Kingdom* [GC] no 15809/02 and 25624/02, 29 June 2007 § 55; *Bykov v Russia* § 104; *Ibrahim and Others v United Kingdom* [GC] no 50541/08, 13 September 2016 § 269.

[59] *O'Donnell v United Kingdom* no 16667/10, 7 April 2015 § 51.

permissibility of drawing negative inferences from the defendant's silence is possible only in the United Kingdom. This is not possible under the laws of most other countries of continental Europe, which relativises the above-mentioned standard of the ECtHR.[60]

Similarly, the privilege does not apply to evidentiary material which is obtained by force, but is in essence independent from the consent of the defendant (such as fingerprints, blood samples, urine samples, breathe, etc, for DNA testing).[61] There are scholarly debates in this regard on whether, in the European legal context, information collected through modern neuro-scientific methods is a type of evidence that can legally be equated to DNA samples and thus be taken without the defendant's consent. Specifically, could the results of tests such as fMRI or brain fingerprinting be used as evidence against the defendant, despite their objection and despite forceful collection? It should be noted that the situation cannot be fully equated with the collection of fingerprints or DNA samples, because the types of neuro-scientific testing that are analysed here require the collaboration of the examinee, and the results can be obstructed (or prevented) by resistance.[62] This is why, in this context, coercion relates to mental force (ie legal coercion) which includes the prospect of negative legal consequences for the refusal to cooperate or the promise of different legal benefits in exchange for cooperation.

Some authors claim that this possibility is realistic in the existing framework and it is thus necessary to establish a new fundamental human right to mental privacy. It is their position that the special nature of the information obtained through the reading of cerebral waves implies intrusion into the privacy of an individual, and the methods for the collection of such information require the development of a new fundamental human right. According to them, the existing law on the protection of privacy and personal data is insufficient to address the technological advances.[63] Others consider it unnecessary to introduce a new fundamental human right because sufficient protections can be drawn from Article 6 (the right to a fair trial), Article 8 (the right to the respect of private and family life) and Article 9 (the freedom of thought, conscience and religion) of the Convention.[64] The latter authors hold that there are significant parallels between cerebral waves and DNA material, which lead to the conclusion that the existing Convention protections should suffice.[65] It

[60] John D Jackson, 'Silence and Proof: Extending the Boundaries of Criminal Proceedings in the United Kingdom' (2001) 5(3) Int J of Evid and Proof 145.

[61] *Saunders v United Kingdom* § 69; *O`Halloran and Francis v the United Kingdom* § 47.

[62] Sean Kevin Thompson, 'The Legality of the Use of Psychiatric Neuroimaging in Intelligence Interrogation' (2005) 90 Cornell Law Rev 1601, 1624.

[63] Marcello Ienca and Roberto Andorno, 'Towards New Human Rights in the Age of Neuroscience and Neurotechnology (2017) 13(5) Life Sci Soc Policy 14–15.

[64] Sjors LTJ Ligthart and others, 'Forensic Brain-Reading and Mental Privacy in European Human Rights Law: Foundations and Challenges' (2021) 14(2) Neuroethics 191–203.

[65] ibid. See also Sjors LTJ Ligthart, 'Coercive Neuroimaging, Criminal Law, and Privacy: A European Perspective' (2019) 6(1) J L& Biosciences 289.

is our position that cerebral waves (or the content of thoughts) and DNA material cannot be equated, because the latter is purely physical in nature, and can be collected without the collaboration of the subject (ie by force), which is impossible for cerebral waves.

5 Reflections on the scope of application in both legal environments

Based on the previous elaborations, it can be concluded that the question of the scope and limitations of the use of modern neuro-scientific technologies in criminal proceedings is currently relevant for criminal law, despite the fact that it has not yet received its final confirmation in judicial practice. It can be assumed that the described mechanisms will be recognised and applied in the near future. This issue has captured the attention of both US and European authors, who discuss many of its controversial aspects, an analysis of which would exceed the scope of this paper.[66] Instead, our focus is placed on the issue of using modern technologies in the context of the privilege against self-incrimination, as one of the fundamental rights of defendants in criminal proceedings.

The nature of modern neuro-examination technologies is such that successful results imply a level of collaboration of the person subjected to such testing. One might even say that the results depend on the person's cooperation in such testing. Therefore, it is clear that any discussion of coercion in such proceedings (such as fixing the head or body, or the use of any tranquilising substances) is moot. We may safely say that there is a universal standard which forbids medical interventions that would influence the defendant's will to testify. The same goes for force, threat or similar means to obtain the defendant's testimony. Bearing this in mind, to apply neuro-examination technologies, the defendant's consent should be necessary.

[66] However, it should be noted that the use of AI in criminal proceedings is recognised in the EU. The European Parliament adopted the resolution of 6 October 2021 on artificial intelligence in criminal law and its use by the police and judicial authorities in criminal matters (2020/2016(INI)). The resolution: 'reaffirms that all AI solutions for law enforcement and the judiciary also need to fully respect the principles of human dignity, non-discrimination, freedom of movement, the presumption of innocence and right of defence, including the right to silence, freedom of expression and information, freedom of assembly and of association, equality before the law, the principle of equality of arms and the right to an effective remedy and a fair trial, in accordance with the Charter and the European Convention on Human Rights; stresses that use of AI applications must be prohibited when incompatible with fundamental rights'. Besides, 'any AI tools either developed or used by law enforcement or the judiciary should, as a minimum, be safe, robust, secure and fit for purpose, respect the principles of fairness, data minimisation, accountability, transparency, non-discrimination and explainability, and that their development, deployment and use should be subject to risk assessment and strict necessity and proportionality testing, where safeguards need to be proportionate to the identified risks; highlights that trust among citizens in the use of AI developed, deployed and used in the EU is conditional upon the full fulfilment of these criteria'.

A comparison of modern neuro-examination technologies with classic fingerprinting or DNA sampling is inadequate. Brain fingerprinting or fMRI is not typical physical evidence. Such methods are rather *sui generis* evidence which cannot be collected without the collaboration of the defendant. Therefore, the issue of coercion in this case is connected to the indirect coercion that comes from suffering negative consequences for rejecting the collaboration. The previous elaboration undoubtedly shows that the legal framework of England and Wales will be most receptive to such practices, because of its rule that the silence of the defendant can be used as an adverse inference. However, adverse inference in the US and in continental Europe criminal procedure is not possible. In the latter systems, the (valid) consent of the defendant will be necessary for such evidentiary methods.

Besides, in most countries of continental Europe, there will be a need for certain legislative amendments, which will provide for new methods of neuro-examination as evidentiary means in criminal proceedings. Such methods ought to be introduced in legal texts mainly in criminal proceedings laws in order to be applied in practice and used as evidence. If there is a new method of evidence gathering, continental legal systems of criminal proceedings require their provisions in the law. The same was true when DNA testing became a new scientific method in criminal proceedings. The application and interpretation of modern neuro-examination technologies require specific (medical) knowledge and skills. This, in fact, is a new type of expertise. New rules or the adjustment of existing rules regarding the findings and opinions of such expert witness testimony are therefore indispensable.

6 Conclusion

The acceleration of scientific development in recent years will inevitably lead to the implementation of new fact-finding methodologies in criminal proceedings. Criminal law and criminal proceedings must keep up with the new times, but they must also maintain satisfactory standards with regards to fundamental human rights and the right to a defence. Therefore, it is important to observe and discuss the application of such technologies in the context of the privilege against self-incrimination, as a constituent part of the right to a fair trial.

The aim of this paper was to compare the US and European interpretation of the privilege, in order to make an informed conclusion on which legal system is more receptive to the use of this technology. It can be concluded that, although they come from different vantage points, the US Supreme Court and the ECtHR are largely taking the same position on the issue, preventing any form of coerced taking of evidence. While physical coercion is excluded by the nature of neuro-examination which requires the collaboration of the defendant, legal coercion is excluded by the modern standards of the defendant's right to a fair trial. Deviation

from this standard exists in England and Wales, where the jury has discretion to draw adverse inference from the defendant's silence.

When discussing new evidentiary methods in criminal proceedings, such as the use of AI, one must start from a basic premise. In order for an evidentiary method to be acceptable in criminal proceedings, it must be reliable and credible. This criterion was not satisfied in the case of the old-fashioned lie detector and therefore such a method was not accepted as evidence in criminal procedure. This is why the use of AI technology must first of all be reliable and credible.

If the use of AI technology proves to be reliable and credible, then such a method must respect well-established human rights standards in criminal proceedings, among which is the right to a fair trial and all its components, which is a central principle of criminal procedure. This paper has shown how the use of AI as an evidential method should be viewed through one of the components of the right to a fair trial, which is the privilege against self-incrimination.

In any case, reliability depends not only on technology, but also on the interpretation of the use of such technology. Interpretation can only be given by experts' findings and opinions. The credibility of these findings and opinions is and should be assessed only by the court in a procedure in which the right to a fair trial is respected. These are sensitive thought and cognitive processes inherent in the human brain. This is why the determination of someone's guilt must not be left to a machine.

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IS THERE ANYTHING NEW UNDER THE SUN? A GLANCE AT THE DIGITAL SERVICES ACT AND THE DIGITAL MARKETS ACT FROM THE PERSPECTIVE OF DIGITALISATION IN THE EU[1]

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Abstract: The adoption of the Digital Services Act (DSA) and Digital Markets Act (DMA) has been a great step towards regulating digital space and industry. The two regulations set out a comprehensive and long-awaited set of requirements for companies providing intermediary and gatekeeping services. According to some commentators, the new laws will largely redefine the operating conditions for businesses in the digital sector.

This article highlights key provisions of the DSA and DMA that may influence the evolution of the digital sector in Europe and shows that the DSA relies heavily on its predecessor, the e-Commerce Directive, and both regulations draw inspiration from other new-age EU secondary legislation, such as the General Data Protection Regulation (GDPR) and industry best practices.

The main conclusions of the article are the following: the changes can be considered a significant step forward from a regulatory perspective, but 'there is nothing new under the sun'. In other words, the regulations do not fundamentally change the liability regime of intermediary service providers, but rather take a necessary step forward to further regulate these businesses. Albeit the DSA and the DMA should be praised for their layered approach on allocating different responsibilities on different size undertakings – unlike the GDPR – as the main 'targets' of the regulations are primarily US-based big tech companies. It is still worrying that the DSA could also increase operational costs for European startups, potentially turning them away from the continent, which in turn could produce an innovation-cooling effect in the Union.

Keywords: DSA, DMA, intermediary services, gatekeepers, innovation

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1 Introduction

The European Parliament and Council adopted the Digital Services Act[2] (DSA) and the Digital Markets Act[3] (DMA) both based on Article 114 of the Treaty on the Functioning of the European Union (TFEU) in 2022. This marks another milestone on the European Union's route towards digitalisation and the regulation of big tech companies, furthermore giving birth to 'European digital constitutionalism', which can be characterised as a set of rules shielding individuals from abuse of power in the digital environment.[4] This route has been marked with other secondary EU legislation in recent years, such as the General Data Protection Regulation,[5] the AI Act[6] and the Cyber Security (NIS 2) Directive.[7] References can also be made to other secondary EU legislation that have entered the legislative process, such as the European Media Freedom Act,[8] the Cybersecurity Regulation,[9] the Information Security Regulation,[10] the Cyber Resilience Act,[11] and the Cyber Solidarity Act.[12] These pieces of secondary legislation – usually – create obligations for big tech companies that can be characterised as flagships of digitalisation and technological

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2 Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L 277 (DSA).

3 Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) [2022] OJ L265.

4 Maria Luisa Chiarella, 'Digital Markets Act (DMA) and Digital Services Act (DSA): New Rules for the EU Digital Environment' [2023] Athens Journal of Law 33, 51.

5 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119 (GDPR).

6 The AI Act is now in the process of formal approval by the European Parliament and the Council after a political agreement on 9 December 2023 < https://ec.europa.eu/commission/presscorner/detail/en/ip_23_6473> accessed 12 December 2023.

7 Directive (EU) 2022/2555 of the European Parliament and of the Council of 14 December 2022 on measures for a high common level of cybersecurity across the Union, amending Regulation (EU) No 910/2014 and Directive (EU) 2018/1972, and repealing Directive (EU) 2016/1148 (NIS 2 Directive) [2022] OJ L333.

8 Proposal for a Regulation of the European Parliament and the Council establishing a common framework for media services in the internal market (European Media Freedom Act) and amending Directive 2010/13/EU 2022/0277(COD).

9 Proposal for a Regulation of the European Parliament and of the Council laying down measures for a high common level of cybersecurity at the institutions, bodies, offices and agencies of the Union (2022/0085 (COD).

10 Proposal for a Regulation of the European Parliament and of the Council on information security in the institutions, bodies, offices and agencies of the Union 2022/0084 (COD).

11 Proposal for a Regulation of the European Parliament and of the Council on horizontal cybersecurity requirements for products with digital elements and amending Regulation (EU) 2019/1020 2022/0272 (COD).

12 Proposal for a Regulation of the European Parliament and of the Council on laying down measures to strengthen solidarity and capacities in the Union to detect, prepare for and respond to cybersecurity incidents 2023/0109 (COD).

development. Among these, the DSA and the DMA were set out to regulate intermediary service providers and gatekeepers, which are in the centre of the Digital Single Market.[13] The DSA – following of the logic of its predecessor, the e-Commerce Directive[14] – supplements the previous conditional liability regime applicable to intermediary service providers and gatekeepers with due diligence obligations and a framework for enforcing the legislation. The regulation takes a layered approach, that is to say, it differentiates between different types of service providers, which goes to the heart of the issue, distinguishing between 'regular' intermediary services and online platforms, search engines, and other gatekeeper-type companies. In comparison, the DMA sets out the requirements applicable to companies providing gatekeeping services, defining the criteria for designation as a gatekeeper, addresses unfair practices by gatekeepers, the specific requirements for certain gatekeeping services, and the enforcement rules for non-compliance. These rules can be seen as a gap-filling exercise, as there was no comprehensive regulation of gatekeepers in this form in the EU before.

Since some commentators argue that the DSA and the DMA will bring fundamental changes to the EU's digital regulatory environment,[15] the aim and goal of this paper is to scale back somewhat the expectations from these regulations. Therefore, the article will, first and foremost, introduce the reader to the DSA and the DMA, outlining their most important norms, and pointing out that 'there is nothing new under the sun'. Of course, it would not be fair to present the DSA and the DMA this way, since they indeed create new obligations for intermediary service providers and gatekeepers. Transparency obligations in the DSA for instance – although common in practice – come as a novelty in terms of legal obligations, and some important changes have also been made to the fundamentals of the enforcement mechanism adopted in the GDPR, for example in connection with the role of the European Commission. All in all, the argument advanced in this chapter is that the DSA and the DMA do not modify the cornerstone rules of intermediary liability, and therefore the fundamentals of the system remain unaffected and the regulatory methods used for creating additional layers to the regulations by the European Union cannot be considered a novelty, in the purest sense of the word, since other new-wave secondary legislation follows the same

[13] 'A Digital Single Market is one in which the free movement of goods, persons, services and capital is ensured and where individuals and businesses can seamlessly access and exercise online activities under conditions of fair competition, and a high level of consumer and personal data protection, irrespective of their nationality or place of residence.' See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A Digital Single Market Strategy for Europe COM(2015) 192, 3

[14] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') OJ L178 (e-Commerce Directive).

[15] Bissera Zankova, Gergely Gosztonyi, 'Quo vadis, European Union's New Digital Regulatory Package?' [2021] Бизнес и право 67, 70.

logical structure and methods. For example, the DSA does not change the fundamental liability system of intermediary service providers, but rather gives extra obligations for these service providers, and, what is also important, these two new regulations essentially follow in the footsteps of previous EU legislation mentioned above, such as the GDPR, in terms of the regulatory logic and methods. It needs to be noted, however, that according to one scholar, the DSA specifically addresses some of the deficiencies of the e-Commerce directive, for instance fragmentation regarding complementary norms and the application of the directive, and the discretion given to service providers when it comes to content moderation,[16] which is, of course, a welcome development in the field.

Another objective of the article is to analyse how the more robust, and stricter obligations placed on these service providers influence innovation in the field of digitalisation. The European Commission stated in the explanatory memorandum of the proposal for the DSA that supervising digital services will enhance innovation and growth in the single market.[17] Furthermore, in the eyes of the Commission, by harmonising obligations, the DSA might contribute to innovation by cutting compliance costs and it might also support growth in turnover in cross-border digital trade to the extent of EUR 8.6 billion to EUR 15.5 billion.[18] While agreeing with the Commission on the benefits of de-fragmentation of laws in this context, our conclusion in this regard is that such legislation can still increase operational costs for companies in Europe and/or targeting Europe as a market, which might bring European consumers into a more disadvantageous position, in contrast with the rest of the world, or it can possibly have an innovation-cooling effect, or, in other words, digital service startups might choose other States, for instance the US, to start and establish their business. This, in turn can seriously jeopardise the objective of both the DSA and DMA, namely the development of the Digital Single Market. By comparison, the DMA's explanatory memorandum argues that small and medium-sized enterprises operating in the European Union are unlikely to be designated as gatekeeper businesses under the new regulation.[19] They will therefore not be burdened with compliance costs that would put them at a competitive disadvantage. In the memorandum, the Commission expects to generate EUR 13 billion in additional consumer surplus linked to innovation by EU-based businesses.[20] Since only the largest operators are considered to be gatekeeping services, we can agree with this objective by looking at the DMA itself.

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[16] Berrak Genç-Gelgeç, 'Regulating Digital Platforms: Will the DSA Correct Its Predecessor's Deficiencies?' (2022) 18 CYELP 25, 57-60

[17] Proposal for a Regulation of the European Parliament and of the Council on a single market for digital services (Digital Services Act) and amending Directive 2000/31/EC. Explanatory Memorandum COM(2020) 825 final 6.

[18] ibid 11-12.

[19] Commission, 'Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act)' (Explanatory memorandum) COM/2020/842 final 13.

[20] ibid 10.

Since the DSA became applicable to very large online platforms (VLOPs) and very large online search engines (VLOSEs) on 25 August 2023, and the DMA entered into force on 25 June 2023, this creates ample opportunity to analyse the two above-mentioned new regulations.[21] To achieve this aim, the article will first provide an overview of the DSA, pointing out parallels with previous, existing, or even planned EU legislation (Part 2); second, it turns to the DMA with the same methodology (Part 3); and finally it offers conclusions based on the review of these new EU regulations (Part 4).

2 The Digital Services Act

The DSA consists of five chapters and 156 recitals. As Article 1 para 1 clearly states, the aim and goal of the regulation is to set harmonised rules – hence the regulation format – for a safe, predictable and trusted online environment that is compatible with fundamental rights and innovation alike.[22]

The DSA sets its scope to apply to intermediary services, but only those which are received by persons located in the EU or those who have their place of establishment in the Union. It is immaterial whether the intermediary service provider has a place of establishment in the EU or not.[23] According to one commentator, this rule in particular aims at taking back digital sovereignty for the EU and to push back against US-based companies dominating the market.[24] In our understanding, it also fits neatly into the so-called 'Brussels effect'. This phenomenon can be characterised as the unilateral ability of the European Union to regulate the global marketplace, as both participants of the market and other State actors align with existing EU legislation.[25] One commentator – supporting this position – claims that by adopting the DSA, the European Union can strongly influence how social media platforms moderate their content even globally.[26] According to that author, a similar example of the Brussels effect can be found in the EU Code of Conduct on Countering Illegal Hate Speech Online.[27] This latter document can be seen as

[21] ' Digital Services Act Takes Effect for Large Online Platforms' (*European Data*, 25 August 2023) <https://data.europa.eu/en/news-events/news/digital-services-act-takes-effect-large-online-platforms> accessed 30 August 2023; DMA Article 54.

[22] DSA, Article 1 para 1.

[23] DSA, Article 2 para 1.

[24] Gabi Schlag, 'European Union's Regulating of Social Media: A Discourse Analysis of the Digital Services Act' [2023] Politics and Governance 1, 2.

[25] Anu Bradford, *The Brussels Effect. How the European Union Rules the World* (OUP 2020) 1.

[26] Dawn Carla Nunziato, 'The Digital Services Act and the Brussels Effect on Platform Content Moderation' [2023] Chicago Journal of International Law 115, 117.

[27] ibid 120-121.

one of the predecessors of the DSA,[28] as it, in a non-binding form, contains rules for example regarding the review of notification of illegal hate speech.[29] Another example to illustrate this trend can be found in the GDPR, which sets its own territorial scope beyond those data controllers who are established in the EU to those who are not, but they still offer services in the Union.[30] The interpretation of the GDPR leads to similar results. For example, in the *Google v CNIL* case, the Court of Justice of the EU (CJEU) ruled that although the GDPR does not require controllers to apply the right to be forgotten globally – in that case Google, a search engine, to delete a certain link – supervisory authorities have the right to create global obligations.[31] Furthermore, the Brussels effect has already manifested itself in the area regulated by the DSA, namely intermediary service provider liability. The CJEU, in *Eva Glawischnig-Piesczek v Facebook Ireland Limited*, determined that based on the e-Commerce Directive, Member State authorities have the power to oblige service providers – in that case Facebook – to take down illegal content globally.[32] This was reinforced by the above-mentioned extra territorial rule of the DSA. Turning back to the original point, the DSA applies to intermediary service providers, which play an important role in the EU's economy as well as in the daily life of Union citizens, but at the same time pose risks and challenges for users of these service as a result of digitalisation or digital transformation.[33]

Intermediary services are information society services as defined by Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015[34] – in other words, any services that are normally provided in exchange for renumeration, at a distance and by electronic means, and, as the last element of the definition, at the request of the recipient of the service itself[35] – laying down a procedure for the provision of information in the field of technical regulations and of rules on information society services. Nevertheless, the DSA limits its application

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[28] There are other instruments and organisations that paved the way for the adoption of the DSA, such as the East StratCom Task Force, against Russian disinformation, the Resolution on Online Platforms and the Digital Single Market and the EU Code of Practice on Disinformation and Action Plan. See Schlag (n 24) 4.

[29] The EU Code of Conduct on countering illegal hate speech online. <https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/combatting-discrimination/racism-and-xenophobia/eu-code-conduct-countering-illegal-hate-speech-online_en> accessed 23 August 2023.

[30] GDPR, Article 3 paras 1-2.

[31] Case C-507/03 *Google v CNIL* ECLI:EU:C:2019:15, paras 64 and 72.

[32] Case C-18/18 *Eva Glawischnig-Piesczek v Facebook Ireland Limited* ECLI:EU:C:2019:821, paras 49-51.

[33] DSA, Recital 1.

[34] DSA, Article 3(g).

[35] Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services [2015] OJ L241, Article 1(1)(b).

to 'mere conduit',[36] 'caching',[37] and 'hosting' services.[38] So far, these notions are almost identical to those of the e-Commerce Directive.[39] There are, however, two 'new' forms of intermediary services introduced by the DSA in comparison with the e-Commerce Directive, namely online platforms[40] and online search engines.[41] To name but a few examples for each services, 'mere conduit' and 'caching' services are internet services, direct messaging services (eg Viber), while 'hosting' services include online media sharing (eg YouTube), file sharing (eg DropBox), social media (eg Twitter, Facebook), and video game platforms (eg Play Station) as well.[42] Furthermore, it is interesting to note that in line with the opinion of one scholar, Large Language Models, such as ChatGPT or Bard, could be considered search engines by analogy, which in turn triggers the application of the DSA for these AI-based services as well.[43] It should be noted at the outset that there is no question that the AI Act would be applicable to Large Language Models.[44]

When it comes to 'mere conduit', 'caching', and 'hosting' services, the DSA follows the logic of the e-Commerce Directive, stipulating that these intermediary service providers are liable for the information in question, unless the provider of these services fulfils the conditions for liability exemption enshrined in the DSA.[45] Although these rules can to a great ex-

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[36] '[Consists] of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network'. See DSA, Article 3(g)(i).

[37] '[Consists] of the transmission in a communication network of information provided by a recipient of the service, involving the automatic, intermediate and temporary storage of that information, performed for the sole purpose of making more efficient the information's onward transmission to other recipients upon their request'. See DSA, Article 3(g)(ii).

[38] '[Consists] of the storage of information provided by, and at the request of, a recipient of the service'. See DSA, Article 3(g)(iii).

[39] e-Commerce Directive, Article 12 para 1, Article 13 para 1, Article 14 para 1. 'Caching' is defined more precisely in the DSA, but the underlying idea is the same.

[40] An online platform is 'a hosting service that, at the request of a recipient of the service, stores and disseminates information to the public'. See DSA, Article 3 (i).

[41] An online search engine is 'an intermediary service that allows users to input queries in order to perform searches of, in principle, all websites, or all websites in a particular language, on the basis of a query on any subject in the form of a keyword, voice request, phrase or other input, and returns results in any format in which information related to the requested content can be found'. See DSA, Article 3(j).

[42] Beatriz Botero Arcila, 'Is It a Platform? Is It a Search Engine? It's Chat GPT! The European Liability Regime for Large Language Models' [2023] Journal of Free Speech Law 455, 468 and 478.

[43] Search engines do not fit nicely within any definition of intermediary services presented by the DSA – and previously the e-Commerce Directive – but pursuant to the case law of the Court of Justice of the European Union and the Recitals of DSA, one can confidently argue that the DSA is indeed applicable to search engines. See Arcila (n 42) 480-483.

[44] AI Act, Articles 2-3.

[45] DSA, Article 4 para 1, Article 5 para 1, Article 6 para 1.

tent[46] also be found in the e-Commerce Directive, a number of new rules have also been adopted in the regulation.

For example, when it comes to hosting services, exemption from liability does not apply to distant contracts concluded by consumers when the information provided leads the consumer to believe that the object of the transaction is offered either directly or indirectly by the online platform.[47] Similarly, Article 7, or in other words the Good Samaritan Clause – which was entered into the text of the DSA at the request of online platforms and which might draw its inspiration from Section 230 of the US Communications Act of 1934 – is a new addition to the rules on digital services.[48] However, it should be noted that the Article corresponds to a great extent to the case law of the CJEU[49] and previous European Commission documents.[50] According to the Good Samaritan Clause, intermediary service providers will not lose their immunity from liability under Articles 4-6 simply because they 'carry out [in good faith] voluntary own-initiative investigations into, or take other measures aimed at detecting, identifying and removing, or disabling access to, illegal content, or take the necessary measures to comply with'[51] legal obligations. One commentator argued that this rule might incentivise general monitoring by service providers, of course on a voluntary basis. Although this might be supported by the fact that intermediaries enjoy relatively large discretion when it comes to their terms and conditions, in other words they can determine through their contractual freedom how they want to offer their services, the DSA raises some limitations as well, for instance in Recital 26, which should be applied in connection with the removal of content as well. As to the technology used in this context, automated tools and other technical solutions might be employed for such purposes, ie voluntary monitoring, but the technology exploited should be reliable enough to maintain a low error ratio.[52]

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[46] Minor changes are noticeable in the two texts. See Sebastian Felix Schwemer, 'Digital Services Act: A Reform of the e-Commerce Directive and Much More' forthcoming in A Savin, *Research Handbook on EU Internet Law* (2022) SSRN version 7–8 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4213014> accessed 22 August 2023.

[47] DSA, Article 6 para 3.

[48] Florence G'sell, 'The Digital Services Act (DSA): A General Assessment' in Antje von Ungern-Sternberg (ed), *Content Regulation in the European Union: The Digital Services Act* (Trier Studies on Digital Law, volume 1, Verein für Recht und Digitalisierung eV, Institute for Digital Law (IRDT) 2023) SSRN version 6-7 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4403433> accessed 14 August 2023.

[49] Case C-682/18 *Frank Peterson v Google LLC and Others and Elsevier Inc v Cyando AG* ECLI:EU:C:2021:503, para 109.

[50] Folkert Wilman, 'Between Preservation and Clarification. The Evolution of the DSA's Liability Rules in Light of the CJEU's Case Law' (*Verfassungsblog*, 2 November 2022) <https://verfassungsblog.de/dsa-preservation-clarification/> accessed 23 August 2023.

[51] DSA, Article 7.

[52] Schwemer (n 46) 12; DSA, Recital 26. The DSA also highlights that '[v]oluntary actions should not be used to circumvent the obligations of providers of intermediary services '[…].' See DSA, Recital 26.

Still, the DSA shows a close resemblance to the e-Commerce Directive when it reinforces the non-obligation of general monitoring or active fact-finding.[53] It should be noted that the DSA and thus the European model for intermediary service provider liability is only one of two possible models. The other one – besides the European model – originates from the US, according to which the intermediary service provider will not be liable for information stored on the platforms, save for copyright infringements. This also means that there is no general monitoring obligation in the US. The second version of liability is a so-called conditional liability regime, which can be illustrated by the EU and the US when it comes to copyright infringements. In these cases, there is no general monitoring obligation, but once the service provider learns of the illegal content, action must be taken against it.[54] It is also interesting to note in connection with the US that the DSA might clash with US legislation, for example Texas's HB 20 law, which prohibits social media platforms from moderating speech based on speaker viewpoint.[55] Reference can also be made to China, where Article 1195 of the Civil Code of the People's Republic of China declares that the network user is jointly and severally liable if the intermediary service provider (network service in the terminology of Chinese law) does not take necessary measures after the notice of the right holder or, as laid down in Article 1197, if the service provider knows or should have known about a civil-law or interest infringement but does not take necessary measures against such actions.[56]

Turning back to the DSA, conditional liability means, for example when it comes to hosting services, that safe harbour from liability for service providers is conditioned by the lack of knowledge of the illegal activity or content – or regarding claims of damages, they are unaware of any facts or circumstances based on which illegal activity or content should be apparent – or when they indeed obtain information regarding these, they act as soon as possible to remove or disable access to the content in question.[57] Conditional liability, however, is only applicable when the service provider does not play an active role, in which it gains knowledge of or control over the information that is provided by the user, in other words, it loses its neutrality.[58] This rule can be traced back to the case law of the CJEU,[59] most prominently to *L'Oréal SA and Others v*

[53] DSA, Article 8; e-Commerce Directive Article 15.

[54] Nagy Katalin, Polyák Gábor, 'Az internetes forgalomirányító szolgáltatók működésének alapjogi vonatkozásai' [2018] 1 Jura 88, 91-92.

[55] HB20 is even more relevant, since the Fifth Circuit held the legislation constitutional. See Ioanna Tourkochoriti, 'The Digital Services Act and the EU as the Global Regulator of the Internet' [2023] Chicago Journal of International Law 129, 144-145.

[56] Civil Code of the People's Republic of China Articles 1195 and 1197.

[57] DSA, Article 6 para 1.

[58] DSA Recital 18.

[59] Wilman (n 50).

eBay International AG and Others.[60] An issue worth mentioning regarding these rules is the definition of illegal content, which is given by the DSA in Article 3(h) as

> any information that, in itself or in relation to an activity, including the sale of products or the provision of services, is not in compliance with Union law or the law of any Member State which is in compliance with Union law, irrespective of the precise subject matter or nature of that law.[61]

This essentially means that any type of illegality can fall under the illegal content definition, which might change the trend for service providers, which tended to focus on criminally illegal content, while ignoring for example consumer protection law violations.[62]

In our understanding, as we go ahead in digital transformation, two aspects will become especially interesting for service providers. First, that they could help the work of the authorities in a lawful and regulated manner, thus not under the table, and, second, that they receive 'immunity' from liability in these cases.[63] Otherwise, they would lose interest in cooperating and in reducing risks in terms of exercising user rights. We believe that the lawmaker was aware of these factors and thus the DSA was drafted along these lines.

Besides norms regulating liability, the DSA also lays down due diligence obligations to achieve a transparent and safe online environment. The logic behind the DSA in this regard is the gradual approach of responsibilities, meaning that the DSA sets minimum due diligence obligations which are applicable to all intermediary service providers, then it gradually raises the number of obligations first to hosting services, then to online platforms, and finally to very large online platforms and very large search engines.[64] We believe that this regulatory approach is one of the key strengths of the DSA in comparison, for example, with the GDPR, which does not differentiate between data controllers based on their size or the risks their personal data processing poses.

As minimum level obligations, the DSA requires all intermediary service providers to designate single points of contact for communication with Member State and EU authorities[65] and for recipients of services.[66]

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[60] Case C-324/09 *L'Oréal SA and Others v eBay International AG and Others* ECLI:EU:C:2011:474, paras 112-113.

[61] DSA, Article 3(h).

[62] Catalina Goanta, 'Now What. Exploring the DSA's Enforcement Futures in Relation to Social Media Platforms and Native Advertising' (*Verfassungsblog,* 2 November 2022) <https://verfassungsblog.de/dsa-now-what/> accessed 23 August 2023.

[63] Lawrence A Cunningham, 'Beyond Liability: Rewarding Effective Gatekeepers' [2007] Minnesota Law Review 323, 323-326

[64] DSA, Chapter II, Sections 1-5.

[65] DSA, Article 11 para 1.

[66] ibid, Article 12 para 2.

Furthermore, service providers which do not have an establishment in the EU, but nevertheless offer services in the Union, must also designate a legal representative in one of the Member States to act as a sort of contact point with Member States and EU authorities.[67] This norm is very similar to the representative of the controllers or processors in accordance with the GDPR.[68] In addition, the DSA requires service providers to 'include information on any restrictions that they impose in relation to the use of their service in respect of information provided by the recipients of the service'.[69] This information should reflect how the service provider moderates content and what kind of rights the users have.[70] Last but not least, all service providers must also publish transparency reports on their content moderation, with the exception of micro or small enterprises.[71] However, once again, such systems are not new under the sun. Meta Inc, for instance, regularly publishes its content moderation practices on Facebook and Instagram.[72] Nevertheless, such an obligation will still be a great step towards transparency for smaller – but above the micro and small business level – service providers who have not been engaged in this reporting activity so far. And it is also important to highlight that a binding reporting obligation is much better than voluntary reports in terms of content and enforceability. In conclusion, it is our understanding that the due diligence obligations of the DSA centre on consumer protection and they build on existing norms and good practice to this effect.[73]

There are other obligations that the DSA creates for hosting service providers, such as a notice and action mechanism for users,[74] and notification of the authorities of the Member States in the case of suspicion of criminal offences which would involve an actual or possible threat to the life or safety of a person.[75] Further responsibilities are placed on online platforms, such as the obligatory establishment of an internal complaint-handling system,[76] supplemented by an out-of-court settlement

[67] ibid, Article 13 paras 1-2.

[68] GDPR, Article 27.

[69] DSA, Article 14 para 1.

[70] ibid.

[71] DSA, Article 15 paras 1-2. A small enterprise is an enterprise which employs fewer than 150 persons, and its annual balance sheet and/or its turnover is less than EUR 10 million. A micro enterprise is even smaller than that. See Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises [2003] OJ L123, Article 2 paras 2-3. It should also be noted that online platforms and very large online platforms, and very large search engines have their own transparency reporting obligations.

[72] See Community Standards Enforcement Report Q1 2023 <https://transparency.fb.com/reports/community-standards-enforcement/> accessed 17 August 2023.

[73] See, for example, e-Commerce Directive, Article 10.

[74] DSA, Article 16.

[75] ibid, Article 18.

[76] ibid, Article 20.

mechanism,[77] and many more, for instance the compliance by design obligations of those online platforms which allow users to conclude distant contracts with traders on their platform.[78] This norm is fairly similar in its nature and goal to the data protection by design and by default rules of the GDPR.[79] The internal complaint-handling system and the out-of-court settlement mechanism can be seen as an excellent way to tackle the problem observed by one commentator, namely that in our information dependent and driven societies, social media platforms act as gatekeepers, and thus they have the power to fundamentally affect political discourse. A good example of this is when Twitter permanently suspended the account of Donald Trump, former US president, without any judicial or independent review.[80] It is important to highlight in connection with this that review cannot be made solely by automated means. In other words, while taking down content can be automated, the review of such a decision cannot.[81]

Last but not least, the DSA created a special framework of rules for VLOPs and VLOSEs. An online platform or a search engine can turn into a VLOP or a VLOSE when the number of average monthly active users of the service in the EU reaches 45 million and when the European Commission designates the providers as such.[82] The European Commission announced the list of VLOPs and VLOSEs for the very first time on 25 April 2023, designating 17 VLOPs and only 2 VLOSEs. To name a few examples of each, VLOPs include the usual suspects, such as Facebook, Instagram, TikTok and YouTube, but one can find surprises on the list as well, for example Zalando or Wikipedia. On the other hand, VLOSEs produce no bewilderment, as Bing and Google were designated as such.[83]

When it comes to VLOPs and VLOSEs, the DSA creates obligations which will cause a serious financial burden and commitment from these service providers. One of the new obligations is risk assessment related to their services and the systems they use, and the connected risk mitigation requirement.[84] Once again, similarities can be identified with the GDPR's data protection impact assessment rules.[85] Another important rule is the so-called 'crisis response mechanism', which is triggered if 'extraordinary

[77] ibid, Article 21.

[78] ibid, Article 31.

[79] GDPR, Article 25.

[80] Giancarlo Frosio, 'Platform Responsibility in the Digital Services Act: Consitutionalising, Regulating and Governing Private Ordering' forthcoming in Andrej Savin and Jan Trzaskowski (eds), *Research Handbook on EU Internet Law* (Edward Elgar) 2 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4236510> accessed 22 August 2023.

[81] Schwemer (n 46) 15.

[82] DSA, Article 33 para 1.

[83] European Commission, 'Digital Services Act: Commission Designates First Set of Very Large Online Platforms and Search Engines' (press release, 25 April 2023) <https://ec.europa.eu/commission/presscorner/detail/en/IP_23_2413> accessed 18 August 2023.

[84] DSA, Articles 34-35.

[85] GDPR, Article 35.

circumstances lead to a serious threat to public security or public health in the Union or in significant parts of it'.[86] In such cases, the European Commission may require service providers to act in accordance with the decision of the Commission.[87] A great financial burden is also introduced in the form of an annual audit to assess compliance primarily with the due diligence obligation of the DSA.[88] One cannot but wonder whether this is also part of the 'hidden' European agenda on strengthening the compliance and audit industry, something that started with the GDPR – with the extensive, and expensive privacy audits that full compliance usually requires – followed by the NIS 2 Directive – with, for example, regular and targeted security audits on essential entities.[89] Another part of the new financial burden is the supervisory fee that the Commission charges these organisations.[90] The good news for the rest of the industry is that these obligations are only applicable to VLOPs and VLOSEs. An interesting question for the future is whether service providers close to the 45 million user border will try to decrease their user base in Europe to escape these robust obligations, or if this will deter them from engaging with their EU audience. This is especially curious considering recent threats from Meta to 'pull out' of Europe in light of the difficulties of data transfer from the EU to the US based on the GDPR.[91] If service providers choose to move away from Europe because of the DSA's obligations, then this will certainly prove disadvantageous for many European consumers.

Finally, it is also useful to summarise the enforcement system and mechanism of the DSA. First, the DSA requires Member States to designate one or more competent authorities to supervise the enforcement of the regulation, one of which should be a Digital Services Coordinator (DSC).[92] In Hungary, the tasks of the DSC were taken by an existing governmental agency, namely the National Media and Infocommunications Authority.[93] DSCs generally have two types of competencies: investigative and enforcement, related, for instance, to requiring information from ser-

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86 DSA, Article 36 para 2.

87 ibid, Article 36 para 1.

88 ibid, Article 37.

89 NIS 2, Directive Article 32 para 2(b).

90 DAS, Article 43.

91 Pascale Davies, 'Meta Warns It May Shut Facebook in Europe but EU Leaders Say Life Would Be "Very Good" Without It' (*Euronews*, 7 February 2022) <https://www.euronews.com/next/2022/02/07/meta-threatens-to-shut-down-facebook-and-instagram-in-europe-over-data-transfer-issues> accessed 18 August 2023. Meta later refuted the news. See Marksu Reinisch, 'Meta Is Absolutely Not Threatening to Leave Europe' (*Meta*, 8 February 2022) <https://about.fb.com/news/2022/02/meta-is-absolutely-not-threatening-to-leave-europe/> accessed 18 August 2023. This issue nevertheless seems to be resolved for the time being with the adoption of the new Privacy Framework. See European Commission, 'Data Protection: European Commission Adopts New Adequacy Decision for Safe and Trusted EU-US Data Flows (Press release, 10 July 2023) <https://ec.europa.eu/commission/presscorner/detail/en/ip_23_3721> accessed 18 August 2023.

92 DSA, Article 49 paras 1-2.

93 The designation was made by Act LXI of 2022, Section 24 para 1.

vice providers, or to carrying out inspections and/or to imposing fines.[94] Member States have been granted the power to create national legislation on penalties for infringement of the DSA, with the limitation that fines for a breach of an obligation cannot exceed 6% of the annual worldwide turnover of the preceding financial year of the service provider, and this threshold is considerably lower, 1% of the annual turnover, if the breach is 'procedural' in nature, eg supplying wrong information. For periodic penalty payments, the fine should be no more than 5% of the average daily worldwide turnover or income in the last fiscal year.[95]

The DSA also sets up a European Board of Digital Services (EBDS) which is an advisory body made up of DSCs and the European Commission (as chair).[96] The Board was tasked with supporting the DSCs, among other ways, in the form of issuing opinions and recommendations.[97] In addition, the European Commission may also exercise supervisory powers in the case of VLOPs and VLOSEs, including the right to impose financial sanctions according to the above-mentioned logic.[98] In this latter case, the CJEU gained competence to review such decisions from the Commission.[99]

One cannot but find similarities once again with existing secondary and interestingly primary EU legislation. The GDPR also requires Member States to designate supervisory authorities,[100] uses a similar method for determining the maximum amount of fines,[101] and creates the European Data Protection Board composed of Member State supervisory authorities and the European Data Protection Supervisor, with similar tasks to that of the EDBS.[102] It should also be highlighted in connection with the GDPR that, according to one commentator, the European Commission may face difficulties in terms of remaining uninfluenced in its enforcement powers, given the Commission's role in the making of secondary EU law. It might be possible that the Commission's own policy decisions in other fields, such as data protection, could influence the organisation's supervisory powers.[103] A further interesting parallel can also be drawn between penalty payments in the DSA and in the TFEU imposed by the CJEU on Member States for treaty infringement.[104]

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94 DSA, Article 51 paras 1-2.

95 ibid, Article 52.

96 ibid, Article 61 para 1 and Article 62 paras 1-2.

97 ibid, Article 63.

98 ibid, Article 65ff.

99 ibid, Article 81.

100 GDPR, Article 51.

101 ibid, Article 83.

102 ibid, Articles 68 and 70.

103 Ilaria Buri, 'A Regulator Caught Between Conflicting Policy Objectives. Reflections on the European Commission's Role as DSA Enforcer' (*Verfassunsblog,* 31 October 2022) <https://verfassungsblog.de/dsa-conflicts-commission/> accessed 23 August 2023.

104 Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/260, para 2.

3 The Digital Markets Act

The DMA is by its very name an attempt to regulate the markets affected by the digital sector. The regulation sets out its requirements in six chapters and 109 recitals. The legislation is closely linked to the issue of promoting digitalisation and supporting it through legal instruments.[105] At the heart of this regulation lies the problem of gatekeepers, which in the end can create 'serious imbalances in bargaining power and, consequently, unfair practices and conditions for business users, as well as for end users of core platform services provided by gatekeepers, to the detriment of prices, quality, fair competition, choice and innovation in the digital sector'.[106]

Access to the certain fundamentally important services takes place through various service providers, among which online platforms and search engines play key roles. This role has already been described in scholarship by the term gatekeeper.[107] Gatekeepers have long been addressed by European legislation,[108] as they have the ability to influence the decisions and perceptions of their users. Gatekeepers as defined by the DMA are providers of core platform services, such as online search engines like Google or Bing, video-sharing platform services like TikTok, operating systems like macOS, and many more, including web browsers, virtual assistants, cloud services, and online advertising services.[109] The scope of the DMA, therefore, covers not only services in the online digital space, but also software solutions installed on computers that can operate offline. A number of these core platform services are also classified as intermediary services, as already mentioned in connection with the DSA.[110] This broad definition helps to ensure that all gatekeeper services that have the potential to significantly influence users' decisions would fall under the scope of the DMA, but it also requires that they have a significant impact on the internal market, that the service they provide is a genuinely important gateway for business users to reach end users, and that their market position is sufficiently stable to justify compliance with the higher requirements.[111] In this respect, as already mentioned above, the regulation makes gatekeeper status conditional on financial performance within the EU and on the 45 million monthly active end users, at

[105] Jörg Hoffmann, Liza Herrmann and Lukas Kestler, 'Gatekeeper's Potential Privilege: The Need to Limit DMA Centralization' [2023] Journal of Antitrust Enforcement 1.

[106] DMA, Recital 4

[107] Rikke Frank Jørgensen, 'Human Rights and Private Actors in the Online Domain' in Molly K Land and Jay D Aronson (eds), *New Technologies for Human Rights Law and Practice* (CUP 2018) 249, 251.

[108] Rupprecht Podszun and Philipp Bongartz, 'The Digital Markets Act: Moving from Competition Law to Regulation for Large Gatekeepers' [2021] Journal of European Consumer and Market Law 60, 61-62.

[109] DMA, Article 2 paras (1)-(2).

[110] ibid, Article 2.

[111] ibid, Article 3, cf DSA Article 33 para 1.

least for the duration of three financial years, bringing its rules closer to the definition of VLOPs and VLOSEs in the DSA.[112]

Since these services are typically provided from outside the EU, the regulation has a clearly stated objective to bring these gatekeepers based in third countries under its scope and to regulate the operational framework for the services they provide.[113] In examining the implications of the regulation for digitalisation, it is therefore particularly appropriate to examine the scope issues for the following reasons. The reason for granting a higher degree of protection, circumscribed by public law rules,[114] is that the legal relationship between the end user and the service provider based on the principles of civil law, thus one party, in this case core platform service providers, will have a significant advantage compared to their users, the 'consumers'.[115] The legal relationship becomes perceptibly one sided in the sense that one party, the undertaking, is in a better position to assert its interests and, in a critical situation, can exercise strong independent influence on the development of the legal relationship and the resulting disputes, irrespective of the interests and expectations of the other party, which can otherwise be considered legitimate. This is also pointed out in Recitals 4 and 13 of the DMA, when it provides for the protection of European citizens and digital businesses against services provided by large third-country companies on unfair and one-sided terms.

To this end, the regulation applies extraterritorially, similar to the DSA: the extraterritorial scope in this case means that the scope of the regulation, and thus the enforcement rights of end users, also extend in certain aspects to the activities and services of gatekeepers and platform providers not resident in the EU. This creates a win-win situation for end users and business users alike, as they can apply EU rules to the legal relationship and only have to partially adapt to the requirements of the legal regime linked to the nationality of the gatekeepers operating the platforms.[116] This is yet again an example of the above-mentioned Brussels effect.

In the event of a dispute, European consumers will be able to pursue their claims under rules that are favourable to them, as jurisdiction and competence will not be based on the domicile of the claimant or, in other words, the gatekeeper, but rather on the domicile or residence of the

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[112] DMA, Article 3 para 2.

[113] ibid, Recital 13.

[114] Pierre Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field' [1987] Hastings Law Journal 805, 814-818; Thomas Livolsi, 'Scope of the e-Commerce Directive 2000/31/EC of June 8, 2000' [2001] Columbia Journal of the European Law 473.

[115] Not all users of such services will necessarily be consumers as defined by consumer protection laws, such as those businesses which operate largely or exclusively on online platforms.

[116] Caroline Cauffman and Catalina Goanta, 'A New Order: The Digital Services Act and Consumer Protection' [2021] European Journal of Risk Regulation 758, 758-765.

consumer (end user or business user).[117] This is also reflected in Article 1 paragraph 2 of the DMA, according to which the rules of the regulation apply to platform services provided by gatekeepers, regardless of their place of establishment, residence, or the applicable law otherwise governing the service. Thanks to the above provision, gatekeepers will not be able to contract out of the scope of the DMA by choosing the governing law of the contract, so even if they choose to apply the law of a non-EU third country as the governing law of the general conditions of their services, the requirements of the DMA will still apply to the resulting legal relationship.

It is important to note, however, that this system can be fragile: extraterritorial application seems to offer great potential for EU enforcement bodies and more effective protection for European consumers against businesses providing services from outside the EU, but experience so far shows a different picture. The application of the GDPR highlights the problem of practical applicability, which, in spite of the Brussel effect, may prevent the enforcement of the regulation's requirements.[118] This means that gatekeeping services are of such economic importance to the EU that the application of EU legislation containing strict requirements may be blocked or severely hindered when it is implemented and when Member State enforcement bodies impose sanctions based on non-compliance with those requirements.[119] Large third-country companies may face interminable legal procedures and political pressure, and in many cases the companies concerned simply do not implement the requirements imposed on them, do not cooperate with the authorities, and this may substantially weaken the applicability of further Union legislation. This impact is not insignificant and can only be resolved if the enforcement bodies – EU and Member State alike – apply the law in a uniform and consistent way and support national authorities in doing so.

The DMA, after setting out the criteria for designation as a gatekeeper in Chapter II, lays down the notification obligation for potential gatekeepers and then addresses the specific requirements that gatekeepers must meet.

One way of ensuring this is to create a notification obligation for gatekeeper services: if service providers reach the thresholds for designation as gatekeepers, as outlined above, they must notify the Commission and send them the necessary information for designation. In this notification, the undertaking concerned must clearly identify the services for

[117] Chiarella (n 4) 33.

[118] Dan Jerker B Svantesson, 'Extraterritoriality and Targeting in EU Data Privacy Law: The Weak Spot Undermining the Regulation' [2015] International Data Privacy Law 226.

[119] Joanne Scott, 'Extraterritoriality and Territorial Extension in EU Law' [2014] The American Journal of Comparative Law 87, 88; See Renzo Marchini, Camille Ebden and Alex Beresford, 'Meta Transfer Enforcement from the Irish DPC: Issues and Consequences for Other Companies' (*fieldfisher*, 23 May 2023) <https://www.fieldfisher.com/en/services/privacy-security-and-information/privacy-security-and-information-law-blog/meta-transfer-enforcement-from-the-irish-dpc> accessed 25 August 2023.

which the thresholds are reached.[120] In the absence of a notification, the Commission can also proceed with the designation, against which the undertaking concerned can demonstrate that, although the core platform service meets all the conditions, it exceptionally does not meet the requirements listed in Article 3 paragraph 1 due to the operational circumstances of the core platform services concerned.[121]

On the basis of the requirements of the regulation, the Commission must establish a designation decision specifying the relevant platform services as gatekeepers and the obligations on them as set out in Article 5. As of writing, there are seven potential gatekeepers, such as Alphabet, Apple, Microsoft – the usual suspects – but interestingly Samsung as well.[122]

A significant part of the requirements, which are defined in Chapter III DMA, is designed to prevent gatekeepers from gaining further benefits by pooling and jointly using the data sets they have acquired through their services – in accordance with Recitals 2 and 13 DMA. On this basis, it is prohibited to combine data with personal data obtained from other services, and to circulate data used in the provision of one of its services in the provision of another service, even by inducing its users to use another service, except if the user gives his or her consent to the processing.[123] These requirements are intended to reduce the ultimate bargaining power of the gatekeeper, as these gatekeepers may appear as a single solution for certain services, single, big platforms that may become inescapable, thereby worsening competition in the EU internal market, leaving both end users and business users connecting through the platform service vulnerable. However, it is questionable whether the requirements of the regulation can be exempted from these prohibitions[124] if the end user has been offered a specific choice and has given his or her consent under the requirements of the GDPR.

While this may seem to give back choice to users, this is really only an illusion, as the legal basis for the provision of services is more likely to be the legal basis for the performance of the contract,[125] leaving users with only the illusion of consent, which can be a significant market influencing force. It should therefore be pointed out that this problem is only apparent, yet it has an impact on user decisions. The very nature of platform services means that this may not be a real alternative for users, and leaves them in a similar dilemma as before the GDPR: for immediate

[120] DMA, Article 3 para 3.

[121] ibid, Article 3 para 5.

[122] 'Remarks by Commissioner Breton: Here Are the First 7 Potential "Gatekeepers" under the EU Digital Markets Act (*European Commission*, Statement, 4 July 2023) <https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_23_3674> accessed 25 August 2023.

[123] DMA, Article 5 para 2.

[124] ibid.

[125] GDPR, Article 6.1(b).

benefits (platform use, easy access to acquaintances, and so on), they are more willing to sacrifice the protection of their data than consider the more distant and indirect disadvantages (data theft, incidents and disadvantages resulting from data interlinking, profiling) as a real risk. The cognitive and structural problems outlined by Daniel J Solove are revived here.[126] The article will turn back to this issue below.

However, this situation is mitigated by the introduction of rules such as the audit obligation outlined in Article 15 DMA, whereby the gatekeeper is obliged to present its profiling techniques to the Commission, which may adopt audit rules on them in an implementing act. This will allow the EU institution to have a meaningful insight into the technical solutions, preventing the disadvantages of using some methods.

The other direction of the key requirements for gatekeepers is that the rights of business users who use the platform service to provide their own services also enjoy heightened protection. For instance, gatekeepers cannot arbitrarily favour their own products and services, impose mandatory use of their own systems, or require subscription or registration to other services.[127] These requirements will also make it easier for business users to switch platforms and gatekeepers, creating a higher level of competition in the market for platform services.

This approach is also reflected in the requirements for inter-personal communications services, where interoperability requirements make it easier for business users to connect to the services of the provider and a liberalisation direction can be seen with the reference offer and other obligations under Article 7, the regulatory direction of which is very similar to the way the EU legislator previously sought to facilitate the opening of markets dominated by State monopoly telecom operators through liberalisation in order to create a single internal market.[128]

From a digitalisation point of view, the provisions under which gatekeepers must allow end users more freedom than before in terms of IT settings under the DMA are of great importance. Where there is an end-user relationship with a gatekeeper described above, this means that the end user is given complete freedom to change the default settings of the gatekeeper's operating system, virtual assistant, or web browser, within certain well-defined limits that guide or direct end users to products or services offered by the gatekeeper, or to easily remove software applications installed on the gatekeeper's operating system that are not essential for the operation of the service, operating system, or device.[129]

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[126] Daniel J Solove, 'Introduction: Privacy Self-management and the Consent Dilemma' (2012) 126 Harv L Rev 1880.

[127] DMA, Article 5 para 8.

[128] Damien Geradin, 'Twenty Years of Liberalization of Network Industries in the European Union: Where Do We Go Now?' [2006] SSRN version < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=946796> accessed 18 August 2023.

[129] DMA, Article 6 para 3.

Similarly, taking forward the outcome of the earlier decryption debate,[130] it should allow the installation and effective use of third-party software applications or app stores containing them, providing the access and information necessary for interoperability.[131]

These requirements allow consumers who are end users to tailor these services to their own needs and to combine them with other services they use. The requirements clarify and provide a framework for the digital copyright developments of the last decades, which both third-party software developers and end users will benefit from, in comparison to the entrenched and long-lasting position of the gatekeeper service providers.

The DMA also requires gatekeepers to provide end users with access to and use of content, subscriptions, features, or other items through the business user's software application, even if those items were obtained from the relevant business user without the use of the gatekeeper's core platform services.[132] This indeed ensures the user's freedom of choice, regardless of the settings of the basic platform services of the gatekeeper, and also contributes to the user's ability to fulfil and enjoy the consumer legal relationship to the fullest extent possible.

The gatekeeper must also ensure the portability of data for users, thus enabling them to switch providers, even if this process may be difficult when the data are delivered.[133] The difficulty lies in the fact that the data are organised according to the capabilities and system of the original gatekeeper, hence even if the data are in an open file format, their usability can be severely hindered. If we look at the regulatory objective, it is therefore rather the objective of ensuring the interoperability of data that lies behind the requirement to provide the possibility to switch between service providers.[134] Data management is also considered a key regulatory issue: Article 5(2) DMA sets out the conditions for the use of end users' data, which are designed to prevent gatekeeping services from gaining an unfair advantage in the market simply because their services are widely used by users, making it difficult for them to switch providers in the event of a data breach. To this end, it must not process or combine the personal data of end users who use a third-party service operating

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[130] Case T-167/08 *Microsoft Corp v Commission* ECLI:EU:T:2012:323. The controversy was based on the fact that operating system vendors in the early years of computing did not allow unrestricted access to the source code of their systems, which had a restrictive effect on competition in the software development market. The dispute was resolved by the judicial declaration of an interoperability obligation, and we see its continuation in these requirements. See Jonathan Band, *Interfaces on Trial: Intellectual Property and Interoperability in the Global Software Industry* (Routledge 2019) 50-62.

[131] DMA, Article 6 para 7.

[132] DMA, Article 5 para 5.

[133] Antonio Manganelli and Antonio Nicita, 'Regulating Big Techs and Their Economic Power' in Antonio Manganelli and Antonio Nicita (eds), *Regulating Digital Markets: The European Approach* (Springer International Publishing 2022) 137-165.

[134] See Jörg Hoffmann and Begona Gonzales Otero, 'Demystifying Data Interoperabilty in the Access and Sharing Debate' [2021] JIPITEC 252.

on the gatekeeper's services, use data obtained through the gatekeeper's platform services for other services, and enter end users into contracts for other services of the gatekeeper for the purpose of combining personal data.[135]

For both business users and end users, the DMA regulation creates the right to raise 'any issue of non-compliance with the relevant Union or national law by the gatekeeper with any relevant public authority, including national courts, related to any practice of the gatekeeper'.[136] This is an option that is always available, even under different contractual terms and conditions, which serves as an addition to legitimate internal or extra-judicial dispute resolution mechanisms, for the enforcement of consumer rights and services. However, it does not include the consumer's right to turn to the national authorities to enforce the provisions of the DMA, as this is excluded by Article 1(5) DMA.[137]

Under Article 8 of the Regulation, the gatekeeper must not only ensure but also be able to demonstrate compliance with the requirements set out in the DMA. This is very similar to the principle of accountability of the GDPR.[138] The Commission may initiate a procedure to find whether the gatekeeper is compliant or adopt an implementing act specifying the measures to be taken by the gatekeeper to achieve compliance with the requirements applicable to it. The requirements for this procedure are set out in Chapter IV of the DMA. The gatekeeper can request such a procedure from the Commission as well.[139]

The Commission has wide-ranging powers in the procedure, not only to request information from the gatekeeper,[140] but also to carry out interviews and take statements,[141] and even to carry out on-the-spot inspections if it considers them justified.[142] Where investigations show that there is a risk of serious and irreparable harm to the business users or end users of gatekeepers, the Commission may take interim measures, including by means of implementing acts.[143] If the investigation reveals non-compliance, the Commission will have more tools than before to encourage gatekeepers to comply: it may impose a fine, which may be substantial, up to 10% of the gatekeeper's total worldwide turnover in

[135] See Szőke Gergely László and Pataki Gábor, 'Az online személyiségprofilok jelentősége' in Polyák Gábor (ed), *Algoritmusok, keresők, közösségi oldalak és jog – A forgalomirányító szolgáltatások szabályozása* (HVG ORAC 2020) 79-88.

[136] DMA, Article 5 para 6.

[137] See Josef Drexl and others, 'Position Statement of the Max Planck Institute for Innovation and Competition of 2 May 2023 on the Implementation of the Digital Markets Act (DMA)' [2023] GRUR International Volume 864, 866-867.

[138] GDPR, Article 5 para 2.

[139] DMA, Articles 8 and 20.

[140] ibid, Article 21.

[141] ibid, Article 22.

[142] ibid, Article 23.

[143] ibid, Article 24.

the previous financial year,[144] and, in addition, in the event of failure to comply or systematic non-compliance with the measures ordered by the Commission, a periodic penalty payment,[145] which may be imposed on the undertaking and its associations from the date specified in the decision, up to 5% of their average daily worldwide turnover in the previous financial year until the obligation is fulfilled. It should be added that this is the *ultima ratio* sanction of the remedy system outlined in the DMA, and the Commission has a number of enforcement tools at its disposal. The similarities of this method to the DSA and other above-mentioned instruments are noteworthy. While a gatekeeper can avoid negative legal consequences by offering commitments,[146] or by cooperating with the Commission's preliminary findings,[147] in their absence the Commission is given explicitly strong powers to ensure enforcement, which can also act as a deterrent to more serious infringements. Cooperation between the Commission and the national authorities and courts of the Member States is also facilitated by strong cooperation under the requirements of the regulation, which is capable of outlining a uniform European enforcement process to help ensure that gatekeeper companies cannot hide behind the laws of any EU Member State in the case of non-compliance.[148]

However, it should also be emphasised in this respect that this cooperation should be based on a strict delimitation of competences. It is obvious that the implementation of the DMA could be undermined by the introduction of differentiated national implementation mechanisms.[149] Therefore, it is important that no additional obligations should be imposed on gatekeepers under national law, as this could also hinder the 'Union' characteristic of the regulation. This will ensure the uniform application of the DMA, which will help the digitalisation process to move forward in the internal market.

4 Conclusions

The development of digital technologies and the age of platforms require an appropriate legal framework and aptitude from the legislator – and this is particularly true when we think of legislation at the European level. Digital services, gatekeepers, intermediaries, and content providers are now pervading much of and actively shaping the social and economic aspects of our lives. One of the major dilemmas in regulating these areas is how to create a technology neutral, and therefore timeless, regulatory framework that provides the appropriate basis for the parties concerned to further regulate their own legal relationships, on which services can

144 ibid, Article 30.

145 ibid, Article 31.

146 ibid, Article 25.

147 ibid, Article 29 paras 2-6.

148 ibid, Articles 37-39.

149 Hoffmann, Herrmann, Kestler (n 105) 6-7.

be based, even at the global level, while at the same time fully protecting the rights and legitimate interests of consumers, users, and other stakeholders.

The DSA and DMA in this respect regulate a long-standing problem in relation to the services provided by gatekeepers and intermediaries, which by the nature of things have a disproportionate advantage in their legal relationship with their users, which warrants further protection for these groups and specific responsibilities for the intermediaries and gatekeepers. The analysis carried out shows that, in addition to the existing requirements, the DSA and DMA have created new obligations for service providers which create better conditions both in the area of fair competition and in the area of consumer relations, but still they do not fundamentally change the liability regime of intermediary service providers. This does not mean, however, that the DSA and DMA would have only advantages, to which the chapter returns in the last paragraph.

The regulations represent a significant step forward in harmonising legislation among Member States, and they strengthen the extraterritorial applicability of EU law, depicted as the Brussels effect. Enforcement of the two regulations is fairly similar to the approach of the GDPR, but they place more emphasis on the role of the European Commission than national supervisory authorities. This, combined with the significant scope for intervention and the high level of fines, will create a more uniform application of the law and could provide a meaningful deterrent to non-compliance. As has been repeatedly pointed out in the article, the DSA and the DMA follow in the footsteps of a handful of recent and earlier secondary legislation in the field, but the similarities to the GDPR – and of course the e-Commerce Directive – are the most striking. The regulations also draw inspiration from best practices in the industries as shown above for instance on the reporting obligations.

The various solutions for transparency activities (reporting, internal complaints handling with users, etc), which have so far been carried out on a voluntary basis, will become mandatory rules that can serve the development and progress of the whole sector and help digitalisation to move forward by imposing uniform requirements on all market players, albeit with a layered set of requirements.

However, there are also serious concerns about the requirements: it is feared that the strengthened enforcement rules will increase operational costs for service providers, thus creating a barrier to entry to the markets. This might not be significant for VLOPs and VLOSEs,[150] since a barrier to the market usually benefits existing actors on the market, but this may very well produce side effects in Europe, where startups might

[150] The cost of non-compliance in their case, however, is very significant. Alphabet, for instance can have a maximum yearly fee of USD 76 million based on the DSA alone. These data are based on the 2021 financial year. See Afiq Fitri, 'Europe's Digital Services Act Is Set to Cost Big Tech Millions' (*Tech Monitor*, 6 April 2022) <https://techmonitor.ai/policy/big-tech/digital-services-act-cost-eu-alphabet-meta> accessed 31 August 2023.

be persuaded to avoid the continent, based on a cost-benefit analysis.[151] Since the DMA does not apply to small and medium-size businesses, this conclusion is relevant only to the DSA. It needs to be noted, however, that according to PwC, the DSA and the DMA might contribute to better competition through lowering the Herfindahl-Hirschman Index, by creating low barriers to entry.[152] While this is certainly true regarding national law fragmentation in the field, which is solved by the DSA and DMA, the DSA still operates with complex compliance obligations that will heighten entry barriers in comparison with other parts of the worlds.

This will put EU users at a disadvantage in the digitalisation process, since they might lose the opportunity to use new and innovative services based on the operational demands of startups highlighted above. This is due to an EU disadvantage vis-à-vis competitors from third countries, which could operate without such compliance burdens. On the one hand, this could disrupt economic processes in the EU by not facilitating but hindering the future establishment of digital services businesses in the EU, and, on the other hand, it could isolate European users from the latest digital solutions and platform services, which in any case are the result of a slow process. These conclusions remain valid, even though the DSA and the DMA should be praised for their layered approach – especially when it comes to the DMA – which is a significant step forward from the GDPR's generalised compliance costs put on small businesses and giants alike.

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[151] Adam Hays, 'Barriers to Entry: Understanding What Limits Competition' (*Investopedia*, 28 September 2023) <https://www.investopedia.com/terms/b/barrierstoentry.asp> accessed 19 October 2023.

[152] The Digital Services Acts Package and What It Entails (*PwC*) <https://www.pwc.com/m1/en/publications/documents/the-digital-services-acts-package.pdf> accessed 19 October 2023.

FROM GREEN VISION TO LEGAL OBLIGATION: THE CASE FOR MAKING GREEN PUBLIC PROCUREMENT MANDATORY

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Abstract: EU public procurement is most likely the most important part of the internal market since public authorities' purchasing power accounts for more than 14% of EU GDP and can serve as a powerful driver of demand and for sustainable products. This is where a compelling concept that holds the key to a greener future of Europe comes into play: Green Public Procurement (GPP). As a unique instrument of EU law, it most prominently encourages Member States' public authorities to make environmentally responsible choices in public procurement procedures. Therefore, recently, there has been a push for a horizontal general applicable mandate for GPP in EU public procurement law, while under the current framework, this has been of a rather voluntary nature. Nevertheless, mandatory GPP requirements have been introduced for certain sectors, advocating a more strategic and outcome-oriented approach to public purchasing. The present contribution analyses the legal framework of EU GPP. Based on current developments, it maps out and explains the approach towards more strategic and outcome-oriented purchasing. It goes on to elaborate on the ability and effectiveness of the regime of mandating GPP in horizontal and sectoral legislation to achieve environmentally friendly public purchases, and identifies the feasibility and consequences of such a mandate. Finally, it argues for a sectoral approach to mandating GPP.

Keywords: EU public procurement, green public procurement, sustainability, mandatory GPP, sectoral approach.

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1 Introduction

'Congratulations to you [reading this]! You have chosen wisely'.[1] This is because EU public procurement is most likely the most important part of the internal market, since public authorities' purchasing power accounts for more than 14% of EU GDP and 'can serve as a powerful driver of demand and for sustainable products'.[2] This certainly indicates that public authorities can significantly affect market demand with their purchasing decisions, including those for more environmentally friendly goods and services.

As you embark on this journey of discovery, let us introduce you to a powerful concept that holds the key to a greener future of Europe: Green Public Procurement (GPP). In a world where sustainability is no longer a choice but a necessity due the planet's limited resources and the looming threat of climate change, GPP stands tall as a symbol of change. This is all the more important due to the EU's various environmental commitments under the WTO Government Procurement Agreement,[3] the UN Paris Agreement,[4] and the 8th Environment Action Plan.[5]

As a unique instrument of EU law dealing with public money, it most prominently empowers Member States' contracting authorities[6] to make environmentally responsible choices in public procurement processes. According to the Commission's 2008 definition, GPP is a 'process whereby public authorities seek to procure goods, services and works with a reduced environmental impact throughout their life-cycle when compared to goods, services and works with the same primary function that would otherwise be procured'.[7]

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1 Prof Dr Sarah Schoenmaekers, Lecture on state aid and public procurement in the European Union of 18 April 2023 at Maastricht University, the Netherlands.

2 Commission, 'Circular Economy Action Plan, For a cleaner and more competitive Europe' (2020) para 2.2 <https://ec.europa.eu/environment/circular-economy/pdf/new_circular_economy_action_plan.pdf> accessed 25 May 2023.

3 WTO, 'Agreement on Government Procurement 2012 and related WTO legal texts' (2012) <https://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.pdf> accessed 1 June 2023.

4 UN, 'Paris Agreement' (2015) <https://unfccc.int/files/essential_background/convention/application/pdf/english_paris_agreement.pdf> accessed 1 June 2023.

5 Decision (EU) No 591/591 of the European Parliament and of the Council of 6 April 2022 on a General Union Environment Action Programme to 2030 [2022] OJ L 114/22.

6 For a definition on contracting authorities, see Article 2(1)(1) of Directive 2014/24/EU: The state, the regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law, the latter being characterised by their establishment for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character.

7 Commission, 'Public procurement for a better environment {SEC (2008) 2124} {SEC (2008) 2125}{SEC (2008) 2126}' (Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions) COM (2008) 400 final.

However, while mandatory GPP requirements have been introduced for certain sectors or products through sectoral legislation, there is no horizontal generally applicable mandate for GPP in EU public procurement law. Instead, it is of a rather *voluntary nature*. For example, Directive 2014/24/EU[8] only *allows* environmental concerns to be taken into account,[9] without obliging contracting authorities to make environmentally friendly purchases. Nevertheless, there appears to be a compelling push for a general, more strategic, and outcome-oriented approach to public purchasing. This has resulted in developments of mandating GPP in sectoral legislation to achieve broader sustainability goals. In this paradigm, the focus involves a shift from a mere transactional and economic mindset guided by a procedurally set process under the General 2014 Public Procurement Directives[10] to a more strategic and results-based one. It rests on the premise that contracting authorities identify their actual needs and objectives, followed by an alignment of their procurement decisions with broader policy goals of sustainability. Instead of merely following the procedurally set process under Directive 2014/24, contracting authorities therefore play a more proactive role in identifying innovative solutions and making informed decisions about *'what to purchase'*.

In the realm of those developments, where, taken to the extreme, every decision appears to carry the weight of our planet's future, one critical question looms large: To what extent can GPP become mandatory under the existing framework of EU public procurement law? As the world grapples with the urgent need for environmental preservation, the concept of mandating GPP holds the potential to drive monumental change. In this vein, some proponents argue that making GPP compulsory would compel contracting authorities as well as business operators to take a greener path, leaving no room for complacency. Others raise valid concerns about the feasibility, potential drawbacks, and unintended consequences of such a mandate. For example, imposing a general mandate of GPP could pose challenges for SMEs not (yet) having the necessary capacities to implement the complexity of such rules, while contracting authorities fear an increased administrative burden and costs associated with purchasing environmentally friendly products or services. Potential challenges may also result from the divergences across the EU since Member States implement GPP to different degrees.

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[8] Directive (EU) No 24/2014 of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, [2014] OJ L 94/65.

[9] S Schoenmaekers, 'The Influence of Sustainable Reporting Obligations on Public Purchasing' (2023) ERA Forum 378.

[10] Directive (EU) No 24/2014 of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC [2014] OJ L 94/65; Directive (EU) No 23/2014 of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts [2014] OJ L94/1; Directive (EU) No 25/2014 of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC [2014] OJ L 94/243. This contribution, however, will only address Directive 2014/24.

So, fasten your seatbelt and get ready to explore the transformative potential of GPP. In this contribution, we delve into the heart of this contentious debate by exploring the merits, challenges, and implications of mandating GPP under EU public procurement law, without looking at national legislation and practice. Together, we shed light on whether GPP can be turned into a general horizontal obligation under Directive 2014/24, or if alternative approaches can achieve more effective results. Thus, the present contribution strongly argues for a sectoral approach to mandating GPP.

In order to elucidate the question of to what extent and by what means GPP can become mandatory under EU public procurement law, this paper engages in doctrinal legal analysis by referring to legislation, the case law of the Court of Justice of the EU (CJEU, Court) and academic articles. The first section provides an analysis of the current legal framework of GPP and its developments from a public procurement and environmental perspective. To complete this legal analysis, based on developments within sectoral legislation, the second part maps out and explains the approach to more strategic and outcome-oriented public purchasing. The last section elaborates on the ability and potential effectiveness of the regime of mandating GPP in horizontal and sectoral legislation to achieve environmentally friendly public purchases. In this way, the feasibility, potential drawbacks, and unintended consequences of such a mandate are addressed.

2 Green public procurement: not a 'may' but a 'must'?

2.1 The legal framework

Originally, the EU public procurement regulation emerged with the aim of establishing a common market by creating a level playing field for businesses across Europe. Here, the objective of public procurement was primarily economic and not to discriminate against different firms from other Member States.[11] This was codified through the Directive on procedural rules guiding national authorities in the Member States on *how* to choose an economic operator.[12] Nevertheless, apart from those procedural and economic-centred aspects, the Commission also encouraged the inclusion of non-economic elements including a 'wider use of GPP in order to establish a framework for the use of market-based instruments to achieve smart, sustainable and inclusive growth'.[13] Besides the EU legislature, the CJEU also played a significant role in the development of

[11] R Caranta, 'Sustainability Takes Centre Stage in Public Procurement' (2023) 85(1) Ruch Prawniczy, Ekonomiczny I Socjologiczny Rok 45.

[12] Council Directive (EEC) No 305/1971 of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts [1971] OJ L 185/5.

[13] Commission, 'Europe 2020. A strategy for smart, sustainable and inclusive growth' (Communication from the Commission) COM (2010) 2020 final 14.

GPP. In its early case law,[14] the Court particularly endorsed the inclusion of environmental elements in public procurement policies.[15] Subsequent case law and non-binding Commission instruments eventually prompted the legislature to include environmental concerns in the 2004 Public Procurement Directive (now: Directive 2014/24). Shortly afterwards, both environmental and sectoral legislation emerged which resulted in a highly fragmented GPP legislative framework.

In order to understand the development and current status of GPP in EU law, this section covers various sources of GPP. Specifically, it deals with primary and secondary legislation, most notably Directive 2014/24, soft law adopted by the Commission, and CJEU case law.

2.1.1 Hard law concerning GPP: Directive 2014/24

The general EU stance on the protection of the environment can be seen in the EU Treaties. As the primary line of obligation, Article 11 TFEU and Article 37 of the EU Charter provide that environmental protection requirements must be integrated into the definition and implementation of EU policies and activities to promote sustainable development.[16] Taking on from this, Directive 2014/24 'clarifies how contracting authorities can contribute to the protection of the environment and the promotion of sustainable development, whilst ensuring that they can obtain the best value for money for their contracts'.[17] In order to accomplish this objective, Directive 2014/24 contains several provisions which are designed to incorporate environmental concerns in the public procurement process.

Primarily, as a principle of public procurement, Article 18(2) requires Member States to ensure that economic operators, in the performance of public contracts, comply with, *inter alia*, environmental obligations arising from EU law. Furthermore, Article 42(3)(a) allows contracting authorities to formulate technical specifications which specify the characteristics necessary for work, service or supply, in terms of performance or functional requirements, including environmental characteristics, provided that the parameters are sufficiently precise. Pursuant to Article 43(1), contracting authorities may also require specific labels in technical specifications, award criteria, or contract performance conditions proving that certain environmental characteristics are fulfilled. Moreover, Article 62(2) enables contracting authorities during the qualitative selection of participants to require compliance with certain environmental management systems or standards. In the selection and qualification stage of the

[14] Case C-31/87 *Gebroeders Beentjes BV v State of the Netherlands* ECLI:EU:C:1988:422; Case C-225/98 *Commission v French Republic* ECLI:EU:C:2000:494.

[15] K Pedersen and E Olsson, 'Chapter 13: The Role of the European Court of Justice in Public Procurement', in C Bovis (ed), *Research Handbook on EU Public Procurement Law* (Edward Elgar Publishing 2016) 16.

[16] Article 11 of the Treaty on the Functioning of the European Union (TFEU); Article 37 of the Charter of Fundamental Rights of the European Union (EU Charter).

[17] Recital 91 Directive 2014/24.

procurement procedure, according to Article 56(1), contracting authorities may also decide not to award a contract to the most economically advantageous tender (MEAT) where it is established that the tenderer did not comply with the principles under Article 18(2). If the contracting authority can demonstrate violation of those principles, economic operators may even be excluded from participation in the procurement procedure on the basis of Article 57(4)(a).

Moreover, Article 67(1) stipulates that contracting authorities must base the award of public contracts on MEAT. According to Article 67(2), such a tender should be identified on the basis of the price or cost, using a cost-effectiveness approach, such as life-cycle costing, and may include the best price-quality ratio, which will be assessed on the basis of criteria, including environmental aspects. Furthermore, Article 69(3)(2) prescribes the duty for contracting authorities to reject an abnormally low tender where they have established that it does not comply with the obligations in Article 18(2). Additionally, Article 70 allows Member States to lay down special conditions relating to the performance of a contract, including environmental considerations, provided that they are linked to the subject matter of the contract. Finally, according to Article 71(1), there is also the duty for subcontractors to comply with the obligations referred to in Article 18(2).

Following from the above, Directive 2014/24 refers to environmental obligations in numerous articles, covering every stage of the procurement procedure and beyond. In this sense, it can be seen as empowering the contracting authorities to engage more strongly in GPP.[18] Nevertheless, under the current framework, GPP remains *voluntary* in the sense that it is left to the Member States to mandate its implementation, and, ultimately, to the contracting authorities themselves to incorporate the above provisions when drawing up the contract notices. Considering Article 288 TFEU, the Directive is only binding as to the result to be achieved upon the Member States to which it is addressed, but leaves them the choice of the form and methods to achieve the results. It is therefore not a directly applicable legal instrument as it must be transposed into national law and cannot directly bind contracting authorities.[19] Thus, *if not obliged by national law, the application of environmental concerns is ultimately left to the discretion of the contracting authorities.*

[18] M Andhov, R Caranta, W Janssen and O Martin-Ortega, 'Shaping Sustainable Public Procurement Law in the European Union: An Analysis of the Legislative Development from "How to Buy" to "What to Buy" in Current and Future EU Legislative Initiatives' (The Greens/EFA in the European Parliament 2022) 10 <https://extranet.greens-efa.eu/public/media/file/1/8361> accessed 16 May 2023.

[19] Article 288 TFEU.

2.1.2 Soft law instruments concerning GPP

The Commission plays a crucial role in developing and promoting GPP. Since the late 1990s, it has enacted a vast number of soft-law instruments on GPP matters, including guidelines, green papers, and other policy documents.[20] Today, these instruments are complementary to Directive 2014/24 and serve to help contracting authorities and economic operators to engage in GPP.

One of the important policy documents was the Commission's 2008 Communication on 'Public procurement for a better environment'[21] which defined GPP as 'a process whereby public authorities seek to procure goods, services and works with a reduced environmental impact throughout their life cycle when compared to goods, services and works with the same primary function that would otherwise be procured',[22] and set grounds for the development of 'common GPP criteria' for products and services.[23]

Soon after the 2008 Communication, in 2010, the Commission adopted its 'Europe 2020 strategy for smart, sustainable and inclusive growth'[24] where the wider use of GPP appeared as a target in three flagship initiatives: 'Innovation Union',[25] 'Resource-efficient Europe',[26] and 'Energy 2020'.[27] Following on from this, the Commission issued its 'Circular Economy Action Plan (CEAP)' which highlighted the importance of public procurement in overall EU consumption as it accounts for nearly 20% of EU GDP. Accordingly, GPP can be considered a crucial factor in the circular economy, calling, however, for necessary actions, such as emphasising circular economy aspects, greater uptake by the public authorities, and reinforcing the use of GPP in EU procurement and funding.

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[20] For an extensive overview, see Centre for European Policy Studies (CEPS) and College of Europe, 'The Uptake of Green Public Procurement in the EU27' (STUDY – FWC B4/ENTR/08/006, 2012), <https://ec.europa.eu/environment/gpp/pdf/CEPS-CoE-GPP%20MAIN%20REPORT.pdf> accessed 23 May 2023; and F De Leonardis, 'Green Public Procurement: From Recommendation to Obligation' (2011) 34(1) International Journal of Public Administration 110-113.

[21] Commission (n 7).

[22] ibid 4.

[23] ibid 5 ff; in order to clarify the notion, this contribution speaks of 'common GPP criteria' whenever reference is made to EU GPP criteria adopted by the Commission following its 2008 Communication.

[24] Commission (n 13).

[25] Commission, 'Europe 2020 Flagship Initiative Innovation Union' (Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions) COM (2010) 546 final.

[26] Commission, 'Roadmap to a Resource Efficient Europe' (Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions) COM (2011) 571 final.

[27] Commission, 'Energy 2020 A Strategy for competitive, sustainable and secure energy' (Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions) (COM (2010) 639 final.

Furthermore, the 2011 'Green Paper on the modernisation of EU public procurement policy'[28] initially presented the two underlying ideas of public procurement, namely the concept of '*how to buy*' and '*what to buy*',[29] aiming to achieve the objectives of environmental protection, social inclusion, and the promotion of innovation as presented in the Commission's 'Europe 2020 Strategy'.[30] Here, the concept of '*how to buy*' refers to the procedurally prescribed process under Directive 2014/24. The idea of '*what to buy*' imposes mandatory requirements adopted via delegated acts or incentives to steer the decision on which goods and services should be procured. An example of the latter would be sector-specific legislation imposing environmental requirements such as maximum levels for energy and resource use, environmental harmful substances, minimum levels of recycling, or alternatively by setting targets, eg that a certain percentage of public purchases must be environmentally friendly.[31]

Another instrument is the Commission's 'Buying Green' handbook on GPP which was fully revised in 2016.[32] This is the main guidance document designed for public authorities to help them to procure goods and services with a lower environmental impact and builds upon Directive 2014/24.[33] It illustrates how environmental considerations can be included at each stage of the procurement process, gives practical examples, and describes key GPP sectors. Importantly, the handbook also refers to the above-mentioned common GPP criteria. They are adopted to promote GPP and should lead to more harmonisation as they are envisaged to be implemented directly into tender documents.[34] This aims at lessening the administrative costs both for economic operators and contracting authorities and facilitating the inclusion of green requirements into procurement procedures.[35] Currently, the common GPP criteria cover 21 products and service groups, though some of which are outdated. The intention is for the criteria to be updated.[36]

In 2019, the Commission tabled its famous European Green Deal.[37] In this regard, GPP appeared as one of the major targets of the climate ambition for 2030 and 2050 in the context of enabling buyers to make

[28] Commission, 'Green Paper on the modernisation of EU public procurement policy. Towards a more efficient European Procurement Market', COM (2011) 15 final.

[29] ibid 35 ff, 41 ff.

[30] Commission (n 13).

[31] ibid 41.

[32] Commission, 'Buying green! A handbook on green public procurement' (3rd edn, 2016), <https://ec.europa.eu/environment/gpp/pdf/Buying-Green-Handbook-3rd-Edition.pdf> accessed 23 May 2023.

[33] ibid 4.

[34] ibid 6.

[35] ibid 15.

[36] ibid.

[37] Commission, 'The European Green Deal' (Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions) COM (2019) 640 final.

more sustainable decisions. Both EU institutions and national contracting authorities should lead by example and ensure that the procurement is green, for which the Commission plans to propose further legislation and guidance.[38]

In 2020, the Commission adopted a new CEAP 'For a cleaner and more competitive Europe'.[39] Here, the Commission stated that public procurement 'represents 14% of the EU GDP and can serve as a *powerful driver of demand for sustainable products*'.[40] Accordingly, the Commission commits to propose minimum mandatory GPP criteria and targets in sectoral legislation and compulsory reporting in order to monitor the uptake of GPP.[41] The same attitude can also be seen from the recent 2022 Communication 'On making sustainable products the norm',[42] in which the Commission declared that 'contracting authorities would be required to use green procurement criteria to purchase specific groups of products'.[43]

Furthermore, in 2021 the Commission adopted a report on the 'Implementation and best practices of national procurement policies in the Internal Market'.[44] Here, the Commission identified that Member States have implemented GPP in their national laws to different degrees.[45] Accordingly, only one third of the Member States have introduced a legal obligation to introduce GPP for specific sectors, product groups, or if the value of the contract is above specific thresholds.[46]

Another source to mention is the 'GPP Training Toolkit'.[47] This toolkit is a module-based training course provided by the Commission and designed for public purchasers and GPP trainers. The toolkit specifically aims at achieving a higher uptake of GPP within public purchases by providing guidance, high-quality training material, and targeted training schemes to public bodies.

Finally, the 2021 'Innovation procurement' initiative should be mentioned.[48] Innovation procurement enables public buyers to foster the market uptake of innovative products, services, and works, it increases

[38] ibid 8.

[39] Commission (n 2).

[40] ibid 5.

[41] ibid.

[42] Commission, 'On making sustainable products the norm' (Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions) COM(2022) 140 final.

[43] ibid 6.

[44] Commission, 'Implementation and best practices of national procurement policies in the Internal Market' (Report from the Commission) COM (2021) 245 final 9.

[45] ibid.

[46] ibid.

[47] Commission, 'GPP Training Toolkit (2023)' <https://ec.europa.eu/environment/gpp/toolkit_en.htm> accessed 23 May 2023.

[48] Commission, 'Guidance on Innovation Procurement' (Commission Notice) COM (2021) 4320 final 5.

opportunities for SMEs to access markets, and boosts the development of innovative solutions to allow for green and digital transformation.[49] In this regard, the Commission held that the General 2014 Directives 'adjusted the public procurement framework to the needs of public buyers and economic operators arising from technological developments, economic trends and increased societal focus on sustainable public spending'.[50] Most interestingly, it (re)introduced the idea from the 2011 Green Paper of public procurement rules no longer being only concerned with pre-set rules on '*how to buy*' but leaving room for incentives on '*what to buy*'.[51] The Commission further elaborated that the objective of spending tax-payers' money will gain new dimensions beyond merely satisfying the primary needs of public entities.[52] These new dimensions concern 'whether it brings the best added value in terms of quality, cost-efficiency, *environmental* and social impact and whether it brings opportunities for the suppliers' market'.[53]

2.1.3 CJEU case law on GPP

Most importantly, the CJEU was the first to include non-economic, also known as 'horizontal', objectives in EU public procurement processes. In that regard, it is argued that the Court is not just interpreting the legal framework of GPP but even developing it.[54] This commenced with the *Beentjes* case[55] as early as 1988, where the CJEU opened the door to horizontal GPP policies. Here, the CJEU held that the option to award a contract on the basis of MEAT under the relevant law (Directive 71/305/EEC at this time[56]) 'leaves it open to the authorities awarding contracts to choose the criteria on which they propose to base their award of the contract'.[57] Accordingly, the Court found that the Directive did not lay down a uniform and exhaustive body of Community rules, and therefore does not exclude a condition related to the employment of long-term unemployed persons, as long as it has no direct or indirect discriminatory effect on tenderers from other Member States.[58]

Twelve years later in *Nord pas de Calais*,[59] the CJEU further clarified that EU public procurement law does not preclude contracting authorities from using non-economic, in that case employment-related, criteria

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49 ibid.

50 ibid.

51 ibid.

52 ibid.

53 ibid (emphasis added).

54 Pedersen and Olsson (n 15) 405.

55 Case C-31/87 *Gebroeders Beentjes BV v State of the Netherlands* ECLI:EU:C:1988:422.

56 Council Directive (n12).

57 ibid, para 19.

58 ibid, paras 2, 20, 30.

59 Case C-225/98 *Commission v French Republic* ECLI:EU:C:2000:494.

for the award of public contracts provided that the condition is consistent with all the fundamental principles of EU law, in particular the principle of non-discrimination.[60]

The case-law series continued with the ground-breaking *Concordia Bus Finland* case[61] concerning the inclusion of environmental elements in public procurement. Here, the CJEU defined that, when a contracting authority decides to award a contract to the tenderer who submits MEAT, it may consider criteria relating to the preservation of the environment, provided that (i) they are linked to the subject matter of the contract; (ii) they do not confer an unrestricted freedom of choice on the authority; (iii) they are expressly mentioned in the contract documents or the tender notice; (iv) and they comply with all the fundamental principles of EU law, in particular the principle of non-discrimination.[62]

The next case arriving before the CJEU was *EVN and Wienstrom*[63] in 2003. This case concerned the considerable weight put on environmental concerns within award criteria. The CJEU held that EU public procurement law does not preclude contracting authorities from applying the condition that electricity is produced from renewable energy sources weighing 45% of the award, provided that they comply with both the procedural rules and the fundamental principles of EU law. The Court also emphasised that the use of renewable energy sources for producing electricity is useful for protecting the environment in so far as it contributes to the reduction in emissions of greenhouse gases, which are amongst the main causes of climate change which the EU and its Member States have pledged to combat.[64]

Another case lining up in the case law on GPP matters was *Evropaïki Dynamiki v European Environment Agency* in 2010 which concerned the issue of a vague formulation of environmental criteria as award criteria.[65] The Court found that the European Environmental Agency, acting as the contracting authority, had not breached EU public procurement law by formulating the award criteria as the '*general environmental policy*' required of the company. The Court explained that such a criterion can be satisfied in many ways, such as through certified environmental management schemes, genuine environmental policies, and other equivalents.[66]

Another well-known case is *Max Havelaar*,[67] which concerned the use of environmental criteria, more specifically the use of eco-labels, in different stages of the procurement procedure. In that case, the CJEU

[60] ibid, paras 46, 50.

[61] Case C-513/99 *Concordia Bus Finland* ECLI:EU:C:2002:495.

[62] ibid, para 64.

[63] Case C-448/01 *EVN AG and Wienstrom GmbH v Republik Österreich* ECLI:EU:C:2003:651.

[64] ibid, paras 35-40.

[65] Case T-331/06 *Evropaïki Dynamiki v European Environment Agency* ECLI:EU:T:2010:292.

[66] ibid, paras 70-78.

[67] Case C-368/10 *Commission v Netherlands* ECLI:EU:C:2012:284.

held that technical specifications may include environmental characteristics. Furthermore, it stated that contracting authorities are authorised to choose the award criteria based on considerations of an environmental nature, including the fact that the product concerned was of a fair-trade origin. However, at the time, the relevant Directive 2004/18/EC did not allow those eco-labels to be deployed as technical specifications, since technical specifications exclusively refer to the characteristics of a product, while the requirement that products need to be of a fair-trade origin relates to the conditions governing the performance of a contract.[68] Hence, the CJEU found this practice not to be compatible with the Directive.

Finally, the *Tim SpA* case from 2020[69] concerned the general procurement principles of Article 18(2) of Directive 2014/24. Here, the CJEU stated that the exclusion criteria on the ground of the violation of the principles of public procurement can be applied to the subcontractor, and elaborated that the obligations for economic operators to comply, in the performance of the contract, with obligations relating to environmental, social and/or labour law, constitute, in the general scheme of Directive 2014/24, a *cardinal value* with which the Member States must comply.[70]

2.2 Prescribing 'what to buy': towards a more strategic and outcome-oriented approach

Considering that the above-mentioned legal instruments did not achieve the effective implementation of GPP and the more compelling environmental targets recently laid down, sectoral legislation emerges as the most promising approach in realising GPP. This stems from the fact that mandatory GPP requirements were introduced in numerous pieces of sectoral legislation which started even before the Commission's advocacy for mandatory GPP. Above all, the incorporation of GPP through sectoral legislation can also be attributed to Directive 2014/24 specifying that it is not appropriate to set general mandatory requirements for environmental procurement due to the significant differences between individual sectors and markets.[71]

The first tendencies towards sectoral mandatory GPP can be traced back to the 2008 Energy Star Regulation.[72] This Regulation is still in force, and, in particular, Article 6 mandates central government authorities to specify certain minimum energy-efficiency levels to be reached by the office equipment they purchase. Legal developments continued with

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[68] ibid, paras 73-76.

[69] Case C-395/18 *Tim SpA* ECLI:EU:C:2020:58.

[70] ibid, paras. 12, 14, 38.

[71] Recital 95 Directive 2014/24.

[72] Regulation (EC) No 106/2008 of the European Parliament and of the Council of 15 January 2008 on a Union energy-efficiency labelling programme for office equipment [2008] OJ L39/1.

the 2009 Clean Vehicles Directive[73] requiring contracting authorities, when purchasing road transport vehicles, to take into account operational lifetime energy and environmental impacts such as energy consumption, CO_2 emissions, and certain pollutants.[74] Procedurally, this obligation could have been fulfilled by either setting technical specifications or by including energy and environmental impacts as award criteria.[75] However, the 2009 Clean Vehicles Directive fundamentally changed with the 2019 amendment (hereinafter CVD),[76] as will be shown in the following analysis. A similar tendency towards sectoral mandatory GPP can also be seen in the 2012 Energy Efficiency Directive (EED)[77] mandating the public sector to purchase only products, services, and buildings with high energy-efficiency performance.[78]

Recently, the Commission's proposal for minimum mandatory GPP criteria and targets in sectoral legislation together with compulsory reporting to monitor the uptake of GPP[79] are just a drop in the vast sea of proposals and amendments to existing legislation. They, *inter alia*, concern batteries and waste batteries, ecodesign requirements for sustainable products, construction products or packaging, and packaging waste.

Based on the above-mentioned legislative developments, this section will demonstrate that there is a more strategic and outcome-oriented approach in public procurement law. This paradigm rests on the premise that the EU initially focused on mere procedural rules concerning '*how to buy*' rather than on '*what to buy*'. As will be shown, by introducing mandatory GPP through sectoral legislation, the EU created an innovative framework instructing contracting authorities '*what to buy*'.[80]

The sectoral legislation entailing implications andateory GPP that is tackled in this section are the 2019 Clean Vehicles Directive (CVD),[81] the Batteries and Waste Batteries Regulation (BWBR),[82] the Proposal

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[73] Directive (EC) No 33/2009 of the European Parliament and of the Council of 23 April 2009 on the promotion of clean and energy-efficient road transport vehicles [2009] OJ L120/5.

[74] ibid, Article 5.

[75] ibid, Article 5(3).

[76] Directive (EU) No 1161/2019 of the European Parliament and of the Council of 20 June 2019 amending Directive 2009/33/EC on the promotion of clean and energy-efficient road transport vehicles [2019] OJ L188/116 [hereinafter CVD].

[77] Directive (EU) No 27/2012 of the European Parliament and of the Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC [2012] OJ L315/1.

[78] ibid, Article 6.

[79] Commission (n 2) 5.

[80] Andhov (n 18) 13; Caranta (n 11) 46.

[81] CVD (n 76).

[82] Regulation (EU) No 2023/1542 of the European Parliament and of the Council concerning batteries and waste batteries, amending Directive 2008/98/EC and Regulation (EU) 2019/1020 and repealing Directive 2006/66/EC [2023] OJ L191/1 (hereinafter BWBR).

for an Ecodesign Regulation for Sustainable Products (EDSP),[83] and the Proposal for a Regulation on Packaging and Packaging Waste (PWPR).[84] The analysis focuses on specific substantive and procedural GPP requirements established in those acts which are briefly summarised in Table 1 and examined in detail thereafter. Moreover, it provides for the main takeaways and identifies the strategic and outcome-oriented approach in public procurement law specifically prescribing a sectoral '*what to buy*'.

[83] Commission, 'Proposal for a Regulation of the European Council and of the Council establishing a framework for setting ecodesign requirements for sustainable products and repealing Directive 2009/125/EC' COM (2022) 142 final (hereinafter EDSP).

[84] Commission, 'Proposal for a Regulation of the European Parliament and of the Council on packaging and packaging waste, amending Regulation (EU) 2019/1020 and Directive (EU) 2019/904, and repealing Directive 94/62/EC' COM (2022) 677 final (hereinafter PPWR).

Table 1 – Sectoral legislation with implications for mandatory GPP practices

Legislative Act	Specific substantive GPP requirements	Specific procedural GPP requirements	Type of harmonisation	Monitoring and compliance	Capacity building and awareness	Peculiarities
CVD[1]	mandatory minimum GPP targets	none; for contracting authorities to decide	minimum harmonisation	reporting and review	exchange of knowledge and best practices	targets to be reached within a certain reference period; Member State specific targets
BWBR[2]	mandatory minimum GPP criteria or targets, to be developed by the Commission via delegated acts	setting technical specifications *and* including developed GPP in award criteria	mixed form (maximum *or* minimum harmonisation)	penalties for non-compliance	none	none
EDSP[3]	mandatory ecodesign requirements, to be developed by the Commission via delegated acts, no specified form	technical specifications, selection criteria, award criteria, contract performance clauses, *or* targets, as appropriate	maximum harmonisation	implementation, monitoring and reporting requirements to be established by the Commission via delegated acts; penalties for non-compliance	initiatives which help SMEs to integrate ecodesign requirements in their value chains	reference to common GPP criteria
PPWR[4]	mandatory minimum GPP criteria to be developed by the Commission via delegated acts	none, for contracting authorities to decide	minimum harmonisation	penalties for non-compliance	none	none

[1] 2019 Clean Vehicles Directive
[2] 2023 Batteries and Waste Batteries Regulation
[3] The Proposal for an Ecodesign Regulation for Sustainable Products
[4] The Proposal for a Regulation on Packaging and Packaging Waste

2.2.1 The 2019 Clean Vehicles Directive (CVD)

The CVD[85] in its Recital 21 explicitly states that Member States are called upon 'to foster [GPP] policies through the purchasing of zero-emission vehicles and ultra-low emission vehicles by public authorities for their own fleets or for public or semi-public car-sharing programmes, and for phasing out of new CO_2-emitting cars by 2035'.

In that vein, Article 1 CVD stipulates that '[t]his Directive *requires* Member States to ensure that contracting authorities and contracting entities take into account lifetime energy and environmental impacts, including energy consumption and emissions of CO_2 and of certain pollutants, when procuring certain road transport vehicles [...] (emphasis added)'. In contrast to the 2009 Clean Vehicles Directive which prescribed substantive criteria such as energy consumption or emissions of CO_2 to be taken into account when purchasing road transport vehicles,[86] the CVD sets out *mandatory minimum procurement targets* that are *Member State specific*, defined as minimum percentages in terms of the number of low and zero emission vehicles in the aggregate public procurement across a Member State, and required *to be reached within a certain reference period* ending in 2025 and 2030.[87]

The CVD as opposed to its 2009 predecessor is not only limited to the procedural options of setting technical specifications or including energy and environmental impacts as award criteria, but provides for '*targets*', for which it is *up to the contracting authorities to decide how* they intend to live up to the obligations set out under the CVD.[88]

Furthermore, the CVD allows Member States to apply or authorise their contracting authorities to opt for higher national targets or more stringent requirements than those stipulated in the Annex.[89] This, in fact, underlines the character of *minimum harmonisation* of the CVD, allowing Member States and their contracting authorities and entities to apply higher mandates.

As regards *monitoring and compliance* of the set obligations, the CVD requires the Member States to submit by 18 April 2026, and every three years thereafter, a report to the Commission on the implementation of this Directive.[90] These reports will accompany the reports required under the General 2014 PP Directives[91] and will provide information on the measures taken to implement this Directive and on future implementa-

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85 CVD (n 76).

86 2009 CVD (n 73), Article 5; Andhov (n 18) 33.

87 See CVD (n 76) Article 5 in conjunction with Table 3 and 4 of the Annex.

88 Andhov (n 18) 33.

89 CVD (n 76) Article 5(7).

90 CVD (n 76) Article 10(2).

91 See Article 83(3) of Directive 2014/24/EU and the second subparagraph of Article 99(3) of Directive 2014/25/EU.

tion activities.[92] Member States are thus required to establish monitoring systems and report on their progress in integrating green criteria into public procurement. This could potentially enable the EU to assess the effectiveness of the CVD and identify areas for improvement.

With respect to capacity building and awareness, the CVD requires the Commission to facilitate and structure the *exchange of knowledge and best practices* between Member States on the implementation of the CVD.[93] This particularly facilitates the learning and dissemination of successful approaches to mandatory GPP by, *inter alia*, sharing experiences and practical guidance on implementing green criteria in public procurement processes.

2.2.2 The 2023 Batteries and Waste Batteries Regulation (BWBR)

A similar approach can be inferred from the BWBR,[94] which was tabled by the Commission in December 2020. This legislation forms an integral part of the European Green Deal[95] and aims to modernise the EU's legislative framework for batteries by, *inter alia*, fostering the consideration of environmental impacts of batteries over their life cycle in public procurement.[96]

To establish the necessary link to GPP, Article 85 BWBR – entitled Green Public Procurement – explicitly *mandates* that contracting authorities and contracting entities, 'when procuring batteries or products containing batteries […][to] *take account of the environmental impacts of batteries over their life cycle* with a view to ensure that such impacts of the batteries procured are kept to a minimum' (emphasis added). Just like the CVD, the BWBR also foresees *minimum mandatory GPP criteria or targets*, to be adopted by the Commission by means, however, of delegated acts.[97] Yet, in contrast to the CVD, the BWBR prescribes that contracting authorities and contracting entities must include *technical specifications and award criteria* based on Article 7 (carbon footprint of electric vehicle batteries and rechargeable industrial batteries), Article 8 (recycled content in industrial batteries, electric vehicle batteries, and automotive batteries), Article 9 (performance and durability requirements for portable batteries of general use), and Article 10 (performance and durability requirements for rechargeable industrial batteries and electric vehicle batteries).[98] The BWBR therefore explicitly prescribes that the obligation needs to be fulfilled by using technical specifications *and* – cumulatively – award criteria. Consequently, it is less discretionary in terms of

92 CVD (n 76) Article 10(2).

93 CVD (n 76) Article 8.

94 BWBR (n 82).

95 ibid 1.

96 ibid 1 and Article 85.

97 ibid, Article 85(3).

98 ibid, Article 85(2).

procedural options than the CVD under which it is completely up to the contracting authorities to decide how they intend to meet the set targets.

Under the BWBR, the Commission is not only required to adopt delegated acts concerning minimum mandatory GPP criteria, but also to specify the standards and requirements of Articles 7 to 10, on which contracting authorities need to base technical specifications and criteria within their procurement. These standards and requirements can be specified either by *maximum harmonisation* (eg, maximum life cycle carbon footprint thresholds in Article 7(3)(1) *or* by *minimum harmonisation* (eg, minimum shares of cobalt, lead, lithium or nickel recovered from waste in Article 8(3) or minimum values for electrochemical performance and durability for rechargeable industrial batteries and electric batteries in Article 10(2) and (3)).[99] Consequently, this entails that contracting authorities can only opt for higher standards in their procurement in the case of minimum harmonisation, and cannot go beyond the maximum set standards in the case of maximum harmonisation.

Importantly, the BWBR requires Member States to lay down rules on *penalties* applicable to infringements of this Regulation.[100] However, the BWBR does not contain any specific rules related to the monitoring of the implementation of the mandatory GPP criteria or targets and does not provide for any capacity building or awareness measures.

2.2.3 The proposal for an Ecodesign Regulation for Sustainable Products (EDSP)

The EDSP,[101] unveiled in March 2022, provides for ecodesign requirements including product durability, reusability, upgradability and reparability, the presence of substances of concern in products, product energy and resource efficiency, recycled content of products, product remanufacturing and high-quality recycling, and for reducing products' carbon and the environmental footprint in order to ensure that all products placed on the Union market will become increasingly sustainable over the whole life cycle.[102]

Article 2(6) of the proposed EDSP defines 'ecodesign' as 'the integration of environmental sustainability considerations into the characteristics of a product and the process taking place throughout the product's value chain'. 'Ecodesign requirements' refer to performance requirements or information requirements aimed at making a product more environmentally sustainable.[103] The proposed Regulation will apply to any physical good that is placed on the market or put into service, including com-

[99] Andhov (n 18) 36.

[100] BWBR (n 82) Article 93.

[101] EDSP (n 83).

[102] ibid 1, Recital 2.

[103] ibid, Article 2(7).

ponents and intermediate products, but excluding specific products such as food, feed, or medicinal products.[104]

To make the necessary connection to GPP, Recital 87 of the proposal explicitly empowers the Commission to adopt delegated acts to *require*, where appropriate, contracting authorities to align their procurement with specific GPP criteria or targets, to be set out in delegated acts adopted pursuant to the Regulation.

Likewise, Article 4 of the proposed EDSP particularly entitles the Commission to adopt delegated acts by establishing ecodesign requirements for, or in relation to, products to improve their environmental sustainability. It is further stipulated in subparagraph 3(h) that delegated acts may supplement the EDSP by 'establishing requirements applicable to public contracts, including implementation, monitoring and reporting of those requirements by Member States'. Based on this, Article 58 EDSP – under the title Green Public Procurement – asserts that ecodesign requirements pursuant to Article 4 subparagraph 3(h) may take the form of *mandatory technical specifications, selection criteria, award criteria, contract performance clauses, or targets, as appropriate.* However, the word 'may' does not refer to the nature of 'mandatory' requirements, but to the procedural prescription where they can be included in the procurement process.[105] Discretion is thus left to the Commission as regards the determination of procedural options for contracting authorities to include mandatory ecodesign requirements in their procurement processes.

Most innovatively, and in contrast to the above-mentioned legislation, the proposal *explicitly refers to the common GPP criteria* which must be taken into account by the Commission when preparing ecodesign requirements.[106] This is a positive step, since the common GPP criteria have already undergone rigorous assessment and validation, involving the participation of various stakeholders such as scientific experts, SMEs, industry representatives, public procurement authorities, and civil society organisations.[107] By facilitating broader stakeholder engagement, it therefore ensures the consideration of diverse perspectives and increases the likelihood of establishing legislation striking a fair balance between conflicting interests. Incorporating the common GPP criteria in sectoral legislation could also help promote standardisation by ensuring that GPP practices are uniformly followed without, for example, applying double standards within the same sector. This would thereby avoid distortion of the internal market and ensure fair competition. Referring to the common GPP criteria could also save time and resources and relieve the adminis-

[104] ibid, Article 1(2).

[105] This is also reaffirmed by Article 1(1) last sentence and the general objectives of the proposal as can be drawn from Recital 87, both aiming to provide for the setting of mandatory GPP criteria.

[106] EDSP (n 83) Recital 9, 18, Article 5(4)(c).

[107] Commission, 'Process for Setting Criteria' <https://ec.europa.eu/environment/gpp/gpp_criteria_process.htm> visited 20 May 2023.

trative burden whilst ensuring that the key environmental concerns are adequately addressed. Besides this, the reference to common GPP criteria could also promote transparency as they provide for accessible and clear guidelines. Furthermore, common GPP criteria often draw upon international standards.[108] Making reference to these criteria in sectoral legislation thus also aligns EU legislation with global sustainability goals and commitments.

Importantly, the EDSP opts for a model of *maximum harmonisation*, which can be inferred from Article 3. This provision stipulates that Member States must not prohibit, restrict, or impede the placing on the market or putting into service of products that comply with ecodesign requirements set out in delegated acts, although they are not prevented from setting minimum energy performance requirements. Consequently, in so far as the Commission has adopted delegated acts establishing ecodesign requirements, contracting authorities can only demand requirements that are below these through their procurement processes.

Eventually, the EDSP foresees that implementation, monitoring, and reporting requirements are established by the Commission in the relevant delegated acts.[109] Nevertheless, the EDSP does not specify any measures related to training or the exchange of knowledge or best practices concerning GPP requirements. However, it is particularly noteworthy that the EDSP requires the Commission to take into account *initiatives which help SMEs* to integrate environmental sustainability aspects, including energy efficiency, in their value chain, and mandates Member States to take appropriate measures accordingly.[110] Such measures may include financial support, specialised management and staff training, or organisational and technical assistance.[111]

Finally, the proposed EDSP requires Member States to lay down rules on *penalties* in the case of infringements and to take all measures necessary to ensure that they are implemented.[112]

2.2.4 The Proposal for a Regulation on Packaging and Packaging Waste (PPWR)

The final initiative to be mentioned is the PPWR,[113] unveiled in November 2022. The specific focus of the PPWR on GPP can be inferred from Article 57(1) – titled Green Public Procurement – which *mandates* contracting authorities when awarding any public contracts for packaging or packaged products or for services using packaging or packaged products in situations covered by the General 2014 Directives to apply

[108] For example, standards of the International Organisation for Standardization (ISO).

[109] EDSP (n 83) Article 4 subpara 3(h).

[110] ibid, Article 19.

[111] ibid, Article 19(3).

[112] ibid, Article 68.

[113] PPWR (n 84).

the GPP criteria. These criteria are to be developed by the Commission by means of delegated acts, in which it establishes *minimum mandatory GPP criteria* based on specific requirements set out in PPWR, such as the requirements for substances in packaging (Article 5), recyclable packaging (Article 6), minimum recycled content in plastic packaging (Article 7), compostable packaging (Article 8), packaging minimisation (Article 9), or reusable packaging (Article 10). As indicated in Article 57(3) PPWR, the obligation to apply these GPP criteria applies to any procedure for procurement by contracting authorities for the award of public contracts. However, the proposal does not prescribe any procedural requirements in the sense that contracting authorities are free to designate at which stage of the procurement process they wish to include GPP criteria.

Similar to the CVD, the PPWR opts for *minimum mandatory GPP criteria*, thus allowing contracting authorities to apply higher mandates than those prescribed under the proposed Regulation and its supplementing delegated acts.

Nevertheless, the PPWR does not contain any provisions specifically addressing the monitoring of the implementation of the GPP criteria. It merely requires Member States to lay down rules on penalties applicable to infringements of the PPWR.[114] Regrettably, the PPWR also does not provide for any capacity-building and awareness measures.

2.2.5 Takeaways from the current sectoral approach

What can be drawn from the legislative initiatives as a general pattern is that they all *mandate GPP* and opt for a *sectoral approach* by way of product or sector-specific legislation. Whereas Directive 2014/24 focuses on procedural rules applicable to public procurement, the above-mentioned proposals cover GPP criteria and targets related to specific sectors and products for which contracting authorities are mandated to purchase only those products or services complying with the set criteria or targets.

While the vast sea of legislation differs in specific substantive requirements (reference to 'criteria', 'targets', or 'requirements'), procedural requirements (full discretion, medium discretion, or explicit obligations for contracting authorities at which stage to include GPP in the procurement process) and in the type of harmonisation (minimum harmonisation, maximum harmonisation, or a mixed form), *they still all have the common objective to opt for more sustainability in public procurement by, inter alia, reducing environmental impacts, supporting the development of green industries, and improving resource efficiency.*

In this regard, minimum harmonisation, the reference to common GPP criteria, as well as capacity building and awareness measures concerning contracting authorities and contracting entities and SMEs in some of the initiatives are a positive step forward as they are essential to

[114] ibid, Article 62(1).

achieve the objectives of GPP. By harmonising GPP criteria, the EU essentially also aims to *facilitate cross-border trade* and *ensures the functioning of the internal market* (free movement) by simultaneously e*nhancing the environmental performance across EU Member States.*

Nevertheless, in some of the mentioned proposals, the Commission is vested with the authority to adopt GPP criteria through delegated acts. Controversies about delegated acts are extensively discussed in academic as well as institutional debate.[115] This raises concerns because the envisaged delegated acts essentially aim at establishing the desired level of harmonisation of sustainability for the entire EU, across which significant disparities in terms of national environmental performance and pertinent aspirations among Member States or even within one Member State are quite apparent.[116] Moreover, within the process of adopting delegated acts, the European Parliament, as the only directly democratically elected EU institution, is rather sidelined.[117] Criticism therefore emerges as to the problems of democratic legitimacy, the lack of transparency, limited parliamentary oversight, and a lack of public awareness and engagement.[118]

2.2.6 Towards a more strategic and outcome-oriented approach

The legislative initiatives described above certainly signify a move towards a more strategic and outcome-oriented approach to achieve broader sustainability goals, including those for GPP. In this paradigm, the focus involves a *change from a mere transactional and economic mindset to a more strategic and results-based one*. It rests on the premise that contracting authorities identify their actual needs and objectives, followed by an alignment of their procurement decisions with broader policy goals of sustainability. Instead of merely following a procedurally set process under Directive 2014/24, contracting authorities are called upon to play a *more proactive role* in identifying *environmentally informed solutions about 'what to purchase'.* This concept of '*what to buy*' therefore entails that public procurement will become more results-driven and will encourage a *more holistic and long-term perspective.*

Against this background, some authors have argued that there is a shift in approach of the EU initially focusing on '*how to buy*' under Directive 2014/24 towards creating an innovative framework of '*what to buy*'.[119]

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[115] See, for example, K Bradley, 'Delegation of Powers in the European Union: Political Problems, Legal Solutions?' in C F Bergström and Dominique Ritleng (eds), *Rulemaking by the European Commission: The New System for Delegation of Powers Rulemaking by the European Commission: The New System for Delegation of Powers* (Oxford Academic 2016) ch 4.

[116] A Iurascu, 'How Will the Adoption of Mandatory GPP Criteria Change the Game? Lessons from the Italian Experience' (2023) 18(1) European Procurement & Public Private Partnership Law Review 8.

[117] See to that effect Article 290(2) TFEU.

[118] These will not be further discussed due to the scope of this paper.

[119] Andhov (n 18) 13; Caranta (n 11) 46.

However, this is to be argued against for two particular reasons: first, as identified in section 1, the Commission already proposed this idea of specifically prescribing '*what to buy*' years ago. Second, it was initially based on the premise of introducing mandatory GPP criteria through sectoral legislation specifically prescribing '*what to buy*'.

Nonetheless, what could be considered as a new paradigm shift is the concept of moving towards a *general* obligation on '*what to buy*'. This would certainly put two layers of obligations to be followed, one to be found within sectoral legislation, and the other potentially established under the horizontal framework of Directive 2014/24. Crucially, this poses the question of whether such an approach of generally mandating GPP under the horizontal framework of public procurement law can actually accomplish effective operationalisation of mandating GPP. This idea will be examined in the following section.

2.3 From green vision to legal obligation: why the sectoral approach is more efficient in enforcing mandatory GPP

On the basis of the foregoing observations, we can deduce a gradual, yet inexorable, law-making trend towards a 'sectoral approach' regarding the integration of environmental parameters in public procurement processes. As already identified, this concept in itself is not a novelty. Nevertheless, the current debate on rendering GPP mandatory is seen both from the point of view of the general horizontal reforms of Directive 2014/24 and from a sectoral point of view mandating GPP through sector-specific legislation. Even though the vast majority of contributions argues in favour of such horizontal reforms, this section attempts to shed light on the possible weaknesses of the key proposals and puts forward a number of claims in favour of a sectoral approach instead.

To this end, the present section seeks to demonstrate why the proposals of *reinforcing Article 18(2) of Directive 2014/24 by mandating GPP* (sec 2.3.1), *rendering the common EU GPP criteria mandatory* (sec 2.3.2.) and *removing the link to the subject matter* (sec 2.3.3) are hardly reconcilable with the system of fundamental principles of EU public procurement. Building on this analysis, the section aspires to indicate why the ongoing trend of mandating GPP within sectoral legislation is deemed to be a more effective strategy towards an operative, as well as unruffled, transition of integrating the objectives of environmental policies in the public procurement set of pertinent legislation (sec 2.3.4).

2.3.1 Reinforcing Article 18(2) of Directive 2014/24 by mandating GPP

One of the prominent proposals put forward to give effect to GPP is to reinforce the normative force of Article 18(2) of Directive 2014/24 by

explicitly mandating GPP.[120] First of all, it should be stated that this provision constitutes a 'special case'. On the one hand, it is perhaps the most straightforward declaration of the incorporation of environmental (and, generally, of secondary) considerations into public procurement procedures. On the other hand, it is argued that the *ambiguity as regards its binding nature* and the legal consequences attached thereto *deprives it of any normative content*. In fact, if this provision serves one function, it is that it limits the discretion of Member States to disregard environmental, social, and labour law concerns altogether.[121] Yet, one might well ask: *Is this sufficient to push towards or, even more, to force a 'greener' approach to public procurement?* If not, and for the purpose of this contribution, one may ask further: *Would there be any tangible benefit in making this provision mandatory, thus establishing a general mandate for GPP?*

Before examining the prospects for strengthening the binding nature of Article 18(2) of Directive 2014/24, it is necessary to point out that its binding scope remains unclear. First of all, according to the literal interpretation of this provision, the legal obligations arising from the wording '*shall take the appropriate measures*' are addressed to the Member States and not to the contracting authorities. Besides that, given the nature of the instrument as a Directive, the Member States are only bound as to the end result, which is confined to (vaguely and without any prescribed specific standard) ensuring compliance with the applicable obligations in the field of, *inter alia*, environmental law. Moreover, the binding content of the provision is further limited, since its wording does not prescribe any specific action or particular measure to be taken by the Member States in that regard.[122]

The most critical point in this respect is the relationship of Article 18(2) with the other general principles of EU public procurement stipulated in Article 18(1), as originally formulated by the CJEU and subsequently incorporated in Directive 2014/24. In this context, it is observed that for the elaboration of the principle of equal treatment or for the principle of transparency, the Court has used the strong language of mandatory nature.[123] In contrast, the rationale that has been used with regard to the principle of incorporation of strategic considerations under the public procurement framework is much more permissive.[124] For example, by holding that '*the procurement law does not preclude the contracting*

[120] K Pouikli, 'Towards Mandatory Green Public Procurement (GPP) Requirements under the EU Green Deal: Reconsidering the Role of Public Procurement as an Environmental Policy Tool' (2021) ERA Forum 715-716.

[121] C Hamer and M Andhov, 'Article 18 Public Procurement Principles' in R Caranta and A Sanchez-Graells (eds), *European Public Procurement Commentary on Directive 2014/24/EU* (Edward Elgar Publishing 2021) 199.

[122] ibid 205-206.

[123] See, for example, Case C-454/06 *pressetext Nachrichtenagentur GmbH v Republik Österreich and Others* ECLI:EU:C:2008:351; and Case C-496/99 P *Commission v CAS Succhi di Frutta* ECLI:EU:C:2004:236.

[124] Hamer and Andhov (n 121) 205-207.

authority from applying strategic considerations, as long as procurement principles are respected',[125] the CJEU seemed to initially draw a *distinction* between the 'original' public procurement principles (equal treatment, non-discrimination, transparency, and proportionality) and the more recent, weaker, principle of incorporating secondary considerations (environmental, social and labour law). However, in its recent *Tim SpA* judgment, the Court, in a Delphic way, aspired to equalise the principles,[126] yet, this is still in its infancy.

Furthermore, even if we set aside the practical point of view, the principles from Article 18(2) of Directive 2014/24 must not be a compromise of the 'original' procurement principles.[127] Thus, one could not infer that there is a certain kind of hierarchy between the principles. This is all the more crucial because treating all principles equally ensures that economic operators are subject to the same criteria in the public procurement procedure, simultaneously promoting fairness and transparency, and preventing potential discrimination and arbitrary treatment. Where there is no predictability in terms of legal clarity and legal certainty about the application of these principles in tender procedures, the imposition of a horizontal 'green' mandate on the basis of this provision may therefore potentially result in legal uncertainty for economic operators and arbitrary decisions of the contracting authorities. Consequently, it is of utmost importance for the legislature to clarify the relation between those principles stipulated in Article 18(1) and 18(2) of Directive 2014/24. Subsequently, even if Article 18(2) were to acquire sound normative content, this would have little legal effect if it were not accompanied by strengthened implementation of its normative content in the referring provisions of Directive 2014/24.

In view of these observations, it is apparent that this provision, as it stands, cannot be considered a solid basis for establishing specific obligations. It is also doubtful whether the further strengthening of its binding nature can achieve the 'ambition' of transforming it into a clear and unequivocal general provision that imposes the obligation upon contracting authorities to enforce GPP requirements in practice. Given its wording, legal nature, and position within the system of public procurement principles, attaching a clear legal obligation to Article 18(2) to integrate environmental requirements in public procurement procedures is therefore *not expected to enhance its enforceability*.

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[125] Case C-448/01 *EVN AG and Wienstrom GmbH v Republik Österreich* ECLI:EU:C:2003:651, para 34.

[126] Case C-395/18 *Tim SpA* ECLI:EU:C:2020:58, para 38.

[127] For a more elaborated overview on the interconnection of horizontal policies (green, social, innovation) with the principle of competition, see also A Sanchez-Graells, 'Truly Competitive Public Procurement as a *Europe 2020* Lever: What Role for the Principle of Competition in Moderating Horizontal Policies?' (2016) 22(2) European Public Law.

2.3.2 Rendering the common EU GPP criteria mandatory

The proposal of making voluntary common EU GPP criteria mandatory has been formulated in the academic debate,[128] and lately also in legislative instruments such as the CEAP or the EDSP.[129] However, this approach appears disputable due to the possible legal and political shortcomings, as shown below.

First of all, the political implications of rendering GPP criteria mandatory should not be disregarded. This is mainly because the uptake of general mandatory green specifications varies across Member States.[130] There are considerable cross-country variations regarding the existing levels of environmental considerations on national political agendas as well as diverging priorities of contracting authorities headed by political appointees. For a Member State opting for higher mandates of GPP,[131] the 'one-size-fits-all' approach of rendering GPP mandatory across the entire EU would certainly compromise the existing national system[132] and contradict the very nature of Directive 2014/14.[133] Moreover, due to the lack of environmental considerations in national policies and the lack of expertise of contracting authorities,[134] this would potentially lead to undesirable results.

Since the incorporation of GPP in public tenders normally entails higher costs for the budget of the corresponding authority, the different levels of economic developments among Member States are expected to put pressure on the national budgets of those with more limited resources. This is one of the main reasons why the way in which the establishment of mandatory environmental criteria is envisaged appears to be highly controversial. The priorities realised through specific adopted options of public expenditure and the way in which public resources are allocated and further managed lie at the 'heart' of democratic functions. Therefore, any decision that imposes an additional burden on the state budget by mandating the incorporation of certain environmental criteria must be democratically legitimised.

Besides the fact that Member States with a more robust economic status are better 'equipped' to encompass environmental criteria in

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[128] See, for example, Pouikli (n 120) 716.

[129] EDSP (n 83) Recital 87; Commission (n 2) 4.

[130] CEPS and College of Europe (n 20).

[131] ibid. For example, stressing the 'four top performers' Belgium, Denmark, the Netherlands and Sweden.

[132] Andhov (n 18) 64.

[133] See Recital 95 of Directive 2014/24 acknowledging the important differences between individual sectors and markets.

[134] See to that effect CEPS and College of Europe (n 20) empirically identifying the varying uptake of GPP among Member States and the perceived difficulties of contracting authorities to incorporate green criteria in public tenders.

their tenders,[135] the long-term positive environmental impacts of procuring 'greener' are often at odds with national short-term political biases. This is mainly because more expensive solutions in public procurement procedures are connected to more spending of taxpayers' money. Consequently, these solutions are likely to be highly controversial in the political'sphere, ultimately leading to unprofessed non-noble aims resulting in corruption and political dependencies.

Another point worth mentioning is the way in which GPP criteria are currently adopted. In the procedure, the Commission's Joint Research Centre's Institute for Prospective Technological Studies (JRC) plays a leading role by providing all relevant information. The JRC is in consultation with the GPP Advisory Group[136] composed of representatives of the Member States and various stakeholders. Even though this ensures diverse perspectives, there are some drawbacks that need to be acknowledged. Namely, the formulation and revision of the common GPP criteria aimed at harmonising technical specifications is an onerous, bureaucratic, and time-consuming task. Consequently, there is a risk that they may already be outdated from the moment of their adoption until their incorporation into tender notices. Indeed, since the 2008 Communication until today, the Commission has adopted 21 common GPP criteria, seven of which are already outdated and not yet revised, while there are only two newer ones, dating from 2021.[137] It can therefore be assumed that, as the range of the criteria expands and once they become mandatory, the enterprise of keeping them up to date will be more demanding, more complicated, and, sometimes, muddling and highly contentious. This is especially to be contrasted with the current situation where the criteria are set forth as mere 'templates' for contracting authorities.

[135] J Rossel, 'Getting the Green Light on Green Public Procurement: Macro and Meso Determinants' (2021) 279 Journal of Cleaner Production 3.

[136] Commission, 'Process for Setting Criteria', <https://ec.europa.eu/environment/gpp/gpp_criteria_process.htm> accessed 30 May 2023.

[137] Commission, 'EU GPP Criteria' <https://ec.europa.eu/environment/gpp/eu_gpp_criteria_en.htm> accessed 3 June 2023.

Figure 1. Procedure for the development and revision of EU GPP criteria[138]

This brings back the already mentioned points of criticism of the potential emergence of double standards within the same sectors if there are GPP criteria adopted as just described (common GPP criteria) and those established via delegated acts within sectoral legislation. As identified above, GPP criteria are simultaneously adopted via delegated acts, for example under the BWBR or the PPWR, without any reference to the common GPP criteria. So far, only the EDSP refers to the common GPP criteria. It is therefore indispensable to streamline and unify the existing (or future adopted) GPP criteria to avoid double standards. The EDSP could therefore serve as a leading example to incorporate references to common GPP criteria within *all* pieces of sectoral legislation mandating GPP.

In a nutshell, the establishment of mandatory common EU GPP criteria may *disproportionately burden a country's economic planning and may lack the necessary political support and legitimacy*. Besides the fact that a Member State may struggle to live up to those standards, such mandatory prescriptions might well create considerable barriers to the public procurement market, at least for a period of adjustment, and prevent companies from participating in tendering procedures and thereby limit competition. In other words, such a development could possibly bring about distorted market dynamics, thereby undermining the strate-

[138] Commission, 'Procedure for the development and revision of EU GPP criteria' <https://ec.europa.eu/environment/gpp/gpp_criteria_procedure.htm> accessed 3 June 2023.

gic use of public procurement towards greener public purchases.[139]

This has *significant consequences regarding the fundamental principles of fair competition and equal treatment*.[140] As eloquently put by the CJEU in the *Concordia Bus Finland* case, the duty to observe the principle of equal treatment lies at the very heart of Directive 2014/24 which is intended, in particular, to promote the development of effective competition.[141] This is to suggest that compliance with the principle of non-discrimination is not just a matter of conformity with the fundamental public procurement principles, but rather serves the very *telos* of the public procurement framework. In addition, the mandatory inclusion of GPP criteria in calls for tenders essentially compels the contracting authorities to *unintentionally favour economic entities from countries with higher environmental standards*, thereby compromising the general principle of non-discrimination.[142] Since compliance with environmental standards across the EU is not homogeneous, the imposition of uniform mandatory GPP criteria leads to the discrimination of economic entities on the basis of their nationality.

2.3.3 Removing the link to the subject matter

Another proposal that is currently being discussed is the removal of the 'link to the subject matter of the contract' (L2SM) throughout Directive 2014/24 and to *replace it by a link to the life cycle of relevant goods or services*.[143] To recall, the CJEU established the concept of the L2SM in its *Concordia Bus Finland* case where it explicitly allowed the possibility to include environmental considerations in award criteria of a public contract provided that certain conditions are fulfilled, as described in section 2.1.3. Since then, reference to the L2SM has been incorporated in numerous Articles of Directive 2014/24.[144] However, despite Article 67(3) of Directive 2014/24 requiring the L2SM 'to be understood with reference to the life cycle as defined with reference to award criteria', this does not necessarily mean that the L2SM should be replaced by a link to the life cycle of relevant goods or services entirely.

First of all, the L2SM ensures that public procurement procedures are *efficient and deliver value for money*. In this sense, it helps to *prevent wasteful spending* as it clearly defines the boundaries for contracting au-

[139] Sanchez-Graells (n 127) 378.

[140] Joined Cases C-21/03 and C-34/03 *Fabricom SA v Belgian State* ECLI:EU:C:2005:127, para 27 with reference to Case C-434/02 *Arnold André* ECLI:EU:C:2004:800, para 68 and Case C-210/03 *Swedish Match* ECLI:EU:C:2004:802, para 70: 'It is settled case-law that the principle of equal treatment requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified'.

[141] Case C-513/99 *Concordia Bus Finland* ECLI:EU:C:2002:495, para 81.

[142] See Article 18(1) of Directive 2014/24.

[143] See, for example, Andhov (n 18) 58-59.

[144] See, for example, Articles 42, 43, 45, 67, 68 and 70 of Directive 2014/24.

thorities of what can be purchased and therefore enables them to focus only on the procurement of goods and services that are directly linked to its mission. This also prevents environmental considerations being used to discriminate among economic operators,[145] or arbitrary purchases more generally, and thereby serves as a *safeguard against corruption and collusion*. Simultaneously, the L2SM encourages *fair competition* by allowing only qualified bidders with expertise in the relevant subject matter to participate in a tender. If the L2SM were to be removed, this would potentially open the door to unqualified or unrelated candidates compromising the quality of the purchased goods or services. Furthermore, the L2SM ensures compliance with the fundamental principle of *transparency*. In that vein, it provides for legal certainty and predictability as it sets clear parameters both for economic operators and contracting authorities to understand the requirements and expectations in advance. Finally, the L2SM is anchored in case law and in the common practice of public procurement procedures that have been used for decades now. The creation of the new life cycle link would then without doubt require a long transitional and adjustment period to prove itself first.

2.3.4 Favouring a sectoral approach towards accomplishing better operationalisation of GPP requirements

When it comes to accomplishing better operationalisation of mandating GPP, the sectoral approach stands out as the clear favourite over general horizontal reforms to Directive 2014/24. Regarding the points that have been observed and the legal implications of implementing the above proposals, a sectoral approach towards mandating GPP has significant advantages.

Most importantly, by focusing on specific sectors and products, it allows for tailored strategies addressing specific characteristics of different industries, including those with the most significant environmental impact.[146] It recognises that each sector has its own set of environmental concerns, market dynamics, and technological advancements. In that way, by customising GPP requirements to specific sectors, effective competition and innovation can be fostered and sustainable practices can be driven that are relevant and feasible for each particular sector or industry. Besides, a sectoral approach is also favourable since it provides for clear signals and criteria to both public authorities and private businesses operating within a given sector. It thereby creates a transparent framework that facilitates compliance as all actors know exactly what is expected of them. This also minimises the burden on economic operators and contracting authorities as they can focus their efforts on meeting sector-specific GPP criteria rather than navigating a complex net of generalised horizontal rules.

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[145] Andhov (n 18) 58.

[146] See Recital 95 of Directive 2014/24.

Moreover, the sectoral approach generates momentum by creating visible and measurable progress, inspiring other sectors to follow suit which potentially results in great spill-over effects accelerating the transition towards green procurement practices across the entire economy.[147]

The sectoral approach also acknowledges the interconnectedness of various industries and their supply chains. By addressing specific sectors, collaborations between different actors can be stimulated. This also facilitates the exchange of best practices, the development of innovative solutions, and the creation of synergies.[148]

Lastly, the main argument for a sectoral approach is that mandating GPP under horizontal reforms would certainly mean that GPP becomes mandatory overnight without ensuring that contracting authorities and business operators are prepared to comply with such high premises.[149] Instead, establishing binding GPP criteria through the 'backdoor' of sectoral legislation allows for a smooth transition, given also the fact that the respective legal acts often allow for a time of transposition or adaptation. This potentially allows for targeted training, awareness measures, and the sharing of best practices in the meantime.

3 Conclusion

As shown in this paper, the 'Greening' of public procurement practices marks a significant shift in the objectives attached to EU public procurement law.[150] The development of the public procurement framework has apparently departed from the establishment of a solid internal market by eliminating protectionist practices across the EU as regards public purchases. In light of the general public procurement legal framework and the environmental considerations informing all EU policies, we are witnessing a shift, or, to be more precise, an urge to shift from an enabling instrument of the internal market to a strategic instrument for achieving broader EU policy goals of sustainability,[151] including the EU's environmental targets. It is expected that this transformation in the functioning of the public procurement framework cannot be without legal contradictions, especially if it is taken into account that the economic logic, ie, the narrow sense of value for money that governs the award of public contracts, is not always compatible with environmental considerations. At the same time, the establishment of GPP as common practice in the EU requires the conducting of new assessments (beyond those

[147] See Schoenmaekers (n 9) 390, 392 in the context of sustainable reporting obligations and M Andhov and R Caranta, 'Sustainability through Public Procurement: The Way Forward – Reform Proposals' (SMART Project Report 2020) 43, 47 speaking of a 'race to the top'.

[148] L Mélon, 'More Than a Nudge? Arguments and Tools for Mandating Green Public Procurement in the EU' (2020) 12 Sustainability 16-17.

[149] Pouikli (n 120) 714.

[150] Commission, 'Barriers to the take-up of GPP' <https://ec.europa.eu/environment/gpp/barriers_en.htm> accessed 2 June 2023.

[151] Mélon (n 148) 4.

incorporated in the existing public procurement framework) to reconcile the fundamental principles governing public contracts with those of environmental policy. It cannot be expected that this will happen overnight and neither can it be expected that it will be achieved without fostering the knowledge and allocating the resources required to take a step further in public procurement law in order to purchase 'green'.[152]

As can be concluded from the analysis above, there certainly needs to be some element of 'mandatoriness', but the main question is *'what' needs to become mandatory* and '*how far' can it be realised*? For more than a decade now, the focus has primarily been on *whether GPP* needs to become mandatory. While this now constitutes a rather uncontroversial part of the debate, controversies remain about '*to what extent*' it can be realised. As shown above, the current proposals for mandating GPP throughout the current legislative framework, namely by (i) reinforcing Article 18(2) of Directive 2014/24, (ii) rendering the common EU GPP criteria mandatory, and (iii) replacing the L2SM with a link to the life cycle of goods or services, potentially entail legally contentious consequences and various political stumbling blocks which cannot be ignored and which for now do not seem to serve as the 'silver bullet' of 'green' purchasing.

Instead, this contribution has opted for favouring a sectoral approach to accomplishing better operationalisation of GPP requirements rather than horizontal reforms of Directive 2014/24 in the realm of a broader reform package. It has argued that a sectoral approach duly considers the specific characteristics of different industries and relieves the administrative burden of contracting authorities as well as the expenses of business operators as they can focus on meeting sector-specific GPP criteria rather than navigating a complex net of generalised horizontal rules. Additionally, it has demonstrated that such an approach can result in great spillover effects, accelerating the transition towards green procurement practices across the entire economy. Lastly, it has identified that a sectoral approach allows for a smooth transition of mandating GPP, ensuring that contracting authorities and business operators can adapt to the high premises.

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[152] Andhov (n 18) 63.

ATTRIBUTION AND RESPONSIBILITY REGARDING CFSP ACTS IN LIGHT OF THE RENEGOTIATION OF THE EU'S ACCESSION TO THE ECHR

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Abstract: The international responsibility of international organisations and that of the sui generis European Union (EU) is one of the most debated issues of international law. At the heart of the question of international responsibility lies the attribution of conduct and responsibility. On this question, the Articles of the Responsibility of International Organizations (ARIO), a final draft of which was adopted in 2011 but not turned into an international treaty, contain a much-debated set of rules arguably based on customary international law. Attribution vis-a-vis the EU is of particular relevance in the context of the European Convention of Human Rights (ECHR), to which the EU is not yet a party but to which it is planning accession, which would allow for external human rights reviews by the European Court of Human Rights. The ECtHR does not necessarily approach international responsibility and attribution in line with the Articles on the Responsibility of International Organizations This factor is of crucial relevance to the EU – both now and also following its possible accession to the ECHR. This question, however, needs to be nuanced with regard to the special legal nature of the Common Foreign and Security Policy (CFSP) and the acts adopted therein, as this has proven to be one of the deciding points for the negative opinion of the Court of Justice concerning the EU's accession. This paper first looks at the current state of play, then analyses the viewpoints of the EU Court of Justice reflected in its binding opinion on the original draft accession agreement of the EU to the ECHR, and subsequently examines the renegotiated draft accession agreement – prepared in 2023 – in this regard. The novelties of the renegotiated accession agreement regarding the attribution of CFSP acts are examined in detail, focusing on the reattribution concept proposed by the EU and its relation to the ARIO, highlighting a number of dogmatic problems, including the probable effect of reattribution on access to legal remedies.

Keywords: international responsibility, attribution, European Union, Common Foreign and Security Policy, European Court of Human Rights, Articles on the Responsibility of International Organizations

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1 Introduction

The responsibility of international organisations (IOs) is a complex and multi-layered question of international law. As far as States are concerned, this field of law relies on the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA).[2] Thus, it is not, strictly speaking, codified, though the ARSIWA are generally seen as validly representing existing customary international law.[3] The question of the responsibility of IOs is even more debated and unclear: the Articles on the Responsibility of International Organizations (ARIO) go far beyond the codification of existing customary law and constitute, at least in part, a progressive development of international law in this field.[4] At the crux of the responsibility issues lie, among other things, the questions of attribution of conduct and attribution of responsibility to IOs and their Member States, including but definitely not limited to the concept of shared responsibility.[5]

The European Union (EU) is usually seen as having a sui generis legal nature, and the specific nature of the organisation brings with it an additional layer of questions. The EU is a supranational entity with a legal system that exhibits a constitutional character. It utilises legislative competences transferred by its Member States to adopt binding legislative acts which enjoy direct effect and primacy of application vis-à-vis national law. The relationship between the EU and its Member States is quite intensive and arguably unique. Because of this difference in relationship, attribution may follow a different formula within the EU.[6] The Common Foreign and Security Policy of the EU (CFSP), encompassing also the Common Security and Defence Policy (CSDP), however, is an exception to many of the special rules otherwise pertaining to the EU.[7] Unlike other

[2] Draft Articles on Responsibility of States for Internationally Wrongful Acts. UNGA RES 56/83 (12 December 2001) A/RES/56/83.

[3] Péter Kovács, *Nemzetközi közjog* (Osiris 2016) 542.

[4] For a brief recent overview, see Bence Kis Kelemen, Ágoston Mohayand Attila Pánovics, 'A nemzetközi szervezetek felelőssége: koncepcionális és értelmezési kérdések' in Gábor Kajtár and Pál Sonnevend (eds), *A nemzetközi jog, az uniós jog és a nemzetközi kapcsolatok szerepe a 21. században: Tanulmányok Valki László tiszteletére* (ELTE Eötvös Kiadó 2021) 285-298.

[5] According to the prominent literature, shared responsibility occurs when several actors contribute to an individual harmful outcome, which can, in fact, be any wrongdoing, and where responsibility is shared between the actors rather than being borne by a collective – or rather a collective entity. It is also important to note that in a case of shared responsibility, the individual contribution of the actors to the harmful result cannot be established separately, ie the specific conduct of separate actors cannot be directly causally linked to a specific part of the infringement. See André Nollkaemper and Dov Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' [2013] Michigan Journal of International Law 359, 366–368.

[6] On the many facets of the issue of the EU's international responsibility, see, for example, Malcolm Evans and Panos Koutrakos (eds), *The International Responsibility of the European Union: European and International Perspectives* (Hart, 2013).

[7] Compare, for example, Graham Butler, *Constitutional Law of the EU's Common Foreign and Security Policy: Competence and Institutions in External Relations* (Hart 2019).

EU policies, the CFSP possesses an essentially intergovernmental character, where decision-making and institutional roles differ from the general rules, where measures are not imbued with direct effect or primacy of application, and where the jurisdiction of the Court of Justice is limited and thus presents a gap in judicial protection, even if the Court has been rather inventive in expanding it as far as possible.[8] Nevertheless, especially with regard to this last element, numerous questions remain.

Understandably, CFSP acts can result in fundamental rights infringements. Although a system of fundamental rights protection is in place in the EU in the form of the Charter of Fundamental Rights and the general principles of EU law, the EU is obliged (since the Lisbon Treaty) to accede to the European Convention of Human Rights (ECHR), which would allow for external human rights reviews by the European Court of Human Rights (ECtHR). However, the way in which the ECtHR approaches international responsibility and attribution is not necessarily in line with the ARIO, which in and of itself raises many questions.

A further layer of complexity is added to the aforementioned by the planned accession of the EU to the ECHR. At the moment, the EU is not a party to this European 'benchmark' of human rights protection. However, it is not only empowered but obliged to accede to it – since the Treaty of Lisbon – by Article 6(3) TEU. The CJEU had ruled the original draft ECHR accession agreement to be incompatible with EU law (with one of the Court's objections relating to none other than jurisdiction over CFSP measures), which meant it had to be redrafted. However, the Member States of the EU remain bound by the ECHR regardless of their membership of a supranational organisation[9] and, as parties, can be taken to court in Strasbourg – also for measures adopted or actions taken as a result of or in the context of obligations under EU law, including the CFSP. The ECtHR, however, generally does not rely on the ARSIWA (let alone the ARIO) when determining breaches of the Convention, and even if it may do so occasionally, this is not necessarily reflected in its reasoning. This 'silence' of the Strasbourg court leaves open the question of whether it considers the ECHR's rules as *lex specialis* regarding general international responsibility or not.[10]

This paper analyses the concept of attribution to and responsibility of the EU for Common Foreign and Security Policy measures in the context of the European Convention on Human Rights, with particular emphasis on a comparison of how the issue is regulated in the original and redrafted accession agreements. To this end, it first briefly outlines the

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[8] See, for example, Peter Van Elsuwege, 'Judicial Review and the Common Foreign and Security Policy: Limits to the Gap-filling Role of the Court of Justice' [2021] Common Market Law Review 1731-1760.

[9] See especially the judgment of the European Court of Human Rights (ECtHR) in *Matthews v The United Kingdom* (1999) 28 EHR 361.

[10] Compare Pavel Šturma, 'State Responsibility and the European Convention on Human Rights' [2020] Czech Yearbook of Public & Private International Law 3.

status quo as regards the international responsibility of the EU (Section 2) and the responsibility of the EU at the ECtHR (Section 3). It subsequently analyses how the original draft agreement on the EU's accession to the ECHR aimed to approach the issue of responsibility of CFSP acts and why the CJEU found it lacking in this regard (Section 4). Finally, relevant draft suggestions emerging from the resumed accession negotiations will be considered. The novelties of the renegotiated accession agreement regarding the attribution of CFSP acts are examined in detail, focusing on the reattribution concept proposed by the EU and its relation to the ARIO, highlighting several dogmatic problems including the probable effect of reattribution on access to justice (Section 5). Finally, concluding remarks and *de lege ferenda* suggestions will be offered (Section 6).

2 The law of international responsibility – not for the EU?

For the purposes of this paper, some of the complexities of the responsibility of the EU and its Member States will have to be, at least partly, set aside. Nevertheless, it first needs to be established if and how international responsibility norms are applicable to the EU. As mentioned above, the ARSIWA of 2001 have not been adopted as a treaty, but they are generally regarded as the codification of existing custom, which binds States. In 2002, Crawford noted that the ARSIWA would have to prove themselves in practice and that they should primarily be seen as an articulation of customary law, and for this reason, the lack of a treaty format would not impede their application.[11] This assessment seems to have been essentially correct, as the ARSIWA are being applied by international courts and are relied upon by States.[12] They have also been 'much cited and have acquired increasing authority'.[13]

The ARIO[14] of 2011, on the other hand, received a much less consistent reception. Certain provisions of the ARIO were quoted by domestic and international courts even prior to their adoption,[15] but these articles contain many provisions which are progressive developments of interna-

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[11] James Crawford, 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect' [2002] American Journal of International Law 874, 889.

[12] See *Responsibility of States for Internationally Wrongful Acts – Compilation of Decisions of International Courts, Tribunals and Other Bodies* (UNGA Report of the Secretary-General 77/74), which lists altogether no less than 786 references to the ARSIWA between 2001-2022. The ICJ notably relied on them, eg in *Bosnia and Herzegovina v Serbia and Montenegro* (2007) ICJ Rep 43, 77 2007.

[13] As Crawford also noted, ten years after their adoption. James Crawford, *Brownlie's Principles of Public International Law* (8th edn, OUP 2012) 539.

[14] United Nations GA Res 66/100, 9 December 2011, Responsibility of international organizations.

[15] As Gerlich notes, provisions of the ARIO were quoted by domestic and international courts even prior to their adoption by the General Assembly. Olga Gerlich, 'Responsibility of International Organizations under International Law' [2013] Folia Iuridica Universitatis Wratislaviensis 19.

tional law rather than mere codification of existing custom.[16] The ARSIWA and the ARIO, however, do share many provisions, as they are built around the same basic tenets, even if the International Law Commission (ILC) refrained from using analogies in many instances, since a deeper examination of the ARIO reveals substantial differences from their predecessor.[17] The differences between States and IOs notwithstanding, the fundamental elements of international responsibility need to be essentially the same for both types of subject of international law, otherwise the coherence of the law of international responsibility will be imperilled.[18]

The EU, for its part, already emphasised the unique characteristics of the EU legal order in the course of the formation of the ARIO. It was highlighted by the European Commission that, unlike traditional international organisations, the EU acts and implements its international obligations to a large extent through its Member States and their authorities, and not necessarily through 'organs' or 'agents' of its own, and that the EU's unique features include 'important law-based foreign relations powers that have a tendency to develop over time'.[19] The EU's insistence on the uniqueness of its legal order – as something other than international law – is also strongly reflected in Opinion 2/13 of the CJEU on the accession of the EU to the ECHR.

3 The Responsibility of the EU before the ECtHR: A question of attribution?

The EU's responsibility, of course, is also a crucial question in the law of the ECHR, as all Member States of the EU are parties to the ECHR.

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[16] United Nations, 'Draft Articles on the Responsibility of International Organizations, with Commentaries [2011] Yearbook of the International Law Commission (vol 2, part 2) 46-47.

[17] See, for example, Articles 7, 17 and 61 of the ARIO. Compare Christiane Ahlborn, 'The Use of Analogies in Drafting the Articles on the Responsibility of International Organizations – An Appraisal of the "Copy-Paste Approach"' [2012] International Organisations Law Review 53. The ILC itself noted at the outset the need for 'some' coherence in the output of the Commission as regards international responsibility, and reaffirmed that the ARSIWA should constantly be taken into consideration as a source of inspiration while drafting the ARIO, though it did recognise that analogous solutions would not always be possible or desirable (ILC Report, Fifty-fourth Session, UN Doc A/57/10 (2002), p 232 (para 475).

[18] Alain Pellet, 'International Organizations are Definitely not States. Cursory Remarks on the ILC Articles on the Responsibility of International Organizations' in Maurizio Ragazzi (ed), *Responsibility of International Organizations. Essays in Memory of Sir Ian Brownlie* (CUP 2013) 41, 44. Though to nuance the role of both the ARSIWA and ARIO, it should be added that there may be an inherent risk in relying solely on ILC articles as 'shortcuts' to identifying customary law. See Fernando Lusa Bordin, 'Still Going Strong: Twenty Years of the Articles on State Responsibility's 'Paradoxical' Relationship between Form and Authority' in Federica Paddeu and Christian J Tams (eds), *The ILC Articles at 20: A Symposium* (Glasgow Centre for International Law & Security 2021) 15; and more generally Fernando Lusa Bordin, 'Reflections of Customary International Law: The Authority of Codification Conventions and ILC Draft Articles in International Law' [2014] International and Comparative Law Quarterly 535, 548.

[19] Responsibility of International Organizations: Comments and Observations Received from International Organizations (14 February 2011) UN doc A/CN4/637, 7.

As the EU, however, is not a party to the ECHR, it is not bound by it in the sense of international law. The EU cannot become a defendant in proceedings before the ECtHR for having infringed the Convention, and the ECtHR cannot directly examine the compatibility of EU law with the ECHR.[20]

Nevertheless, the ECtHR has consistently held that the Member States of the EU remain bound by the ECHR, regardless of their membership of a supranational organisation. It has also pointed out that the fact that when the ECHR was signed, the European States did not yet intend to create a supranational organisation did *not* preclude the application of the ECHR to the institutions of a supranational community – especially since the Member States of that community were all States Parties to the ECHR.[21]

The ECtHR has also had to decide whether it could examine acts that an EU Member State had adopted in the implementation of EU law, ie State acts rooted in EU law obligations. Without diving too deeply into the abundant details,[22] by reliance on the *Cantoni*[23] and *Povse*[24] judgments, the answer to the question depends on whether the EU Member State had discretionary powers in relation to the act concerned. Generally, EU Member States are bound to follow obligations flowing from EU law not only due to the principle of *pacta sunt servanda*, but also based on

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[20] See, already in this spirit, the decision of the European Commission of Human Rights in the case *Confédération Française Démocratique du Travail v the European Communities, alternatively: their Member States a) jointly and b) severally* App no 8030/77 (10 July 1978), where an action against the European Community was declared inadmissible ratione personae. This also follows from Article 34 of the 1969 Vienna Convention on the Law of Treaties (ie the principle of the relative binding effect of treaties). Applicants have also attempted – unsuccessfully – to sue all EU Member States collectively before the ECtHR. See *Société Guérin Automobilos contre les 15 Etats de l'Union Européenne* App no 51717/99 (ECtHR 4 July 2000) and *Senator Lines Gmbh v Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom* App no 56672/00 (ECtHR 10 March 2004), where the ECtHR declared the applications inadmissible (although for different reasons), as it did in *Segi and others and Gestoras Pro-Amnistia and others v 15 States of the European Union* App nos 6422/02 and 9916/02 (ECtHR 23 May 2002)and *Emesa Sugar NV v The Netherlands* App no 62023/00 (ECtHR 13 January 2005). For a concise overview of these cases, see Paul Craig and Gráinne de Búrca, *EU Law: Texts, Cases and Materials* (OUP 2008) 420-422.

[21] *Matthews v The United Kingdom* (n 8) para 39. In this respect, the ECtHR referred to the established principle of its case law that the Convention constituted a 'living' instrument. See, for example, George Letsas, 'The ECHR as a Living Instrument: Its Meaning and Legitimacy' in Andreas Føllesdal, Birgit Peters and Geir Ulfstein (eds), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (CUP 2013) 106-41.

[22] For a compendium of relevant case law, see Council of Europe / European Court of Human Rights, 'Guide on the Case-law of the European Convention on Human Rights: European Union Law in the Court's Case-law' 2022.

[23] *Cantoni v France* App no 17862/91 (ECtHR, 11 November 1996).

[24] *Povse v Austria* App no 3890/11 (ECtHR, 18 June 2013).

the principle of loyalty as embodied by Article 4(3) TEU.[25] They are, however, endowed with varying levels of discretion in the implementation of these obligations, depending first and foremost on the form of secondary EU legislation that is used to lay down specific obligations. In *Cantoni*, the dispute revolved around a provision of French law which was essentially identical to the text of the EC directive that the State had transposed. The ECtHR held that the textually identical nature did not exclude the French law from the scope of the ECHR, as the transposition of a directive gives the national legislator 'room to manoeuvre'. It is therefore the responsibility of the State to follow the obligations laid down in the directive in a way that at the same time remains compatible with the ECHR.[26] However, vis-à-vis secondary EU law, which does not provide national legislators with meaningful discretion, especially regulations, the ECtHR has held (in *Povse)* that in such cases the Member State is simply following EU law obligations with no possibility of divergence.[27] This can nevertheless lead to a violation of Convention rights if the root of the infringement is indeed the EU legislative act. Theoretically, this would lead to the invocation of the responsibility of the EU itself, which, however, is not possible *de iure condito.* This is where the oft-cited *Bosphorus* formula comes into play.

In *Bosphorus*, the ECtHR construed a presumption of legality to address the contradiction that States cannot exclude themselves from the scope of the ECHR by delegating their powers to an international entity, but at the same time, the supranational organisation itself is not directly bound by the ECHR. The case concerned a measure taken by a Member State on the basis of an EU regulation implementing at the EU level a binding resolution of the UN Security Council.[28] According to the *Bosphorus* presumption, a State's obligation to take action arising from its membership of an international organisation is lawful as long as the organisation concerned provides for the protection of fundamental rights in a way at least equivalent to the protection guaranteed by the ECHR, both substantively and procedurally.[29] The presumption of an adequate and

[25] On the relationship of the two principles, see Marcus Klamert, *The Principle of Loyalty in EU Law* (OUP 2014) pp 9-30 <https://doi.org/10.1093/acprof:oso/9780199683123.003.0001> accessed 2 December 2023.

[26] See, for example, Paul Craig, 'EU Accession to the ECHR: Competence, Procedure and Substance' [2013] Fordham International Law Journal Volume 1114, 1137-1140; Erzsébet Szalayné Sándor, 'Uniós jog Strasbourgban – a koherens alapjogvédelem új rendje' [2011] Scientia Iuris 89. Although in the case at hand, the ECtHR did not find an infringement of the ECHR, it did give a strong signal, indicating the 'normative power of the EC/EU institutions' did not completely escape judicial review by the Strasbourg court (Luis I Gordillo, *Interlocking Constitutions: Towards an Interordinal Theory of National, European and UN Law* (Hart 2012) 134).

[27] *Povse v Austria* (n 23). The case involved a dispute concerning the application of Regulation 2201/2003/EC (Brussels IIa).

[28] Regulation (EEC) No 990/93 (OJ 1993 L 102/14) implemented UNSC Resolution 820 (1993), which covered the seizure of vehicles wholly or mainly owned or at least controlled by Yugoslavia as part of the UN sanctions against the Federal Republic of Yugoslavia during the armed conflict in the region.

[29] *Bosphorus Airways v Ireland* App no 45036/98 (ECtHR 30 June 2005) paras 155-156.

comparable level of protection of fundamental rights is not final: it may be subject to review by the ECtHR in light of any substantial change. Nevertheless, where an international organisation affords a degree of fundamental rights protection comparable to that guaranteed by the ECHR, the State concerned must be presumed not to have violated the Convention in the performance of its obligations flowing from its membership of an international organisation such as the EU.[30] The presumption is, however, rebuttable if, in a specific case, the protection of the rights contained in the ECHR would be 'manifestly deficient' under EU law. In this case, the ECHR – as a constitutional instrument of European public order – must prevail, as opposed to the interests of the international organisation.[31]

The establishment of the *Bosphorus* presumption has at least two consequences relevant to our topic. On the one hand, it means a favourable equivalence assessment by the ECtHR for the EU, but on the other hand, it also means that ultimately the application of an EU regulation that does not give a Member State any room for discretion remains attributable to the Member State from the ECHR perspective, as the act falls within the jurisdiction of the State. According to Gaja, this should be seen as being in line with what Article 4(1) ARSIWA suggests regarding attribution:

[t]he conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State'

regardless of whether the State was acting under an obligation based on international or EU law.[32] However, based on the strict and non-derogable nature of certain EU legislative acts and on the 'executive federalism'[33] character of EU law, one could argue that, in fact, the Member States are acting as organs of the EU. This is what the concept of normative control posits as well.[34] Despite its supranational character and autonomous legal order, the Union remains dependent on the Member States and their organs as regards the implementation of the vast majority of its legal acts.[35]

If, however, one examines, in turn, the rules of the ARIO, it is apparent that the latter instrument does not consider the Member States of

[30] *Bosphorus Airways v Ireland* (n 28) para 156.

[31] On the role of the ECHR as such an instrument, see *Loizidou v Turkey* App no 15318/89 (ECtHR 18 December 1996).

[32] Giorgio Gaja, 'Accession to the ECHR' in Andrea Biondi, Piet Eeckhout and Stefanie Ripley (eds), *EU Law after Lisbon* (OUP 2012) 190.

[33] See, for example, Robert Schütze, 'From Rome to Lisbon: 'Executive Federalism' in the (New) European Union' [2010] Common Market Law Review 1385.

[34] See Andrés Delgado Casteleiro, *The International Responsibility of the European Union: from Competence to Normative Control* (CUP 2016), especially 227-235.

[35] Jed Odermatt, *International Law and the European Union* (CUP 2021) 208-209.

an IO as organs of the IO. That follows inter alia from Article 2(c) of the ARIO, which defines the organ of an international organisation as 'any person or entity which has that status in accordance with the rules of the organization' – and IOs do not define Member States as their organs, except for the EU, which has argued for recognition of the Member States as de facto organs of the EU vis-à-vis acts adopted within the exclusive competences of the EU.[36] Arguably, Article 64, covering the existence of *lex specialis* rules, can be seen as covering this possibility, as it mentions that 'special rules of international law may be contained in the rules of the organization applicable to the relations between an international organization and its members'. Nevertheless, no *expressis verbis* mention of the aforesaid agent status of Member States is made in the article, and nor can such a rule be found in EU law.[37] Such rules could, however, find a place in the agreement on the accession of the EU to the ECHR in line with the logic that if a Member State organ acts on the basis of EU law but exercises discretion, the act would be attributed to the State, and where a Member State implements an EU act that leaves no room for discretion to the EU itself.[38]

The original draft accession agreement[39] took a different stance. It envisaged that accession would place obligations on the EU 'with regard only to acts, measures or omissions of its institutions, bodies, offices or agencies, or of persons acting on their behalf' (Article 1(3)), and that an act, measure or omission of organs of a Member State of the EU would be attributed to that State, even if such act, measure or omission occurs when the State implements the law of the European Union, including decisions taken under both the Treaty on the Functioning of the European Union (TFEU) and the Treaty on European Union (TEU, Article 1(4)), which of course contains the rules on the CFSP. This is nuanced, however, by the inclusion of the co-respondent mechanism, allowing the EU to become a co-respondent beside a Member State. This mechanism permits the Strasbourg Court *not* to determine who the correct respondent in a given case may be or how responsibility should be shared between them – although the explanatory report seemingly foresees joint responsibility as the 'ordinary' case to be expected.[40] However, this is, as Naert points

[36] Jean d'Aspremont, 'European Law of International Responsibility? The Articles on the Responsibility of International Organizations and the European Union' (2013) SHARES Research Paper 22, 4-6.

[37] ibid 6-7, where d'Aspremont notes, referring to Ahlborn, that the wording of Article 64 and thus its scope (ie what exactly are to be regarded as the rules of the organisation) also remains problematic. Compare Christiane Ahlborn, 'The Rules of International Organizations and the Law of International Responsibility' [2011] International Organizations Law Review, 397.

[38] Gaja (n 31) 190.

[39] Fifth Negotiation Meeting between the CDDH Ad Hoc Negotiation Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights, 'Final Report to the CDDH' (10 June 2013) CoE Doc 47+1(2013)008 rev2.

[40] Christina Eckes, 'EU Accession to the ECHR: Between Autonomy and Adaptation' [2013] The Modern Law Review 266-267.

out, far from evident from the text of Article 1 of the agreement as outlined above. In fact, Naert makes an effective argument detailing how, for instance, in the context of a CSDP operation, the operations themselves:

> are established by the Council of the EU; are governed by EU legal instruments, including international agreements, and EU-approved operational planning documents and rules of engagement; and are conducted by Headquarters and forces/personnel under the command and control of the EU Operation Commander who acts under the political control and strategic direction of the PSC, and ultimately under the responsibility of the Council and of the High Representative. Under international law, it is likely that these combined elements amount to a degree of (effective) control by the Union entailing – at least in principle – the attribution of the acts of an operation and its personnel (not of a private nature) to the Union.[41]

4 CFSP acts in the original draft accession agreement and Opinion 2/13

The draft accession agreement also did not foresee special rules for the EU's responsibility for CFSP measures. On the contrary, it envisaged that acts and measures of the EU and/or its Member States under the CFSP, including Member State implementation of EU CFSP decisions taken under the TEU would fall within the jurisdiction of the ECtHR.[42] Such a solution would close the fundamental rights review gap that currently exists as regards the CFSP and the CSDP.[43] Thus, from a purely fundamental rights standpoint, it should be commended. However, from the point of view of precise regulation of attribution of responsibility, the question may be seen in a different light, taking into account inter alia the variety of actors potentially involved in CFSP or CSDP operations, ranging from the Council (ie representatives of Member State governments deciding – in this case – unanimously), to military forces of various Member States involved in a mission, even possibly entailing the use of NATO assets.[44]

In any case, in its Opinion 2/13, the Court of Justice ruled against this broad determination of the ECtHR's jurisdiction. In its argumentation, the Court of Justice started from the fact that under EU law it has

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[41] Frederik Naert, 'European Union Common Security and Defence Policy Operations' in André Nollkaemper and Ilias Plakokefalos (eds), *The Practice of Shared Responsibility in International Law* (CUP 2017) 700.

[42] Maria José Rangel de Mesquita, 'Judicial Review of Common Foreign and Security Policy by the ECtHR and the (Re)negotiation on the Accession of the EU to the ECHR' [2021] Maastricht Journal of European and Comparative Law 362-363

[43] Compare Joyce De Coninck, 'Effective Remedies for Human Rights Violations in EU CSDP Military Missions: Smoke and Mirrors in Human Rights Adjudication?' [2023] German Law Journal 342-363.

[44] Naert ascertains no less than ten different scenarios resulting in possibly different combinations of (partly shared) responsibility. Naert (n 37) 676-678.

very limited competence in CFSP matters, as it may only monitor compliance with Article 40 TEU and, per Article 275 TFEU, review the legality of restrictive measures against private persons adopted by the Council on the basis of Chapter 2 of Title V of the EU Treaty, thus resulting in certain acts adopted in the context of the CFSP falling outside the ambit of judicial review by the Court of Justice.[45] Almost ominously, the Court added, however, that it has 'not yet had the opportunity to define the extent to which its jurisdiction is limited in CFSP matters as a result of those provisions'.[46] As will be demonstrated in Section 5, such opportunities have since presented themselves.

As outlined above, the draft accession agreement would have empowered the ECtHR to rule on the compatibility with the ECHR of such acts, actions or omissions performed in the context of the CFSP, without the Court of Justice having jurisdiction – and according to the Court, jurisdiction to carry out a judicial review of acts, actions or omissions of the EU cannot be conferred exclusively on an international court which is outside the institutional and judicial framework of the EU.[47] The draft agreement thus failed to have regard to the specific characteristics of EU law as regards the system of the CFSP, and was therefore held to be incompatible with EU primary law.[48]

5 The resumed accession negotiations and the CFSP conundrum

As Opinion 2/13 was delivered under Article 218 TFEU, it is binding on the EU, leaving only two solutions that would allow the accession to go forward: amending the EU treaties themselves or drawing up a new accession agreement – and as the first option was definitely not on the agenda, the second one was pursued, though that is not to say that this latter path was necessarily a much easier one. Following Opinion 2/13, the Member States sitting in the Council agreed that a period of reflection was necessary while also reaffirming their commitment to accession.[49] It was the task of the Commission to analyse the obstacles as laid out by Opinion 2/13. The analyses were, in turn, discussed by the Council Working Party on Fundamental Rights, Citizens' Rights and Free Movement of Persons (FREMP), which further requested the Commission to

[45] Court of Justice of the European Union, Opinion 2/13 ECLI:EU:C:2014:2454, paras 249-252.

[46] ibid, para 251.

[47] The Court pointed in this regard to Opinion 1/09, EU:C:2011:123, paras 78, 80 and 89. The Court of Justice also later relied heavily on this argumentation (and Opinion 2/13) in Case C-284/16 *Achmea* ECLI:EU:C:2018:158 (especially para 57) in the context of intra-EU bilateral investment treaties.

[48] Opinion 2/13 (n 44) para 258.

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

prepare proposals on how to rework the accession agreement.[50] The Commission and the Council of Europe (CoE) have both reiterated that the intention to make the EU's accession to the ECHR possible was unchanged. Following an informal meeting in June 2020,[51] accession negotiations were formally resumed in September 2020.[52]

The issues raised by Opinion 2/13 were arranged into 'baskets' of negotiation, with the CFSP-related questions representing Basket 4. In its initial position paper presented at the outset of the restarted negotiations, the EU emphasised that 'a solution needs to be found, which allows for reflecting the EU internal distribution of competences for remedial action in the allocation of responsibility for the EU acts at issue for the purpose of the ECHR system'.[53] In a later non-paper, the EU drew attention to the fact that in the meantime the Court of Justice had in fact 'had the opportunity' to reflect on the limitation of its jurisdiction in the CFSP, and found that the limitation itself needed to be interpreted narrowly.[54] The EU pointed to the judgments in *Rosneft*,[55] *Bank Refah Kargaran*,[56] *Elitaliana Spa*[57] and *H v Council*,[58] which, succinctly put, affirmed the Court of Justice's position that, in the CFSP, the general rule was, in fact, not the limited nature of the Court's competence. On the contrary, the Court starts from the premise that it has general competence of judicial review under Article 19 TEU. Its limited jurisdiction vis-à-vis the CFSP is merely the exception to the general rule – a logic entirely the opposite of what a textual interpretation would suggest.[59] The Court of Justice has so far already made it clear that it interprets its competence regarding the CFSP as including not only the annulment procedure but also preliminary rulings as to the validity (*Rosneft*) of acts, as well as actions for damages

[50] See Council of the European Union (n 48) 3 and General Secretariat of the Council: Outcome of the Working Party on Fundamental Rights, Citizens' Rights and Free Movement of Persons (FREMP) 14639/18, 10 December 2018, 1.

[51] Virtual Informal Meeting of the CDDH Ad Hoc Negotiation Group ('47+1') on the Accession of the European Union to the European Convention on Human Rights – Meeting Report, 22 June 2020 (47+1(2020)rinf).

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

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

[54] ibid 2.

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

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

[57] Case C-439/13 P *Elitaliana Spa* ECLI:EU:C:2015:753.

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

[59] Ramses A Wessel, 'Legal Acts in EU Common Foreign and Security Policy: Combining Legal Bases and Questions of Legality', presented at the workshop Contemporary Challenges to EU Legality, European University Institute, Florence, 5 February 2019, 6-7.

(*Bank Refah Kargaran*),[60] and has introduced a 'centre of gravity' test for measures that could potentially be considered as falling either within or outside the CFSP *(H v Council)*. In doing so, the Court has aimed to narrow the gap in judicial review by interpreting its own powers rather broadly – yet a gap nevertheless remains.[61]

In the course of the resumed negotiations, the EU has proposed a solution to sidestep the jurisdictional clash (or challenge to the autonomy of the EU legal order, if you will) perceived by the CJEU and, at the same time, close the justiciability gap in the CFSP. This solution would entail introducing a rule of *reattribution* applicable to CFSP acts. According to the solution proposed in March 2021, the EU will be enabled to allocate responsibility for a CFSP act of the EU to one or more Member State in case the act is excluded from CJEU jurisdiction.[62] This would mean, in practice, that acts that the EU could not be held responsible for either by the CJEU or the ECtHR would, in turn, be reattributed to one or more EU Member State. In essence, the concept would not follow the classical logic of attribution (linked to conduct) but would rather shift responsibility to an actor that would otherwise not be responsible – all in order to fill the justiciability gap. In this sense, it can be seen as a 'legal fiction' to override any other method of attribution.[63]

In the context of the ARIO, the concept of the attribution of responsibility (not the attribution of *conduct*) relates to a situation where an internationally wrongful act is committed collectively by an IO and one or

[60] Interestingly, Advocate General Kokott argued in her view on the EU's accession to the ECHR that actions for damages are not covered by the limited jurisdiction of the Court of Justice in the CFSP, speaking against a 'very wide' interpretation of the relevant provisions of primary law. Opinion 2/13, View of AG Kokott ECLI:EU:C:2014:2475 para. 94. This is also noted by Naert (n 40) 692.

[61] Jasper Krommendijk, 'EU Accession to the ECHR: Completing the Complete System of EU Remedies?' [2023] SSRN 3-4 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4418811> accessed 2 May 2023.

[62] CDDH 47+1 Ad Hoc Negotiation Group on the Accession of the European Union to the European Convention on Human Rights, 'Report of the Ninth Negotiation Meeting' (25 March 2021) CoE Doc 47+1(2021)R9, 3.

[63] Krommendijk (n 60) 17. In a way, the solution may lend itself to comparison with that of the EU's situation in the United Nations Convention on the Law of the Sea (UNCLOS, 1982), which is one of the EU's many mixed agreements, where both the EU and its Member States are parties. Based on ITLOS Advisory Opinion in Case No 21 (Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission, 2 April 2015), the International Tribunal for the Law of the Sea at least seems to approach attribution of responsibility in the EU context based on competence rather than the attribution of conduct of agents or organs. In Case No 21, the central issue concerned the question of who was entitled to submit observations on behalf of the EU. On this latter point, see Esa Paasivirta, 'The European Union and the United Nations Convention on the Law of the Sea' [2015] Fordham International Law Journal 1059-1061. Notably, this issue has also resulted in an intra-EU dispute between the Council and the Commission (C73/14 *Council v Commission* ECLI:EU:C:2015:663), with the Court ruling in favour of the Commission. For an analysis, see Soledad R Sánchez-Tabernero, 'Swimming in a Sea of Courts: The EU's Representation before International Tribunals' [2016] European Papers 751-758.

more State.[64] The attribution of responsibility does not necessarily result in *multiple* responsibility, however.[65] A reattribution clause per se would not be foreign to the logic of the ARIO. It would, however, definitely mean overriding the general logic of attribution in a certain way. The EU has not made it clear how or on what basis the EU would reattribute responsibility to certain Member States in the situation described above. With such a clause, the EU aims to *remove* attribution entirely from both the logic of the ARIO and that of the ECtHR's jurisprudence and decide on attribution internally instead. While the solution would make the situation of applicants easier, the dogmatic background of the concept remains unclear, at least in the absence of official documents on its details. The sensitive nature of the CFSP-related issue is demonstrated by the fact that from among numerous working documents presented to the CDDH Ad Hoc Negotiation Group on accession, the one containing 'Proposals by the European Union on the situation of EU acts in the area of the Common Foreign and Security Policy that are excluded from the jurisdiction of the Court of Justice of the European Union' was one of the very few restricted ones.[66]

At its 18th meeting held in March 2023, the Negotiation Group reached a unanimous provisional agreement on solutions to the issues raised by Opinion 2/13 – save for the CFSP issue.[67] According to the Group, the solutions proposed as regards 'Baskets 1, 2 and 3' were in line with the general principles that the Group had agreed, ie preserving the equal rights of individuals and the rights of applicants under the ECHR, as well as maintaining the equality of all contracting parties (be they States or the EU), and preserving as far as possible the control mechanism of the ECHR and its application to the EU in the same way as to all other parties.[68]At the same meeting, the EU informed the Group of its resolve to address the CFSP conundrum internally and 'of its expectation that

[64] As rightly pointed out by Boon (Kristen E Boon, 'Are Control Tests Fit for the Future? The Slippage Problem in Attribution Doctrines' [2014] Melbourne Journal of International Law 12-13), the attribution of responsibility, as distinguished from attribution of conduct, rests primarily on concepts developed by Roberto Ago as ILC Special Rapporteur (see, for example, 'First Report on State Responsibility' [1969] II Yearbook of the International Law Commission 125, UN Doc A/CN4/217; 'Second Report on State Responsibility' [1970] II Yearbook of the International Law Commission 177, UN Doc A/CN4/223).

[65] Compare Stian Øby Johansen, 'Dual Attribution of Conduct to both an International Organisation and a Member State' [2019] Oslo Law Review 182-183 and 192-193, who considers the terminology of 'attribution of responsibility' confusing and imprecise as such, stating that attribution in international law should always be tied to conduct, and thus suggests using the term shared and/or derived responsibility. Furthermore, he argues that dual attribution of conduct may or may not result in simultaneous attribution to a State and an IO, and thus they should not be regarded as being synonymous.

[66] See, for example, CDDH 46+1 Ad Hoc Negotiation Group on the Accession of the European Union to the European Convention on Human Rights, 'Report on the 13th Negotiation Meeting (13 May 2022), CoE Doc 46+1 (2022) R13.

[67] 46+1 CDDH Ad Hoc Negotiation Group ('46+1') on the Accession of the European Union to the European Convention on Human Rights, 'Report to the CDDH' (30 March 2023) CoE Doc 46+1(2023)35 FINAL.

[68] ibid.

the Group would not be required to address this issue as part of its own work'. The Group rightly noted that it would nonetheless be necessary for all parties to the accession negotiations to be appropriately informed about the way in which the EU was looking to resolve Basket 4 as a precondition to any possible final agreement by all parties on the EU's accession; the EU undertook to keep the CDDH appropriately informed.[69]

Otherwise, the general attribution rules enshrined in Article 1(3)-(4) remain unaltered in the new draft agreement. The comments provided by the Negotiation Group make it clear that paragraph (4) applies to CFPS acts as well;[70] the actual text of the draft agreement foregoes any express mention of this policy field. Pergantis and Johansen note that the (original, but thus also the revised) agreement starts from the idea that attribution of responsibility should primarily depend on the act and/or the provision at the origin of the breach and not on any additional concept of normative control such as the allocation and nature of competence or the existence or lack of discretion, allowing the ECtHR to decide on a factual basis to whom conduct should be attributed.[71] This could be the case for attribution of conduct but not necessarily for the proper attribution of *responsibility*.[72]

6 Concluding remarks

This paper has shown that conceptualising, regulating and interpreting attribution and responsibility for CFSP acts at the ECtHR is a complicated exercise. *De lege lata*, there are no specific rules pertaining to this issue in either legal order, and, based on the outcome of the renegotiation process, there seems to be little chance of such rules being codified *de lege ferenda* in the revised accession agreement either. Interestingly, during the negotiations on the original draft accession agreement, the EU *did* propose and advocate a special attribution rule pertaining to the CFSP. This proposal would have added to what is now Article 1(4), stating that:

> acts or measures shall be attributable only to the member States of the European Union where they have been performed or adopted in the context of the provisions of the Treaty on European Union on the common foreign and security policy of the European Union, except in cases where attributability to the European Union on the basis of European Union law has been established within the legal order of

[69] ibid.

[70] ibid 16.

[71] Vassilis Pergantis and Stian Øby Johansen, 'The EU Accession to the ECHR and the Responsibility Question. Between a Rock and a Hard Place?' in Christine Kaddous. Yuliya Kaspiarovich, Nicolas Levrat and Rasmes A Wessel (eds), *The EU and its Member States' Joint Participation in International Agreements* (Hart 2022) 237.

[72] Compare in this context James D Fry, 'Attribution of Responsibility' in André Nollkaemper and Ilias Plakokefalos (eds), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (CUP 2014) 106.

the European Union.[73]

This proposal, however, was firmly rejected by the non-EU parties to the negotiations and was not only simply dropped, but the reference to the TFEU and TEU was added, conveying the idea that no difference exists between violations arising from whichever EU policy – not even the CFSP.[74]

The concept of normative control has been suggested to potentially act as a special rule of attribution in EU-Member State relations.[75] Of course, the CFSP has a special situation from this point of view as well, as some of the elements of the EU's perceived normative control are missing from the CFSP, including notably the full jurisdiction of an internal judicial organ[76] – then again, the Court of Justice is slowly but surely expanding its jurisdictional reach in this policy, so arguments for a normative control-based attribution in the CFSP could perhaps be made. The concept itself is, however, missing from both the original and the revised accession agreement. The attribution rules in the revised agreement remain unchanged, relying on singular attribution coupled with the co-respondent mechanism; an attribution of *responsibility* is not foreseen or supported in this scheme.[77]

Yet the co-respondent mechanism is not a true attribution rule, as it depends on the willingness of the EU or its Member States to enter into the proceeding in question willingly, and of their own accord, and this cannot be taken for granted.[78] The EU did signal in a draft declaration that it would request to become a co-respondent in every case where the conditions are fulfilled, yet this undertaking does not change the nature of the clause as a 'self-judged' rule.[79]

The Union's resolve that it will decide internally on CFSP attribution brings to mind the Court of Justice's statements made in Opinion 1/17 on the Comprehensive Economic and Trade Agreement between Canada, the EU and its Member States, where it emphasised that in the CETA dispute resolution system, the competence to decide the 'correct' respondent (ie whether it should be the EU or a Member State) rests with the EU. This was stressed explicitly by the Court as setting the CETA apart from the draft accession agreement to the ECHR.[80]

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[73] See CDDH 47+1 Ad Hoc Negotiation Group, 'Report of the Third Negotiation Meeting' (11 March 2012) CoE Doc 47+1(2012)R03, as noted by Pergantis and Johansen (n 70) 238.

[74] ibid 239.

[75] See notably Delgado Casteleiro (n 33) and Cristina Contartese, 'Competence-Based Approach, Normative Control, and the International Responsibility of the EU and its Member States' [2019] International Organizations Law Review 339.

[76] Delgado Casteleiro (n 33) 233.

[77] Pergantis and Johansen (n 70) 240.

[78] This was also noted in the view of AG Kokott on Opinion 2/13, para 216.

[79] Pergantis and Johansen (n 70) 240. Compare also Opinion 2/13, paras 218-222.

[80] Court of Justice of the European Union, Opinion 1/17 ECLI:EU:C:2019:341 para 132, with reference to Article 8.21 of the CETA.

This may be beneficial from the perspective of the EU and the autonomy of its legal order, though empowering the ECtHR to decide would arguably be more consistent[81] with Article 1 Paragraph 1(b) of the relevant protocol annexed to the TEU and TFEU, which requires that the accession agreement include the 'mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the Union as appropriate'.[82] Furthermore, internalising the (re)attribution issue could have detrimental effects for applicants as well, as it could complicate and/or draw out access to justice. Pergantis and Johansen rightly question whether this represents an ideal solution in light of the right to effective judicial review, enshrined inter alia in the EU Charter for Fundamental Rights.[83] It would also definitely mean that the EU would not be on an equal footing with other contracting parties,[84] and would partly weaken the external judicial review provided by the ECtHR, as it would ultimately *not* have the power to decide on whom to attribute responsibility to.[85] The details of how the decision on reattribution would be taken are not known at this point, although this raises a number of additional questions. From the perspective of the judicial remedies available to individuals, one of the most significant ones would be whether internalised attribution can be subjected to 'internal' judicial review by the CJEU. According to the CJEU, the Treaties aim to establish a complete system of judicial remedies.[86] However, the jurisdiction of the CJEU in the CFSP remains limited even if one takes the relevant jurisprudence – outlined in brief in Section 5 – into account. Thus, if the reattribution decision itself is taken on a CFSP legal basis (which can be assumed), the right to an effective remedy could see another setback, especially as such a decision would fall neither within the scope of Articles 24(1) and 40 TEU nor Article 275

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81 Gaja (n 31) 346.

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

83 Pergantis and Johansen (n 70) 247.

84 Yet this was one of the stated principles of the elaboration of the original draft accession agreement (see Steering Committee for Human Rights: Report to the Committee of Ministers on the Elaboration of Legal Instruments for the Accession of the European Union to the European Convention on Human Rights, CDDH(2011)009, 16). This principle is also the strongest argument against maintaining the *Bosphorus* presumption post-accession. See: Leonard FM Besselink, 'Should the European Union Ratify the ECHR?' in Andreas Føllesdal, Birgit Peters and Geir Ulfstein (eds), *Constituting Europe. The European Court of Human Rights in a National, European and Global Context* (CUP 2013) 310-312. Even without *Bosphorus*, many see the EU's position as envisaged by the original draft accession agreement as privileged (see, for example, Fisnik Korenica, *The EU Accession to the ECHR: Between Luxembourg's Search for Autonomy and Strasbourg's Credibility on Human Rights Protection* (Springer 2015) 99-100). The same can be said regarding the revised agreement.

85 Pergantis and Johansen (n 70) 248.

86 Compare the CJEU's decades-spanning case law starting with the landmark *Les Verts* case (Case 294/83 *Les Verts* ECLI:EU:C:1986:166).

TFEU.[87] This would affect not only individuals, of course, but Member States as well, should they strive to contest the reattribution.

In any case, the current practice of the ECtHR reveals an attempt at a balancing act. On the one hand, the Strasbourg court will not ascertain the responsibility of a Member State simply on the basis of its membership of an international (supranational) organisation alone, but at the same time it will seek to avoid a situation where a Member State of such an organisation could escape its ECHR obligations by transferring certain powers to the organisation – an understandable approach since the primary concern of the ECtHR is to ensure that individuals have access to judicial remedy in the ECHR system regarding any act of the EU.[88] This approach will not change even if the EU accedes to the ECHR. From the point of view of the individual seeking access to justice, the doctrinal soundness of attribution is of less concern (the primary consideration being access to justice),[89] but as we have seen above, the newly proposed internal reattribution system is not irrelevant from the point of view of individual applicants either, possibly affecting access to (an effective) judicial remedy.

From the Union's point of view, the attribution of CFSP acts can logically be considered as an internal public law issue of constitutional relevance. This is partly due to the autonomy of the Union's legal order. However, it is far from certain whether a reattribution of responsibility within the Union, to the exclusion of the ECtHR, is the most appropriate solution or even whether it will be acceptable to non-EU members of the Council of Europe[90] – or even to the EU Member States themselves. The accession of the EU to the ECHR would nevertheless be of great importance for the protection of individual human rights, regardless of these uncertainties.

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[87] For an excellent general conceptual analysis of the CJEU's jurisdiction in the CFSP, see Panos Koutrakos, 'Judicial Review in the EU's Common Foreign and Security Policy' [2018] International & Comparative Law Quarterly 1. Compare also, focusing specifically on CSDP missions, De Coninck (n 42) 351-352.

[88] Odermatt (n 34) 223 and 226.

[89] Naert (n 40) 699; De Coninck (42) 361.

[90] Critical comments have already been made by some States. Krommendijk (n 60) 17.

CAN THE EU MAKE MEMBER STATES RECOGNISE KOSOVO?

Stjepan Novak*

Abstract: Because of their internal situations, Cyprus, Greece, Romania, Slovakia and Spain do not recognise Kosovo. Aware of its inability to create a common view, as in other cases, the European Council has noted that 'Member States will decide, in accordance with national practice and international law, on their relations with Kosovo' on a sui generis basis. Nevertheless, the EU has engaged in de facto recognition of Kosovo by treating it as an independent State. Their obligations rooted in a duty of sincere cooperation and mutual solidarity mean that the five Member States that do not recognise Kosovo may not obstruct the EU's 'engagement without recognition' policy and, in this way, participate in de facto recognition of Kosovo. After some introductory remarks, the specific nature of recognition of States from the perspective of EU law will be explored. The section after that will deal with Member States' obligations regarding recognition when the EU has adhered to a certain recognition policy. The fourth section will investigate the sui generis case of Kosovo in specific circumstances defined by EU law. The paper concludes with some final remarks.

Keywords: recognition of States, de jure and de facto recognition, duty of sincere cooperation, duty of mutual solidarity, Kosovo.

1 Introduction

According to the Institute of International Law Resolution, the recognition of a new State is a free act by which countries acknowledge the existence of a politically organised society on a defined territory, independent of any other State, which is capable of entering into relations with other States, and which expresses a desire to be accepted as a member of the international community.[1] These conditions coincide with the Montevideo Convention criteria for statehood: (a) a permanent population; (b) a defined territory; (c) a government; (d) the capacity to enter into relations with other States.[2] In the last century, new conditions were created by the

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[1] Justitia et Pace Institut de Droit International, Session de Bruxelles – 1936, 'La reconnaissance des nouveaux Etats et des nouveaux gouvernements' <https://www.idi-iil.org/app/uploads/2017/06/1936_brux_01_fr.pdf> accessed 12 June 2023.

[2] Montevideo Convention on the Rights and Duties of States <https://www.ilsa.org/Jessup/Jessup15/Montevideo%20Convention.pdf> accessed 12 June 2023. See James R Crawford, *The Creation of States in International Law* (2nd edn, OUP 2007) 45.

international community and particularly the European Communities, such as respect for human rights, democracy and minority rights.[3]

This can be seen in the Declaration on the 'Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union'[4] and the 'Declaration on Yugoslavia',[5] which intrinsically link recognition with a respect for human rights in the broadest sense, as well as respect for the UN Charter and other international law acts that ensure respect for human rights.[6]

Furthermore, these conditions are in accordance with Article 41 of the Responsibility of States for Internationally Wrongful Acts, according to which 'no State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation'.[7] Article 40 refers to an 'obligation arising under a peremptory norm of general international law'. This means that not only is respect for human rights a *conditio sine qua non* for recognition, but that recognition of a State that does not respect human rights or that has been created as a result of or in connection with such a violation would itself be violation of international law.[8]

From the point of view of international law, Kosovo should be recognised as an independent country. Not only are all the Montevideo criteria for statehood satisfied, but the International Court of Justice (ICJ) has declared that the Unilateral Declaration of Independence of Koso-

[3] Edward Newman and Gëzim Visoka, 'The European Union's Practice of State Recognition: Between Norms and Interests' (2018) 44(1) Review of International Studies 1, 3 <https://eprints.whiterose.ac.uk/129089/1/Newman%20and%20Visoka%20-%20EU%20Practice%20of%20State%20Recognition.pdf> accessed 12 June 2023; James Ker-Lindsay 'Engagement without Recognition: The Limits of Diplomatic Interaction with Contested States' (2014) 91(2), International Affairs, 1, 5 <http://eprints.lse.ac.uk/60177/1/Ker-Lindsay_Engagement%20without%20recognition.pdf > accessed 12 June 2023.

[4] Declaration on the 'Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union' (16 December 1991) <https://www.dipublico.org/100636/declaration-on-the-guidelines-on-the-recognition-of-new-states-in-eastern-europe-and-in-the-soviet-union-16-december-1991/> accessed 12 June 2023.

[5] Declaration on Yugoslavia (Extraordinary EPC Ministerial Meeting, Brussels, 16 December 1991) <https://www.dipublico.org/100637/declaration-on-yugoslavia-extraordinary-epc-ministerial-meeting-brussels-16-december-1991/> accessed 12 June 2023.

[6] Matthew CR Craven, 'The European Community Arbitration Commission on Yugoslavia' (1995) 66(1) British Yearbook of International Law, 333, 372.

[7] Cedric Ryngaert and Sven Sobrie 'Recognition of States: International Law or Realpolitik? The Practice of Recognition in the Wake of Kosovo, South Ossetia, and Abkhazia' (2011) 24(2) Leiden Journal of International Law 468, 473 <https://dspace.library.uu.nl/handle/1874/241831> accessed 12 June 2023; International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' (2001) <https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf > accessed 12 June 2023.

[8] Vera Gowland-Debbas, *Collective Responses to Illegal Acts in International Law: United Nations Action in the Question of Southern Rhodesia* (Brill 1990) 273; Jure Vidmar, 'Crimea's Referendum and Secession: Why it Resembles Northern Cyprus more than Kosovo' (EJIL Talk! Blog of the European Journal of International Law, 20 March 2014) <https://www.ejiltalk.org/crimeas-referendum-and-secession-why-it-resembles-northern-cyprus-more-than-kosovo/> accessed 12 June 2023.

vo did not violate international law.[9] The European Parliament has on multiple occasions encouraged those EU Member States which have not already done so to recognise the independence of Kosovo.[10] Those States are Cyprus, Greece, Slovakia, Spain and Romania. The Commission has concluded various agreements with Kosovo, and the Court of Justice of the European Union (CJEU) has made moves in the same direction.[11] However, there is no doubt that the EU cannot recognise Kosovo on behalf of its Member States, and nor can it oblige its Member States to do so. Nevertheless, the question arises as to whether it is able to do so indirectly or, to be more precise, can it make its Member States recognise Kosovo de facto without de jure recognition?[12] The paper tackles this question. For this purpose, after some introductory remarks, the specific nature of the recognition of States from the perspective of EU law will be explored. The chapter after that will deal with Member States' obligations regarding recognition when the EU has adopted a certain policy. The fourth section will investigate the sui generis case of Kosovo[13] in specific circumstances defined by EU law. The paper concludes with some final remarks.

This paper will not consider the legality of Kosovo's independence or its recognition. The paper tackles the issue of the recognition of Kosovo and the specific situation arising from the lack of unanimity among EU Member States on the question.

2 Recognition of States from the EU law perspective

'The EU itself, does not have the competency to recognise states, only individual member states do.'[14] This quote from the answer given by High Representative / Vice-President Ashton on behalf of the Commission confirms the fact that the recognition of other States is the exclusive right of each State and that participation in any international organisation cannot result in the deprivation of this right for Member States of that organ-

[9] Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, ICJ Reports 2010, 403 <https://www.icj-cij.org/sites/default/files/case-related/141/141-20100722-ADV-01-00-EN.pdf> accessed 12 June 2023.

[10] European Parliament resolution of 5 February 2009 on Kosovo and the role of the EU <https://www.europarl.europa.eu/doceo/document/TA-6-2009-0052_EN.html> accessed 12 June 2023; European Parliament resolution of 6 July 2022 on the 2021 Commission Report on Kosovo (2021/2246(INI)) <https://www.europarl.europa.eu/doceo/document/TA-9-2022-0285_EN.html> accessed 12 June 2023.

[11] Case C632/20 P *Kingdom of Spain v Commission* ECLI:EU:C:2023:28.

[12] Juraj Andrassy, Božidar Bakotić, Maja Seršić and Budislav Vukas, *Međunarodno pravo 1. dio*, (Školska knjiga 2010) 92.

[13] European Commission, General Affairs and External Relations, press release 2851st Council meeting <https://ec.europa.eu/commission/presscorner/detail/en/PRES_08_41> accessed 12 June 2023.

[14] European Parliament, Parliamentary Question No E-0006540/2014, Answer given by High Representative/Vice-President Ashton on behalf of the Commission 24 October 2014 <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2014-006540&language=EN> accessed 12 June 2023.

isation. This is in line with Article 4(1) of the Treaty on European Union (TEU), according to which competences not conferred upon the EU in the Treaties remain with the Member States, and the right of recognition of new States is in no way conferred upon the EU.

Furthermore, recognition is a completely voluntary act and the discretionary right of each State.[15] An obligation to recognise a State which has met all the criteria for recognition under international law does not exist.[16] Were this the case, as Andrassy claims, a situation would result in which every State that did not recognise that State would be violating international law.[17]

However, although the EU, from a legal point of view cannot recognise States or oblige its Member States to do so, it can undertake actions equivalent to recognition. This is a fact which is demonstrated not only by EU collective recognition policies in the cases of the former Soviet Union and Yugoslavia but also in its non-recognition policies. This demonstrates that the EU can influence its Member States concerning their recognition policies.[18] For example, the Declaration on the 'Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union' explicitly states that the 'Community and its Member States will not recognize entities which are the result of aggression', and the commitment to these principles opens the way to recognition by the Community and its Member States.[19] Moreover, the Declaration on Yugoslavia sets out that 'the Community and its Member States agree to recognise the independence of all the Yugoslav Republics fulfilling all the conditions set out below'.[20] In 2008, the EU Council called on Member States not to recognise the proclaimed independence of Abkhazia and South Ossetia following Russia's unilateral decision to recognise their independence.[21] This is a clear signal that the EU can influence the recognition policy of its Member States by creating for them quasi-obligations to recognise or

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15 Ker-Lindsay (n 3) 6.

16 See Crawford (n 2) 22; a different claim is made in Hersch Lauterpacht, 'Recognition of States International Law' (1944) 53 (3) The Yale Law Journal 385.

17 Andrassy (n 12) 91.

18 Newman and Visoka (n 3) 8.

19 Declaration on the 'Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union' (16 December 1991) <https://www.dipublico.org/100636/declaration-on-the-guidelines-on-the-recognition-of-new-states-in-eastern-europe-and-in-the-soviet-union-16-december-1991/> accessed 12 June 2023. For more, see Roland Rich, 'Recognition of States: The Collapse of Yugoslavia and the Soviet Union' (1993) 4(1) European Journal of International Law, 36 <http://www.ejil.org/pdfs/4/1/1207.pdf> accessed 13 June 2023.

20 Declaration on Yugoslavia (Extraordinary EPC Ministerial Meeting, Brussels, 16 December 1991) <https://www.dipublico.org/100637/declaration-on-yugoslavia-extraordinary-epc-ministerial-meeting-brussels-16-december-1991/> accessed 12 June 2023; Vidi and Andrassy (n 12) 95.

21 Extraordinary European Council, Brussels 1 September 2008 <https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/102545.pdf> accessed 12 June 2023.

not to recognise new States.[22]

The EU has dealt with various situations regarding the recognition of countries.

In the case of South Sudan, the Declaration by the EU and its Member States on the Republic of South Sudan's independence does not mention 'recognition', but states that the EU and its Member States 'warmly congratulate the people of South Sudan on their independence' and 'look forward to further developing a close and long-term partnership with the Republic of South Sudan and its people'.[23]

In its resolution of 17 December 2014 on the recognition of Palestine statehood, the European Parliament does not recognise Palestine but 'supports in principle recognition of Palestinian statehood', since 'the recognition of the State of Palestine falls in the competence of the Member States'.[24]

In an answer to a parliamentary question given by Mr Rehn on behalf of the Commission, it is emphasised that the so-called 'Turkish Republic of Northern Cyprus' is recognised neither by the European Union nor by any of its Member States.[25]

In its document 'Visa liberalisation for Taiwanese', the EU Council emphasises that the EU does not recognise Taiwan as a sovereign State.[26] For the EU, 'Taiwan is a reliable and valued like-minded partner in Asia. The EU and Taiwan share common values, such as democracy, the rule of law and human rights'.[27] In addition, the EU develops 'regular contacts and cooperation in economic, trade, research, science and technology, education and culture as well as environmental issues with the Taiwanese authorities'.[28] Nevertheless, since no EU Member State rec-

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[22] Newman and Visoka (n 3) 6.

[23] Declaration by the EU and its Member States on the Republic of South Sudan's independence, 9 July 2011 <https://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/123591.pdf> accessed 12 June 2023.

[24] European Parliament resolution of 17 December 2014 on recognition of Palestine statehood (2014/2964(RSP)) <https://www.europarl.europa.eu/doceo/document/TA-8-2014-0103_EN.html> accessed 13 June 2023; Jessica Almqvist, 'EU and Recognition of New States' (2017) Euborders Working Paper 12, 11 <https://www.researchgate.net/publication/319903887_EU_and_the_Recognition_of_New_States> accessed 13 June 2023.

[25] Parliamentary question - E-5542/2007(ASW), answer given by Mr Rehn on behalf of the Commission, 19 December 2007 <https://www.europarl.europa.eu/doceo/document/E-6-2007-5542-ASW_EN.html?redirect> accessed 12 June 2023.

[26] Council of the European Union, Visa liberalisation for Taiwanese, Brussels, 25 November 2010 16851/10 PRESSE 31 <https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/118011.pdf> accessed 13 June 2023.

[27] European Economic and Trade Office in Taiwan, The European Union and Taiwan <https://www.eeas.europa.eu/delegations/taiwan/european-union-and-taiwan_en> accessed 30 October 2023.

[28] Council of the European Union, Visa liberalisation for Taiwanese, Brussels, 25 November 2010 16851/10 PRESSE 31 <https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/118011.pdf> accessed 13 June 2023.

ognises Taiwan, despite fostering strong economic relationships with it, the EU cannot do so itself, not even de facto as in some of the abovementioned cases.

The EU has issued a document entitled 'The EU's non-recognition and engagement policy towards Abkhazia and South Ossetia'.[29] In addition, in its document 'Declaration by the High Representative on behalf of the EU on Crimea', the EU Council stated that 'the European Union remains committed to fully implementing its non-recognition policy'.[30] These examples are in line with the 'general international law duty of non-recognition of situations brought about through the illegal use of force'[31] or other violations of international law.[32]

Table 1: Recognition of Palestine, Kosovo, South Sudan, East Timor, Eritrea and Taiwan by EU Member States:

STATE	**EU MEMBER STATES THAT RECOGNISE IT**
KOSOVO	All but Cyprus, Greece, Romania, Slovakia and Spain
PALESTINE	Bulgaria, Cyprus, Greece, Hungary, Malta, Poland, Romania, Slovakia and Sweden[33]
SOUTH SUDAN	All
EAST TIMOR	All
ERITREA	All
TAIWAN	None[34]

Unlike the recognition of new States after the dissolution of the Soviet Union and Yugoslavia, including Montenegro, which were more or less normative based,[35] by simply following the UN approaches in the cases of, for example South Sudan, East Timor, Eritrea and Taiwan, the EU waived

[29] Sabine Fischer, 'The EU's non-recognition and engagement policy towards Abkhazia and South Ossetia' (2010) European Union Institute for Security Studies Seminar Reports <https://www.iss.europa.eu/sites/default/files/EUISSFiles/NREP_report.pdf> accessed 12 June 2023; see also Newman and Visoka (n 3) 20.

[30] European Council, Declaration by the High Representative on behalf of the EU on Crimea <https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/hr-eu-crimea/> accessed 12 June 2023; see also Newman and Visoka (n 3) 22.

[31] Gowlland-Debbas (n 8) 282.

[32] See also Crawford (n 2) 173.

[33] Permanent Observer Mission of the State of Palestine to the United Nations <http://palestineun.org/about-palestine/diplomatic-relations/> accessed 31 October 2023.

[34] Newman and Visoka (n 3) 12.

[35] However, even these examples of recognition were the result of political consensus, since Germany's pressure played a crucial role. Newman and Visoka (n 3) 12.

the normative bases of its recognition policy.[36]

This means that EU recognition policy is precisely that: a policy.[37] The lack of influence of international law in recognition policy in general is probably the main reason for the inconsistency[38] and limited capability[39] of the EU's recognition policy as part of the Common Foreign and Security Policy (CFSP),[40] and countries like Kosovo are getting the short end of the stick.

This politicisation[41] of the recognition of States has rendered out of date Lauterpacht's statement that 'the only difference between *de jure* and *de facto* recognition is that the latter is provisional in the sense that its eventual finality is dependent upon the stabilization of the as yet precarious factual conditions of statehood'.[42] De facto recognition does not represent a temporary status until the conditions for recognition are fulfilled. It is a recognition when de jure recognition is not politically acceptable but is practical and desirable. De facto recognition is a compromise between legal conditions, political influences and economic needs. In some circumstances, it could even be considered 'extorted' recognition when States do not want to recognise but are practically or indirectly obliged to do so due to their other obligations rooted in international law. This would be the case with the recognition of Kosovo. De facto recognition by Member States that have not de jure recognised Kosovo form a part of the EU 'engagement without recognition' policy, a policy in which the EU has to maintain its neutral status regarding the recognition of certain States due to divisions on the question among Member States.[43] This is done in order to maintain the appearance of CFSP coherence. This policy sends a clear signal that the EU is more inclined to actual recognition[44] but withholds recognition due to internal inconsistencies. For example, the Greek Foreign Ministry routinely referring to Mr Hoxhaj as Foreign Minister of Kosovo could be considered as 'engagement without recognition' and even as a sign of de facto recognition.[45]

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36 Newman and Visoka (n 3) 17.

37 See Ryngaert and Sobrie (n 7) 478.

38 For example, see also Ryngaert and Sobrie (n 7) 477.

39 Newman and Visoka (n 3) 25.

40 Paul James Cardwell 'On "ring-fencing" the Common Foreign and Security Policy in the Legal Order of the European Union' (2013) 64 (4) Northern Ireland Legal Quarterly 443, 460 <https://nilq.qub.ac.uk/index.php/nilq/article/view/366/260 > accessed 13 June 2023.

41 Almqvist even calls it 'the failure of international law to govern in difficult situations' in Jessica Almqvist, 'The Politics of Recognition, Kosovo and International Law' (2009) Elcano Newsletter 54, 2 <https://www.realinstitutoelcano.org/en/work-document/the-politics-of-recognition-kosovo-and-international-law-wp/> accessed 12 June 2023.

42 Lauterpacht (n 16) 418.

43 Bruno Coppieters, 'Engagement without Recognition' in Gëzim Visoka, John Doyle and Edward Newman (eds) *Routledge Handbook of State Recognition* (Routledge 2019) 242.

44 Coppieters (n 44) 244.

45 Ker-Lindsay (n 3) 13.

3 Recognition of States and EU Member States' obligations

As stated above, the EU can shape the recognition policies of its Member States and create a quasi-obligation for them, including making them de facto recognise a certain State. The legal or, to be more precise, normative basis for this EU power is the CFSP and the relevant provisions of the TEU and Treaty on the Functioning of the European Union (TFEU), as well as the duty of sincere cooperation.

As Article 24 TEU states, 'the Union shall conduct, define and implement a common foreign and security policy, based on the development of mutual political solidarity among Member States, the identification of questions of general interest and the achievement of an ever-increasing degree of convergence of Member States' actions'. The same Article imposes an obligation on Member States to 'support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity and to comply with the Union's action in this area'.

Further grounds for the EU's power to pressure its Member States into recognising or not recognising countries can be found in the duty of sincere cooperation and its derivation from Article 32 TEU. The duty of sincere cooperation requires Member States to abstain from 'any measure which could jeopardize the attainment of the Union's objectives.' This principle is line with today's Article 4(3) TEU which states that 'Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.' The CJEU more than fifty years ago determined that this principle 'lays down a general duty for the member states, the actual tenor of which depends in each individual case on the provisions of the Treaty, or the rules derived from its general scheme'.[46] This duty extends to all Union policies, and its breach cannot be excused by the fact that it occurred within the field of the CFSP. Thus, in a case where this obligation is not respected, the Commission could resort to Article 258 of the TFEU. This would not be because of the Member State failing to comply with the CFSP but because of a failure to respect the duty of the sincere cooperation.[47] As the CJEU has reiterated on various occasions, the 'duty of genuine cooperation is of general application and does not depend either on whether the Community competence concerned is exclusive or on any

[46] Case C-78/70 *Deutsche Grammophon* ECLI:EU:C:1971:59, para 5.

[47] Peter Van Elsuwege, 'The Duty of Sincere Cooperation and its Implications for Autonomous Member State Action in the Field of External Relations: Member State Interests and European Union Law' in Marton Varju (ed), *Between Compliance and Particularism* (Springer 2019) 283, 288 <https://www.researchgate.net/publication/330961755_The_Duty_of_Sincere_Cooperation_and_Its_Implications_for_Autonomous_Member_State_Action_in_the_Field_of_External_Relations_Member_State_Interests_and_European_Union_Law> accessed 12 June 2023; Christophe Hillion, 'A Powerless Court? The European Court of Justice and the Common Foreign and Security Policy' in Marise Cremona and Anne Thies (eds) *The European Court of Justice and External Relations Law: Constitutional Challenges* (Hart Publishing 2014) 47, 67; Andres Delgado Casteleiro and Joris Larik, 'The Duty to Remain Silent: Limitless Loyalty in EU External Relations?' (2011) 36 (49) European Law Review 522.

right of the Member States to enter into obligations towards non-member countries'.[48]

According to Article 32 TEU, Member States are obliged to consult each other before undertaking any action on the international scene or entering into any commitment which could affect the Union's interests. They also have to ensure 'that the Union is able to assert its interests and values on the international scene', and at the same time show mutual solidarity.

When read together, Articles 24(3), 4(3) and 32(1) send a clear signal to the Member States that they are under an obligation to adapt their recognition policies to the Union's recognition policy despite the fact that recognition is de jure an internal question of every State. This means that if a certain Member State persists in its policy of non-recognition of a State whose recognition is incorporated in the EU's objectives, the EU can tolerate this as long as it does not jeopardise the same objective. On the other hand, if recognition or non-recognition of a certain State is especially important from the point of view of the Union's foreign policy, each Member State should subject its internal political interests to that goal.

A Member State can circumvent this obligation by referring to Article 4(2) TEU. It should be noted that the Treaties do not provide for the exclusive jurisdiction of Member States regarding recognition issues. Nevertheless, Member States could claim that a certain recognition question is connected with its vital interests. This could be the case if the recognition of a certain State conflicted with a Member State's national identity, inherent in its fundamental structures, either political or constitutional, inclusive of regional and local self-government, or with essential State functions, including ensuring the territorial integrity of that Member State, maintaining law and order, and in particular, safeguarding national security.[49] While referring to this Article would be plausible in cases where the State that is being recognised is the result of secession from a Member State, it is hard to imagine any other scenario in which the recognition of a State would be covered by Article 4(2) TEU. When a 'parent State' is a Member State, that Member State referring to the national identity clause would not only be understandable but could definitely be considered a significant national identity issue.[50] Of course, justification for that reference would depend on whether the secession itself was justified, in other words was it a remedial secession or an unlawful one.

It could be concluded that if recognition of a certain country as a sovereign State is a question of general interest, it represents a CFSP

[48] Case C-246/07 *Commission v Sweden* ECLI:EU:C:2010:203, para 71; Case C-266/03 *Commission of the European Communities v Grand Duchy of Luxemburg* ECLI:EU:C:2005:341, para 58; Case C-433/03 *Commission of the European Communities v Federal Republic of Germany* ECLI:EU:C:2005:462, para 64.

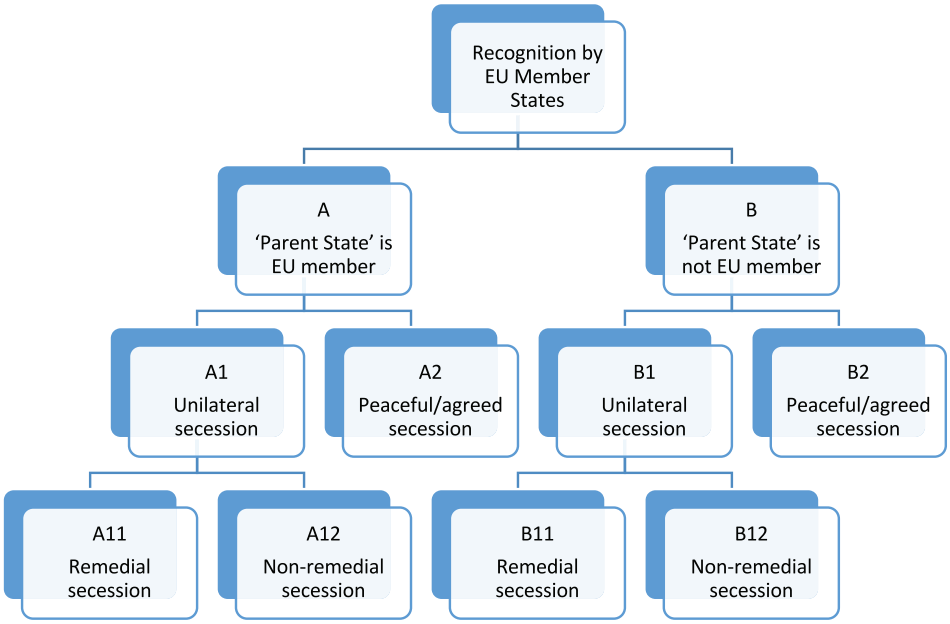
[49] Article 4(2) TEU.

[50] Siniša Rodin, 'National Identity and Market Freedoms after the Treaty of Lisbon' (2011) 7(1) Croatian Yearbook of European Law and Policy, 11.

matter which all Member States must support in a spirit of loyalty and mutual solidarity. Of course, this does not result in Member States' de jure obligation to recognise a country. The use of constructive abstention would easily represent a sufficient compromise.

From the legal point of view, the scope of the rights and obligations of EU Member States differs depending on whether the new State is seceding from an EU Member State or the 'parent State' is a third country.

Table 2: Recognition of new States depending on membership of the EU



In the case of a peaceful secession as a result of an agreement between a Member State and its part that is becoming a new State (A2), other Member States and the EU itself should respect the existence of the new State on the basis of EU law, more precisely Article 32(1) and the duty of sincere cooperation, but also on the basis of international law, providing all the necessary criteria have been met. Recognition in this case would not include membership of the Union. When the referendum on independence for Scotland was being held, it was concluded that Scotland would have to apply to become a member of the Union as provided for by Article 49 TEU.[51]

If a particular secession is a unilateral but not a remedial act, the recognition of the new State would be contrary to EU and international

[51] Stephen Tierney, 'Legal Issues Surrounding the Referendum on Independence for Scotland' (2013) 9(3) European Constitutional Law Review 359, 379.

law.[52] It would be a political but also legal paradox, although not a theoretical impossibility,[53] if an EU Member State were to recognise the Turkish Republic of Northern Cyprus (A12),[54] regardless of the fact that its secession occurred before Cyprus became a Member State. Even if secession were legally acceptable from an international point of view but not from the constitutional point of view of the 'parent State',[55] other Member States should refrain from giving recognition due to their obligation of mutual solidarity.

However, in the case of remedial secession which derives from the illegitimate governing regime of the 'parent State',[56] the situation is somewhat different (A11). Of course, it is hardly plausible that an EU Member State would not be 'possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour'.[57] Or to put it more bluntly, it would be very hard to imagine that an EU Member State would violate the human rights of a part of its population to such a degree that secession would be justified.[58] If this were, nonetheless, the case, the EU and the Member States themselves could turn to the mechanisms provided by the Treaties, incorporated in Articles 258, 259 and 260, as well as Article 7 TEU. Member States would be bound by the duty of sincere cooperation and mutual solidarity referred to in Article 32(1) TEU to a lesser extent, since the respect for the human rights of the abused people of the new State take precedence over the aforementioned principles. Respect for human rights is not just an obligation for all Member States but a fundamental value upon which the EU

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[52] For example, in its document of October 2008, the Council stated that 'a peaceful and lasting solution to the conflict in Georgia must be based on full respect for the principles of independence, sovereignty and territorial integrity recognised by international law, the Final Act of the Helsinki Conference on Security and Cooperation in Europe and United Nations Security Council resolutions'. Extraordinary European Council, Brussels, 1 September 2008 <https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/102545.pdf> accessed 12 June 2023; see also Vidmar (n 8).

[53] Ker-Lindsay (n 3) 6.

[54] Newman and Visoka (n 3) 17; UN Security Council Resolution 541 (1983) <https://digitallibrary.un.org/record/58970> accessed 12 June 2023; Parliamentary question - E-5542/2007(ASW), answer given by Mr Rehn on behalf of the Commission, 19 December 2007 <https://www.europarl.europa.eu/doceo/document/E-6-2007-5542-ASW_EN.html?redirect> accessed 12 June 2023.

[55] Vidmar (n 8); Judgement of the Supreme Court of Canada, Reference re Secession of Quebec [1998] 2 SCR 217 <https://web.archive.org/web/20110506041859/http://scc.lexum.org/en/1998/1998scr2-217/1998scr2-217.html> accessed 13 June 2023.

[56] Ryngaert and Sobrie (n 7).

[57] Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations <https://digitallibrary.un.org/record/202170> accessed 13 June 2023.

[58] Tierney (n 51) 14; Accordance with international law of the unilateral declaration of independence by the provisional institutions of self-government of Kosovo (request for an advisory opinion), Written Statement of the Kingdom of The Netherlands, ICJ Report (2009) <https://www.icj-cij.org/sites/default/files/case-related/141/15652.pdf> accessed 13 June 2023. See also Almqvist (n 24) 15.

is based.[59]

In the case of peaceful secession, when a 'parent State' is not a Member State of the Union, the recognition of a new State should not be a problematic issue for an EU Member State from an international point of view or from the point of view of EU law (B2). This was the case, for example, with South Sudan or East Timor. However, it could be problematic, as has been explained, from a political point of view.

If secession is unilateral, then the main question again is whether it is justified by the illegitimate governing regime of the 'parent State' (B11) or not (B12), as in the cases of Crimea or Abkhazia and South Ossetia. The main condition, of course, is that it does not represent the violation of a peremptory norm of international law. The influence of EU law in these situations is much weaker but far from non-existent. As has been argued above, the EU can shape the recognition policy of its Member States and create quasi-obligations for them, including making them de facto recognise a certain State.

4 Kosovo and the recognition policy of the EU

On 17 February 2008, the Assembly of Kosovo adopted the Declaration of Independence, which proclaimed the Republic of Kosovo an independent State. The very next day, Kosovo was recognised by France, followed by 21 Member States the same year. Recognition of Kosovo could be considered as a B11 situation from Table 2.[60] It could be claimed that it was a remedial secession due to the systematic violations of the human rights of its people[61] by a non-EU member 'parent State'. In its Advisory Opinion, the ICJ explicitly stated that 'it considers that it is not necessary to resolve these questions in the present case'.[62] It also decided that Kosovo's declaration of independence was not incompatible with international law, but emphasised that 'it is entirely possible for a particular act — such as a unilateral declaration of independence — not to be in violation of international law without necessarily constituting the exercise

[59] Article 2 TEU.

[60] Ruth Ferrero-Turrión 'The Consequences of State Non-recognition: The Cases of Spain and Kosovo' (2021) 22(3) European Politics and Society 3 <https://www.researchgate.net/publication/341330616_The_consequences_of_state_non-recognition_the_cases_of_Spain_and_Kosovo> accessed 13 June 2023.

[61] Tierney (n 51) 14; Accordance with international law of the unilateral declaration of independence by the provisional institutions of self-government of Kosovo (request for an advisory opinion)), Written Statement of the Kingdom of The Netherlands, ICJ Report (2009) <https://www.icj-cij.org/sites/default/files/case-related/141/15652.pdf> accessed 13 June 2023. See also Almqvist (n 24) 15.

[62] Accordance with international law of the unilateral declaration of independence in respect of Kosovo, Advisory Opinion of 22 July 2010, ICJ Report (2010) para 83 <https://www.icj-cij.org/sites/default/files/case-related/141/141-20100722-ADV-01-00-EN.pdf> accessed 13 June 2023.

of a right conferred by it'.[63] Although, disappointingly,[64] the ICJ did not tackle the most important questions,[65] it did give the 'green light' to the international recognition of Kosovo. Consequently, the General Assembly welcomed 'the readiness of the European Union to facilitate a process of dialogue' between Serbia and Kosovo which would allow progress on their paths to the European Union to be achieved.[66] Since only sovereign States can join the EU, the General Assembly's message was a straightfoward one.[67]

The EU found itself in the 'engagement without recognition' situation explained above because of the different stances of certain Member States on the issue, and as another consequence of the deterioration of the influence of international law in the recognition process.[68] Cyprus, Greece, Romania, Slovakia and Spain opposed and still oppose recognition of Kosovo due to their own internal situations.[69] Aware of its inability to create a common view, as in other cases, the European Council noted that 'Member States will decide, in accordance with national practice and international law, on their relations with Kosovo' on a sui generis basis.[70]

In 2008, 'following Kosovo's declaration of independence and the transfer of responsibilities in the areas of policing, justice and customs from the United Nations Interim Administration Mission in Kosovo to EULEX',[71] EULEX was launched and Kosovo's 'European path' began. EULEX is 'the largest civilian mission under the Common Security and Defence Policy of the European Union'.[72] Its mission is 'to support relevant rule of law institutions in Kosovo on their path towards increased

[63] Accordance with international law of the unilateral declaration of independence in respect of Kosovo, Advisory Opinion of 22 July 2010, ICJ Report (2010) para 56 <https://www.icj-cij.org/sites/default/files/case-related/141/141-20100722-ADV-01-00-EN.pdf> accessed 13 June 2023; Ryngaert and Sobrie (n 7) 479.

[64] Almqvist (n 24) 9; Marc Weller, 'The Sounds of Silence: Making Sense of the Supposed Gaps in the *Kosovo* Opinion' in Marko Milanović and Michael Wood (eds), *The Law and Politics of the Kosovo Advisory Opinion* (OUP 2015) 187.

[65] Daniel Müller, 'The Question Question' in Marko Milanović and Michael Wood (eds), *The Law and Politics of the Kosovo Advisory Opinion* (OUP 2015) 118.

[66] General Assembly Resolution A/RES/64/298 <https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/ROL%20A%20RES64%20298.pdf> accessed 6 November 2023.

[67] Volker Röben, 'The ICJ Advisory Opinion on the Unilateral Declaration of Independence in Respect of Kosovo: Rules or Principles?' (2010) 2(3) Goettingen Journal of International Law, 1065, 1084.

[68] Ryngaert and Sobrie (n 7).

[69] Newman and Visoka (n 3) 24; Almqvist (n 24) 10.

[70] Council of the European Union, press release 2851st Council meeting, General Affairs and External Relations, Doc no 6496/08 (Presse 41), 18 February 2008, 7 <https://data.consilium.europa.eu/doc/document/ST-6496-2008-INIT/en/pdf> accessed 13 June 2023; Newman and Visoka (n 3) 24; Ryngaert and Sobrie (n 7) 480.

[71] EULEX Kosovo: European Union Rule of Law Mission in Kosovo - Civilian Mission <https://www.eeas.europa.eu/eulex-kosovo/eulex-kosovo-european-union-rule-law-mission-kosovo-civilian-mission_und_en> accessed 6 November 2023.

[72] EULEX <https://www.eulex-kosovo.eu/?page=2,16> accessed 13 June 2023.

effectiveness, sustainability, multi-ethnicity and accountability, free from political interference and in full compliance with international human rights standards and best European practices'.[73] In effect, the establishment of EULEX can be considered to be part of de facto recognition.[74] According to the Mission Statement of Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX Kosovo 'shall assist the Kosovo institutions, judicial authorities and law enforcement agencies in their progress towards sustainability and accountability and in further developing and strengthening an independent multi-ethnic justice system and multi-ethnic police and customs service'.[75] According to Article 3 of the same document, one of EULEX's main tasks is to 'monitor, mentor and advise the competent Kosovo institutions on all areas related to the wider rule of law'.[76] The breadth of this approach clearly demonstrates that the EULEX mission is to prepare Kosovo for its journey to the EU by transforming it into an entity that fully adheres to international human rights standards and best European practices. This, consequently, amounts to the perception of Kosovo as a sovereign country, although words like 'recognition', 'sovereign' or 'country' are skilfully avoided.

In addition, the EU signed a Stabilisation and Association Agreement (SAA) with Kosovo in 2015, 'which signifies political, economic, and legal engagement between the EU and states that seek membership'[77] indicating, though very diplomatically, that the SAA itself is 'without prejudice to positions on status, and is in line with UNSCR 1244/1999 and the ICJ Opinion on the Kosovo declaration of independence'.[78] Nevertheless, it is a fact that 'the Stabilisation and Association Process (SAP) is the European policy framework for relations between the EU and the Western Balkan countries, all the way to their eventual accession to the Union'.[79] The final goal of the Kosovo SAA is the promotion of peace, stability, freedom, security and justice, prosperity and quality of life, as well as Kosovo's

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[73] ibid.

[74] Alexander Orakherashvili, 'Statehood, Recognition and the United Nations System: A Unilateral Declaration of Independence in Kosovo' (2008) 12(1) in the Max Planck Yearbook of United Nations Law, 29.

[75] Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo <https://www.eulex-kosovo.eu/eul/repository/docs/WEJointActionEULEX_EN.pdf> accessed 7 November 2023.

[76] ibid.

[77] ibid, 25.

[78] Stabilisation and Association Agreement between the European Union and the European Atomic Energy Community, of the one part, and Kosovo <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A22016A0316%2801%29> accessed 13 June 2023; Kushtrim Istrefi, 'Kosovo is a Country, and a Country Means a State, Rules the Court of Justice of the European Union' (EJIL Talk! Blog of the European Journal of International Law, 20 March 2014) <https://www.ejiltalk.org/kosovo-is-a-country-and-a-country-means-a-state-rules-the-court-of-justice-of-the-european-union/> accessed 13 June 2023.

[79] EEAS, 'The European Union and Kosovo' <https://www.eeas.europa.eu/kosovo/eu-and-kosovo_en?s=321> accessed 6 November 2023.

transition to a market economy, regional cooperation and preparation for EU accession.[80] Since only independent countries can join the EU, the preparation of Kosovo for EU accession is de facto recognition of it as a country.

In May of the same year, the Commission proposed visa-free travel for citizens of Kosovo,[81] and in July 2018 Kosovo fulfilled all requirements for this. In April 2023, the Commission announced that from January 2024 'citizens of Kosovo will be allowed to travel to the EU – and EU citizens to go to Kosovo – without requesting a visa, for periods of up to 90 days in any 180-day period'.[82] Furthermore, although Commission staff working documents repeat the phrase that 'this designation is without prejudice to positions on status, and is in line with UNSCR 1244/1999 and the ICJ Opinion on the Kosovo declaration of independence',[83] it is treating Kosovo as any other country engaged in accession negotiations,[84] continuously emphasising Kosovo's 'European path' or its 'path towards the EU'.

Another example is the European Parliament resolution of 6 July 2022 on the 2021 Commission Report on Kosovo[85] (2021/2246(INI)) in which the Parliament 'regrets, however, the fact that five EU Member States have not yet recognised Kosovo and reiterates its call for them to do so immediately and reaffirm Kosovo's EU perspective'.[86] In its report on the 2022 Commission Report on Kosovo, the Parliament 'urges the Member States that have not yet recognised Kosovo as a sovereign state, notably Spain, Slovakia, Cyprus, Romania and Greece, to do so without further delay and thus allow it to progress on its European path on an

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[80] ibid.

[81] 'Kosovo on its European Path' <https://neighbourhood-enlargement.ec.europa.eu/system/files/2023-10/Kosovo_Oct2023.pdf> accessed 6 November 2023.

[82] European Commission, Migration and Home Affairs, 'Kosovo visa liberalisation signed for entry in early 2024' <https://home-affairs.ec.europa.eu/news/kosovo-visa-liberalisation-signed-entry-early-2024-2023-04-21_en> accessed 6 November 2023.

[83] Commission Staff Working Document Kosovo 2020 Report <https://neighbourhood-enlargement.ec.europa.eu/system/files/2020-10/kosovo_report_2020.pdf> accessed 7 November 2023; Commission Staff Working Document Kosovo 2021 Report <https://neighbourhood-enlargement.ec.europa.eu/system/files/2021-10/Kosovo%202021%20report.PDF> 7 November 2023; Commission Staff Working Document Kosovo 2022 Report <https://neighbourhood-enlargement.ec.europa.eu/system/files/2022-10/Kosovo%20Report%202022.pdf> accessed 7 November 2023.

[84] For example, Commission Staff Working Document Serbia 2018 Report <https://neighbourhood-enlargement.ec.europa.eu/system/files/2019-05/20180417-serbia-report.pdf> accessed 7 November 2023.

[85] Commission Staff Working Document Kosovo 2021 Report <https://neighbourhood-enlargement.ec.europa.eu/system/files/2021-10/Kosovo%202021%20report.PDF> accessed 7 November 2023.

[86] European Parliament resolution of 6 July 2022 on the 2021 Commission Report on Kosovo (2021/2246(INI)) <https://www.europarl.europa.eu/doceo/document/TA-9-2022-0285_EN.html> accessed 13 June 2023.

equal footing with candidate countries'.[87]

In its judgement C-632/20 P, the CJEU concluded that Kosovo can be considered a 'third country' in the light of EU law, since the 'European Union has entered into several agreements with Kosovo, thus recognising its capacity to conclude such agreements'.[88] Of course, the CJEU has separated the questions of recognition of States by EU Member States and the admission of those States to the EU,[89] and the Commission's adoption of the Commission Decision of 18 March 2019 on the participation of the National Regulatory Authority of Kosovo in the Body of European Regulators for Electronic Communications cannot be interpreted as entailing the implicit recognition by the European Union of Kosovo's status as an independent State.[90] It is questionable whether this reference was even necessary, since the EU does not have the power to recognise a State or to make its Members do so. However, despite this 'safety net', the CJEU stance regarding Kosovo and its recognition is obvious.

In these circumstances, the EU has engaged in implied, de facto recognition of Kosovo by treating it as an independent State[91] through Kosovo's integration process into the EU. In considering Kosovo's application for EU membership of December 2022, it can be expected that the 'light' pressure on the five Member States that do not recognise Kosovo will continue to grow. As far as these five Member States are concerned, when a decision concerning Kosovo is being adopted by EU institutions, each of them can abstain in a vote and qualify its abstention by making a formal declaration. These Member States 'shall not be obliged to apply the decision, but shall accept that the decision commits the Union'. In a spirit of mutual solidarity, those Member States 'shall refrain from any action likely to conflict with or impede Union action based on that decision and the other Member States shall respect its position'.[92]

Indeed, this institute was employed for the first time in 2008 by Cyprus in the context of Kosovo with regard to the European Union Rule of Law Mission in Kosovo (EULEX). Cyprus explicitly invoked this provision emphasising three points: its respect for the wish of Member States for an active engagement of the EU in Kosovo, and its decision not to hinder the decision of the Council; its firm views regarding the legal basis for EU involvement in Kosovo, which are not compatible the Council's view; its adherence to the spirit of mutual solidarity.[93] There is no reason for this

[87] Report on the 2022 Commission Report on Kosovo <https://www.europarl.europa.eu/doceo/document/A-9-2023-0174_EN.html#_section1> accessed 7 November 2023.

[88] Case C632/20 P *Kingdom of Spain v Commission* ECLI:EU:C:2023:28, para 55.

[89] Istrefi (n 7).

[90] Case C632/20 P *Kingdom of Spain v Commission* ECLI:EU:C:2023:28, para 72.

[91] Newman and Visoka (n 3) 24.

[92] Article 31(2) TFEU.

[93] Marise Cremona, 'Enhanced Cooperation and the Common Foreign and Security and Defence Policies of the EU' (2009) EUI Working Papers 21, 15 <https://cadmus.eui.eu/bitstream/handle/1814/13002/LAW_2009_21.pdf> accessed 13 June 2023.

institute to be used more frequently[94] by Member States which do not recognise Kosovo in EU-Kosovo relations. Nevertheless, the EULEX website claims that EULEX is supported by all 27 European Union Member States.[95] This statement is very important, since it demonstrates that a compromise can be found between the Union's objectives and concerned Member States' political interests.

5 Conclusion

The EU does not have the competence to recognise States, but it can shape the recognition policies of its Member States and create a quasi-obligation for them, including making them de facto recognise certain States. The normative basis for this EU power is the CFSP and the relevant provisions of the TEU and TFEU, as well as the duty of sincere cooperation. Member States are under an obligation to adapt their recognition policies to the Union's recognition policy despite the fact that recognition is de jure an internal matter for every State. This means that if a certain Member State persists in its non-recognition policy of a State whose recognition is incorporated as an EU objective, the EU can tolerate this as long as it does not jeopardise the same objective. On the other hand, if recognition or non-recognition of a certain State is especially important from a Union foreign policy point of view, each Member State should subject its internal political interests to that goal.

As far as Kosovo is concerned, Cyprus, Greece, Romania, Slovakia and Spain do not recognise it due to their own internal situations. Aware of its inability to create a common view, as in other cases, the European Council has noted that 'Member States will decide, in accordance with national practice and international law, on their relations with Kosovo' on a sui generis basis.[96] Nevertheless, the EU has engaged in de facto recognition of Kosovo by treating it as an independent State and entered into several agreements with it.

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[94] After this, constructive abstention has played a relatively minor role. Austria, Ireland and Malta used it regarding Council Decision (CFSP) 2022/339 of 28 February 2022 on an assistance measure under the European Peace Facility to support the Ukrainian Armed Forces, and Hungary regarding the Military Assistance Mission in support of Ukraine (EUMAM Ukraine); see European Parliament, Policy Department for Citizens' Rights and Constitutional Affairs Study Requested by the AFCO committee, 'The implementation of Article 31 of the Treaty on European Union and the use of Qualified Majority Voting', 61 <https://www.europarl.europa.eu/RegData/etudes/STUD/2022/739139/IPOL_STU(2022)739139_EN.pdf> accessed 13 June 2023; Giovanna Maletta and Lauriane Héau 'Funding Arms Transfers through the European Peace Facility: Preventing Risks of Diversion and Misuse' (2022) Stockholm International Peace Research Institute, 5 fn 30 <https://www.sipri.org/sites/default/files/2022-06/2206_supplying_weapons_through_the_epf_1.pdf> accessed 13 June 2023.

[95] EULEX <https://www.eulex-kosovo.eu/?page=2,16> accessed 13 June 2023.

[96] Council of the European Union, press release 2851st Council meeting, General Affairs and External Relations, Doc no 6496/08 (Presse 41), 18 February 2008, 7 <https://data.consilium.europa.eu/doc/document/ST-6496-2008-INIT/en/pdf> accessed 13 June 2023; Newman and Visoka (n 3) 24; Ryngaert and Sobrie (n 7) 480.

Because of their obligations rooted in a duty of sincere cooperation and mutual solidarity, the five Member States that do not recognise Kosovo may not obstruct the EU's 'engagement without recognition' policy and may have recourse to the institute of constructive abstention. In this way, these States maintain a certain status quo between their internal policies and EU policy. However, considering Kosovo's application for EU membership of December 2022, it can be expected that the 'light' pressure on the five Member States will continue to grow. This means that while the EU cannot make its Member States de jure recognise Kosovo, it can certainly force them into various situations where their de facto recognition is inevitable.

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THE IMPACT OF JUDGMENTS IN *SPAIN V COMMISSION (KOSOVO)* ON KOSOVO EU MEMBERSHIP

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Abstract: On 17 January 2023, the Court of Justice delivered its judgment in the Spain v Commission (Kosovo) case, ruling that despite the EU's non-recognition of Kosovo as a State, Kosovo may participate as a third country in an EU agency under the obligations laid down in Article 35(2) of the BEREC Regulation. The judgment is significant because it clarifies Kosovo's relations with the EU and, more specifically, the ability of Kosovo as a third country to participate in EU agencies. This article analyses the Court of Justice of the European Union judgments in Spain v Commission (Kosovo) and discusses the impact on the future accession of Kosovo to the EU. The paper argues that while these judgments have a positive effect on the consideration of Kosovo as a 'third country' in joining EU bodies and agencies, non-recognition of Kosovo as an independent State by five EU Member States is an obstacle to advancing further its prospects of European integration.

Keywords: General Court, Court of Justice, Kosovo, third country, third State, EU regulatory bodies, EU accession

1 Introduction

When Kosovo declared its independence on 17 February 2008, the EU intensified its relations with it. Firstly, the EU deployed a civilian operation (the EULEX mission) to assist the Kosovo authorities in the rule of law area, and provided the prospect of membership by acknowledging it as a candidate country. Then in 2012, the Commission launched a visa liberalisation dialogue with Kosovo and issued a feasibility study for a Stabilisation and Association Agreement (SAA), which entered into force on 1 April 2016.[1]

The SAA with Kosovo is the first contractual agreement between the EU and Kosovo. Moreover, the SAA with Kosovo represents a new phase of political relations between the two parties. As an association agreement,

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[1] Stabilisation and Association Agreement between the European Union and the European Atomic Energy Community, of the one part, and Kosovo*, of the other part [2016] L71/3 (SAA with Kosovo).

the SAA contains various cooperation provisions at different institutional levels between the EU and Kosovo, and pursues an EU integration agenda. One of the areas of cooperation is electronic communications networks and services. The main purpose of cooperation in this area is the adoption by Kosovo of the EU acquis, 'paying particular attention to ensuring and strengthening the independence of the relevant regulatory authorities'.[2]

In compliance with Article 111 of the SAA with Kosovo and goals set out in the Digital Agenda for the Western Balkans, on 18 March 2019 the Commission adopted a decision regarding the participation of the Office of the National Regulatory Authority of Kosovo in the Body of European Regulators for Electronic Communications (BEREC).[3] The decision was based on Article 35(2) of the BEREC Regulation, which requires that

> the Board of Regulators, the working groups and the Management Board shall be open to the participation of regulatory authorities of third countries with primary responsibility in the field of electronic communications, where those third countries have entered into agreements with the Union to that effect.[4]

In the Commission's view, the SAA fulfilled the cumulative conditions and an 'agreement to that effect', as required by Article 35(2) of the BEREC Regulation.

Pursuant to the Commission's decision allowing Kosovo to take part in BEREC as a third country, Spain, as one of the hard non-recognisers of Kosovo independence, challenged the validity of the decision before the General Court of the European Union (General Court) and then appealed the decision to the Court of Justice of the European Union (Court of Justice).

By adopting a doctrinal legal research methodology, this article analyses the Court of Justice of the European Union judgments in *Spain v Commission* (*Kosovo*) and discusses their impact on the future accession of Kosovo to the EU. In addition, the paper contains a reference to other Court of Justice of the European (CJEU) cases, international law, and secondary sources. The paper argues that while these judgments have a positive effect on the consideration of Kosovo as a third country in joining EU bodies and agencies, non-recognition of Kosovo as an independent State by five EU Member States is an obstacle to advancing further its prospects of European integration.

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2 SAA with Kosovo, Art 111.

3 Commission Decision of 18 March 2019 on the participation of the National Regulatory Authority of Kosovo in the Body of European Regulators for Electronic Communications [2019] OJ C 115.

4 Regulation (EU) 2018/1971 of the European Parliament and of the Council of 11 December 2018 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Agency for Support for BEREC (BEREC Office), amending Regulation (EU) 2015/2120 and repealing Regulation (EC) No 1211/2009 [2018] L 321/1 (the BEREC Regulation).

The paper consists of this introduction and four sections. The second section provides a short historical overview of Kosovo's independence and relations with the EU. The third and fourth sections discuss the judgments of the General Court and Court of Justice, focusing more on how the GC and CJEU treated the question of Kosovo's participation in an EU agency as a third country. The fifth section comments on and analyses the impact of the Court of Justice ruling on Kosovo and EU relations, particularly on Kosovo's accession to the EU.

2 Kosovo and EU relations – between engagement and (non-) recognition

On 17 February 2008, Kosovo declared its independence from Serbia. However, its recognition has remained contentious in the international community and among EU Member States.[5] The official website of the Ministry of Foreign Affairs claims that Kosovo has been recognised by 117 countries.[6] On the other hand, Serbia's diplomacy has been very aggressive on the issue of Kosovo's non-recognition, even announcing the withdrawal of recognition.[7] In the EU context, Kosovo is not recognised as an independent State by five EU Member States.[8] Spain, as a strong opponent of recognising Kosovo among the five States, brought an action before the CJEU for annulment of the Commission's decision allowing Kosovo to take part in BEREC as a third country. The four other EU Member States – Cyprus, Greece, Romania and Slovakia – did not support Spain in the proceedings.[9] In fact, three of these EU members, (Greece, Slovakia and Romania) have engaged to a certain extent with Kosovo.[10]

Despite the issue of its non-recognition as an independent State, the EU has strengthened cooperation with Kosovo. The EU deployed a civilian operation known as the European Union Rule of Law Mission in

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5 Marc Weller, *Contested Statehood: Kosovo's Struggle for Independence* (OUP 2009); James Ker-Lindsay, *Kosovo: The Path to Contested Statehood in the Balkans* (IB Tauris 2011).

6 Ministry of Foreign Affairs and Diaspora, 'List of Recognition' <https://mfa-ks.net/lista-e-njohjeve/> accessed 17 November 2023. The data on recognition of Kosovo are controversial, since some countries have announced their withdrawal of it, but it still appears on the official website.

7 Eugen Cakolli, 'Kosovo: Between Universal Non-recognition and "Derecognitions"' (KAS 2020); Agata Palickova, '15 Countries, and Counting, Revoke Recognition of Kosovo, Serbia Says' <https://www.euractiv.com/section/enlargement/news/15-countries-and-counting-revoke-recognition-of-kosovo-serbia-says/> accessed 17 November 2023.

8 Ioannis Armakolas and James Ker-Lindsay (eds), *The Politics of Recognition and Engagement: EU Member State Relations with Kosovo* (Palgrave Macmillan 2020).

9 Celia Challet and Pierre Bachelier, 'Can Kosovo Be Considered as a "Third country" in the Meaning of EU Law? Case note to *Spain v Commission*' [2021] Maastricht Journal of European and Comparative Law 339, 405.

10 Ioannis Armakolas, 'Greece: Kosovo's Most Engaged Non-recogniser' in Ioannis Armakolas and James Ker-Lindsay (n 8) 123-146; Milan Nič, 'Slovakia: Diplomatically Engaged with Kosovo, but no Recognition' in Ioannis Armakolas and James Ker-Lindsay (n 8) 147-171; Paul Ivan, 'Romania: Kosovo's Cautious Non-recogniser' in Ioannis Armakolas and James Ker-Lindsay (n 8) 173-192.

Kosovo (EULEX mission) within the framework of the Common Security and Defence Policy.[11] Operating under UNSC Resolution 1244,[12] the EULEX mission aims to assist the Kosovo authorities in the rule of law area, specifically in the areas of policing, justice and customs.[13]

Moreover, the EU has intensified its cooperation with Kosovo within the Stabilisation and Association Process.[14] Kosovo signed the SAA on 27 October 2015 and it entered into force on 1 April 2016.[15] The SAA with Kosovo was signed between the European Union and Kosovo. Unlike previous SAAs signed with other Western Balkan countries, where EU Member States were part of the agreement, in this case EU Member States are absent due to a lack of recognition by five Member States.[16] This position is acknowledged in Recital 17 of the SAA with Kosovo and reinforced in Article 2, which states that:

> None of the terms, wording or definitions used in this Agreement, including the Annexes and Protocols thereto, constitute recognition of Kosovo by the EU as an independent State nor does it constitute recognition by the individual Member States of Kosovo in that capacity where they have not taken such a step.

The SAA with Kosovo aims to establish a relationship with the EU based on reciprocity and mutual interest that allows Kosovo to further strengthen and extend its relations with the EU.[17] It covers wide areas that require Kosovo to harmonise its domestic law in line with the EU acquis. According to Article 74(1) of the SAA with Kosovo, Kosovo will endeavour to approximate its domestic legislation and ensure its proper implementation and enforcement. In addition to the conditions to be fulfilled by Kosovo, the SAA contains various cooperation provisions at different institutional levels between the EU and Kosovo, pursuing an EU integration agenda.

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[11] Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO [2008] OJ L 42/92.

[12] United Nation Security Council Resolution 1244 (S/RES/1244) 10 June 1999.

[13] Martina Spernbauer, 'EULEX Kosovo: The Difficult Deployment and Challenging Implementation of the Most Comprehensive Civilian EU Operation to Date' [2010] German Law Journal 769; Robert Muharremi, 'The European Union Rule of Law Mission in Kosovo (EULEX) from the Perspective of Kosovo Constitutional Law' [2010] ZaöRV 70, 357-379; Gentjan Skara, 'The Bumpy Road of EULEX as an Exporter of Rule of Law in Kosovo' [2017] Academicus - International scientific Journal 69.

[14] Commission, 'Stabilisation and Association Process' <https://neighbourhood-enlargement.ec.europa.eu/enlargement-policy/glossary/stabilisation-and-association-process_en#:~:text=The%20Stabilisation%20and%20Association%20Process,establishing%20a%20free%2Dtrade%20area> accessed 19 November 2023.

[15] SAA with Kosovo (n 1).

[16] Peter Van Elsuwege, 'Legal Creativity in EU External Relations: The Stabilization and Association Agreement Between the EU and Kosovo' [2017] European Foreign Affairs Review 394.

[17] SAA with Kosovo (n 1) Recital 2.

One of the SAA areas of cooperation with Kosovo is electronic communications networks and services. Article 111 of the SAA with Kosovo lays down rules that provide the obligation for Kosovo to strengthen its cooperation with the EU in this area. The final goal is the adoption by Kosovo of the EU acquis within five years of the entry into force of the SAA. Particular attention is given to ensuring and strengthening the independence of the relevant regulatory authorities.

After the development of the EU Digital Single Market, on 6 February 2018 the Commission launched the Digital Agenda for the Western Balkans.[18] The initiative intended to allow the Western Balkan countries to benefit from digital tools and to ensure prosperity for their citizens. A communication set out the main areas to be covered by the Digital Agenda for the Western Balkans. In the end, the Commission recommended certain actions to be taken to develop a digital society and for the domestic legislation of Western Balkan countries to be aligned with the EU acquis.

On 22 June 2018, the Commission issued a working document entitled Measures in Support of a Digital Agenda for the Western Balkans.[19] One of the actions was the incorporation of national regulatory bodies into existing regulatory ones or expert groups such as the Body of European Regulators for Electronic Communications (BEREC). Concerning the incorporation of national regulatory authorities into BEREC, the Commission stated that:

> a closer relationship between EU and Western Balkans NRAs will help bring regulatory practice in the region closer to the Union […]. While four out of six Western Balkan economies are currently observers of BEREC, the BEREC Board agreed to work more closely with all six NRAs of the region. This will still be possible under the revised BEREC Regulation.[20]

The revised BEREC Regulation was adopted on 11 December 2018.[21] The BEREC Regulation established the Body of European Regulators for Electronic Communications, which replaced and succeeded the Body of European Regulators for Electronic Communications established by Regulation (EC) No 1211/2009. As stipulated in Recital 5, the BEREC Regulation aims, inter alia, to contribute to the development and better functioning of the internal market for electronic communications networks and services. Article 35 of the BEREC Regulation provides the possibility for BEREC to cooperate with Union bodies, third countries and international organisations. According to Article 35(2) of the BEREC

[18] Commission, 'A credible enlargement perspective for and enhanced EU engagement with the Western Balkans' [2018] COM(2018) 65 final, 14.

[19] Commission, 'Measures in support of a Digital Agenda for the Western Balkans' [2018] Commission Staff Working Document SWD(2018) 360 final.

[20] ibid 16.

[21] BEREC Regulation (n 4).

Regulation, the Board of Regulators, working groups and Management Board are open to the national regulatory authorities of third countries that have an agreement with the EU.

As Kosovo had entered into an agreement with the EU, and in compliance with the goals set out in the Digital Agenda for the Western Balkans, on 18 March 2019 the Commission adopted a decision regarding the participation of Kosovo's national regulatory authority in BEREC.[22] Under Article 35(2) of the BEREC Regulation, the Board of Regulators, the working groups and the Management Board are open to the national regulatory authorities of third countries with primary responsibility in the field of electronic communications that 'have entered into agreements with the Union to that effect'. In the Commission's view, the SAA fulfilled the cumulative conditions and represented an 'agreement to that effect', as required by Article 35(2) of the BEREC Regulation. Following the Commission's decision to allow Kosovo to take part in BEREC, Spain, as one of the hard non-recognisers of Kosovo independence, pursuant to Article 263 TFEU,[23] challenged the validity of the decision before the General Court, and then appealed the decision to the Court of Justice.

3 Judgment of the General Court of the European Union (T-370/19) K Spain v Commission

In the judgment *Spain v Commission* of 23 September 2020,[24] the General Court decided on three issues. The first issue concerned whether Kosovo could be considered as a 'third country' in the light of the BEREC Regulation. The second issue questioned whether the SAA with Kosovo could be considered an 'agreement' as required by Article 35(2) of the BEREC Regulation. The third issue questioned whether the Commission had infringed Article 35 of the BEREC Regulation insofar as the Commission had departed from the established procedure for the participation of the NRAs of third countries in BEREC. These three questions are examined briefly below, with a particular focus on the first issue.

3.1 Kosovo as a 'third country' in the light of the BEREC Regulation

In the first plea, Spain argued that Kosovo is not legally a 'third country' and therefore, the necessary conditions for the NRA of Kosovo to participate in BEREC had not been met.[25] In Spain's view, Article 35(2) of the BEREC Regulation clearly states that only NRAs of 'third countries'

[22] Commission Decision of 18 March 2019 (n 3).

[23] Under Article 263 TFEU, the Court of Justice of the European Union reviews the legality of legislative acts of certain institutions, including Commission decisions that produce legal effects vis-à-vis third parties.

[24] Judgment of 23 September 2020, Case T-370/19 *Spain v Commission* ECLI:EU:T:2020:440, paras 21-26.

[25] ibid, paras 21-26.

are entitled to participate in BEREC. By allowing the NRA of Kosovo to join BEREC, the Commission had infringed Article 35 of the BEREC Regulation, since it had treated Kosovo as a 'third country'. Moreover, Spain argued that even though Kosovo had signed an association agreement with the EU, it still cannot be considered a 'third country' within the meaning of the BEREC Regulation, or treated as a candidate country. In supporting this argument, Spain referred to Article 2 of the SAA, which states that:

> None of the terms, wording or definitions used in this Agreement, including the Annexes and Protocols thereto, constitute recognition of Kosovo by the EU as an independent State nor does it constitute recognition by individual Member States of Kosovo in that capacity where they have not taken such a step.

In answering the first plea in law, the General Court examined the concept of 'third country' within the meaning of Article 35(2) of the BEREC Regulation and assessed whether 'third country' is equivalent to 'third State' as Spain claimed. As a first step, the General Court noted the lack of definition of 'third country' in EU primary and secondary law, including the BEREC Regulation.[26] The General Court emphasised that the TFEU uses both 'third countries' and 'third States'.[27] Furthermore, the General Court noted that a substantial number of TFEU provisions concerning EU external action use the term 'third countries' due to the fact that international society is made up of 'States' and entities 'other than States'.[28]

The General Court went on to argue that TFEU provisions relating to 'third countries' are clearly intended to pave the way for the conclusion of international agreements with entities 'other than States'. In light of this, the General Court held that the EU may conclude international agreements not only with States but also with territorial entities which have the capacity to conclude treaties under international law.[29] In supporting these findings where the EU has concluded a number of international agreements with entities other than sovereign States, the General Court referred to agreements concluded with the Palestine Liberation Organisation (PLO), the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, the Government of the Hong Kong Special Administrative Region of the People's Republic of China, and the Macao Special Administrative Region of the People's Republic of China. [30]

In the case of Kosovo, the General Court noted that the EU had entered into several international agreements with Kosovo, thus recognising Kosovo's capacity to conclude such agreements. The General Court

[26] ibid, para 28.

[27] ibid, para 29.

[28] ibid, paras 29-31; Part V of the TFEU.

[29] ibid, para 30.

[30] ibid, para 31.

acknowledged that two agreements signed by the EU and Kosovo are considered as international agreements, with Kosovo considered 'a third State'.[31] In the General Court's view, these contractual relationships concluded with Kosovo were legally possible 'only because the concept of "third country" referred to in those provisions of the TFEU could be construed broadly, thereby allowing the European Union to regard Kosovo as such'. [32]

In addition, the General Court acknowledged that recognising the capacity to conclude an agreement under Article 217 TFEU does not mean recognition of Kosovo by the European Union as an independent State. The General Court observed that the EU has not recognised Kosovo as a State by making reference to the 17th Recital and Article 2 of the Kosovo SAA, 'which make clear that that agreement does not constitute recognition of Kosovo by the European Union as an independent State or affect the individual positions of the Member States on its status'.[33]

In its conclusion on the first plea, the Court ruled that the concept of 'third country' within the meaning of Article 35(2) of the BEREC Regulation cannot be equated with that of 'third State', as the Kingdom of Spain had submitted. The General Court argued that the concept of 'third country' has a broader scope which goes beyond sovereign States alone. In supporting such a difference, the General Court emphasised that Kosovo, as a 'third country', may also have public authorities and is capable of joining the BEREC Regulation contrary to Spain's assertion that 'only a State can have an NRA'.[34] Thus, Kosovo is considered a 'third country' within the meaning of Article 35(2) of the BEREC Regulation and the Commission had not infringed that provision.

3.2 Infringement of Article 35 of the BEREC Regulation, as there is no 'agreement' to allow the NRA of Kosovo to participate in BEREC

In the second plea, Spain argued that the Commission had infringed Article 35(2) of the BEREC Regulation, since there was no 'agreement' to allow the NRA Kosovo to participate in BEREC. Spain considered that Article 111 of the SAA with Kosovo envisaged the strengthening of cooperation to enable Kosovo to adopt the EU acquis in the telecommunications sector. In Spain's view, Article 111 of the SAA with Kosovo did not provide for the participation of the NRA of Kosovo in BEREC.

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[31] SAA with Kosovo (n 1); Framework Agreement between the European Union and Kosovo (*1) on the general principles for the participation of Kosovo in Union programmes [2017] L 195/3.

[32] *Spain v Commission* (n 24) para 32.

[33] ibid, para 33.

[34] ibid, para 36.

To answer this plea, the General Court examined the scope of the concept of 'agreement with the Union to that effect', as stipulated in Article 35(2) of the BEREC Regulation, and whether Article 111 of SAA with Kosovo falls within that concept. Article 35(2) of the BEREC Regulation requires two conditions to be fulfilled: i) the existence of an 'agreement' between the third country and the EU, and ii) the agreement must have been entered into to that effect. Concerning these two issues, the General Court analysed the nature of the SAA and the object and purpose of Article 111, which seeks to harmonise Kosovo's domestic legislation with the EU acquis in the area of electronic communications and services. The General Court concluded that Article 111 of the SAA with Kosovo is an agreement 'to that effect', within the meaning of Article 35(2) of the BEREC Regulation.[35]

3.3 Infringement of Article 35 of the BEREC Regulation, as the Commission had departed from the established procedure by allowing the NRA of Kosovo to participate in BEREC

In its third plea, Spain submitted that the Commission had infringed Article 35(2) of the BEREC Regulation insofar as it had unilaterally established 'working arrangements' for the participation of the NRA of Kosovo in BEREC.

The General Court examined the procedure for determining working arrangements applying to the participation of NRAs of third countries in BEREC. Relying on Article 16 TEU and established case law, the General Court concluded that the Commission had the power to decide on the participation of the NRA of Kosovo in BEREC.[36]

4 The Court of Justice's judgment in Case C-632/20 *Spain v Commission* (*Kosovo*)

Again, the Kingdom of Spain appealed the case to the Court of Justice for it to: i) set aside the General Court judgment; ii) rule on the action for annulment and annul the decision at issue; iii) order the Commission to pay costs.[37] Spain's grounds of appeal were grouped under two main questions. The first question asked whether Article 35(2) of the BEREC Regulation, read together with Article 111 of the SAA with Kosovo, permits the participation of the NRA of Kosovo in the work of BEREC. The second question addressed whether the Commission enjoyed the institutional competence to adopt a decision allowing the NRA of Kosovo to participate in BEREC.

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[35] ibid, para 55.

[36] ibid, para 82.

[37] Judgment of 17 January 2023, Case C-632/20 P *Spain v Commission* ECLI:EU:C:2023:28, para 29.

Concerning the first question, the main grounds of appeal by Spain were as follows:

i) an error of law in the interpretation of the concept of 'third country';

ii) an error of law in the interpretation and application of Article 111 of the SAA with Kosovo, in conjunction with Article 35 of the BEREC Regulation, and

iii) an error of law in the interpretation of these provisions, since the cooperation precluded the NRA of Kosovo from participating in BEREC.

Spain maintained the position that the term 'third country', as used in the TFEU and in the BEREC Regulation, does not have a broader or different meaning from that of the term 'third State'. Furthermore, the Kingdom of Spain criticised the General Court's position of relying solely on the provisions of the TFEU relating to third countries.

Unlike the General Court, the Court of Justice did not uphold the distinction between 'third States' and 'third countries'. As a preliminary point, the Court of Justice made two observations. Firstly, the terms 'third country' and 'third State' have been used interchangeably in many provisions of the TEU and TFEU without making any explicit justification for the use of either term.[38] Secondly, the CJEU noted that in several different language versions of the EU Treaties, only the term 'third State' is used.[39] The Court of Justice criticised the General Court's conclusion that the provisions of the TFEU relating to 'third countries' pave the way for the conclusion of international agreements with entities 'other than States', 'without taking into account the differences between the language versions of the EU and FEU Treaties, the wording of which does not support the conclusion that there is a difference in meaning between the terms 'third country' and 'third State''.[40] In the Court of Justice's view, the provisions of EU law must be interpreted and applied uniformly in the light of the versions existing in all the languages of the European Union. In the case that there is any divergence between those various versions of the treaties, then the provision in question must be interpreted by reference to the general scheme and purpose of the rules of which it forms a part.[41]

The Court of Justice then analysed whether the term 'third countries', as stipulated in Article 35(2) of the BEREC Regulation, could en-

[38] *Spain v Commission* (n 37) para 39.

[39] ibid, para 44.

[40] ibid, para 44.

[41] ibid, para 42; Judgments of 26 January 2021, Joined Cases C422/19 and C423/19 *Hessischer Rundfunk* ECLI:EU:C:2021:63, para 65; Judgment of 14 July 2022, Joined Cases C59/18 and C182/18 *Italy and Comune di Milano v Council (Seat of the European Medicines Agency)* ECLI:EU:C:2022:567, para 67.

compass Kosovo. The Court found that for the purpose of ensuring the effectiveness of Union law, a territorial entity not recognised as a sovereign State should be treated as a 'third country' within the meaning of that provision 'while not infringing international law'.[42] The Court of Justice did not explain what the non-infringement of international law meant or take into consideration international law as in previous cases with contested statehood.[43] Instead, the Court of Justice relied on the ICJ Advisory Opinion, where the ICJ held that Kosovo's unilateral declaration of independence 'did not violate international law, UNSCR 1244/1999, or the applicable constitutional framework'.[44] The Court of Justice argued that this conclusion does not affect the individual positions of the EU Member States that do not recognise the independence of Kosovo. The Court of Justice went on to argue that the Commission's decision concerning the participation of the NRA of Kosovo in BEREC expressly states that the designation 'Kosovo' is without prejudice to positions on status, as the first footnote to the decision indicates.[45] The same approach has been asserted in the 17th Recital and in Article 2 of the SAA with Kosovo. By this assertion, the EU remains officially neutral on the international legal status of Kosovo. Nevertheless, it remains unclear why the Court of Justice supported its arguments citing the ICJ advisory Opinion, which does not discuss the issue of Kosovo's statehood.

Concerning the issue of integration of third countries, specifically the NRA of Kosovo, into the BEREC scheme, Article 35(2) of the BEREC Regulation stipulates that participation in the BEREC agency requires the existence of two cumulative conditions: i) the existence of an 'agreement' entered into with the European Union and ii) the fact that the agreement was entered into 'to that effect'.[46] In the same vein as the General Court, the Court of Justice noted the fact that the Union has entered into several international agreements with Kosovo, 'thus recognizing its capacity to conclude such agreements'.[47] Article 111 of the SAA with Kosovo provides for cooperation between the EU and Kosovo in the area of electronic communications. This is consistent with the objective of cooperation with third-country NRAs pursued by Article 35(2) of the BEREC Regulation.[48] In the Court of Justice's view, Article 111 of the SAA with Kosovo is suf-

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[42] *Spain v Commission* (n 37) para 50. To this effect, the Court of Justice referred to the established case law in its Judgment of 24 November 1992, Case C286/90 *Poulsen and Diva Navigation* ECLI:EU:C:1992:453, para 9; Judgment of 5 April 2022, Case C161/20 *Commission v Council (International Maritime Organisation)* ECLI:EU:C:2022:260, para 32.

[43] Judgment of 29 September 2021, Case T-279/19 *Front Polisario v Council* ECLI:EU:T:2021:639; Judgment of 25 February 2010, Case C-386/08 *Brita GmbH v Hauptzallamt Hamburg-Hafen* ECLI:EU:C:2010:91.

[44] *Spain v Commission* (n 37) para 51.

[45] ibid, paras 52 and 66.

[46] ibid, para 54.

[47] ibid, para 55.

[48] ibid, para 70.

ficient for NRAs to participate in BEREC[49] and Kosovo can adopt the EU acquis in that field.[50] In the light of the abovementioned argument, the Court of Justice concluded that Kosovo was to be treated as a third country, within the meaning of Article 35(2) of Regulation 2018/1971 and the Commission had not infringed that provision.[51]

In relation to the second question, the Kingdom of Spain relied on two grounds of appeal as follows:

> i) an error of law in the interpretation of those provisions, insofar as the cooperation referred to does not include participation in BEREC; and
>
> ii) an error of law insofar as the judgment under appeal concluded that Article 17 TEU constituted a valid legal basis for adopting the decision at issue.

The Court of Justice found that the Commission lacked the institutional competence to unilaterally draw up working arrangements to allow the participation of the NRA of Kosovo in the work of BEREC. The Court of Justice set the judgment under appeal aside and annulled the relevant decision while maintaining its effects until its replacement by a new act.[52]

5 Effects of the Court of Justice ruling on Kosovo and EU relations

This case provides an interesting contribution to EU external relations, as the Court of Justice ruled on the distinction between 'country' and 'State'. As noted above, there is a difference in understanding and interpreting the notion of 'third country' between the General Court and the Court of Justice. The General Court interpreted the notion of 'third country' in a broader sense. This is clear from the General Court conclusion noting that the international community is not made up of States alone, and should the TFEU allow international agreements to be concluded only with States, this would lead to a legal vacuum in the EU's external relations.[53] The General Court highlighted that the TFEU provisions relating to third countries are clearly intended to pave the way for the conclusion of international agreements with entities other than States. In this regard, the EU does not exclusively enter into international agreements with States but, within the flexible concept of 'country', can do so with other territorial entities having the capacity to conclude trea-

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[49] ibid, paras 56-59.

[50] ibid, para 63.

[51] ibid, para 64.

[52] ibid, paras 96-140.

[53] Kushtrim Istrefi, 'The Luxembourg Court Rules on the Difference between States and Countries as International Law Actors' (2020) EJIL: Talk! <https://www.ejiltalk.org/the-luxembourg-court-rules-on-the-difference-between-states-and-countries-as-international-law-actors/> accessed 18 November 2023; *Spain v Commission* (n 24) para 30.

ties under international law.[54]

On the other hand, the Court of Justice rejected the broad interpretation of the General Court, since the terms 'third country' and 'third State' are used interchangeably in many EU and TFEU provisions 'without there appearing to be any particular justification for the use of either term'.[55] The Court of Justice maintained the position that 'third country' and 'third State' are the same for the purpose of EU legislation dealing with external relations. This conclusion is very important for the EU legal system, as it avoided the creation of an artificial separation between 'third country' and 'third State'.[56] Unlike the ICJ decision, which has no binding force except between the States in dispute,[57] the CJEU is uniformly interpreted and applicable in all EU Member States.

This case also provides an interesting contribution to future relations between Kosovo and the EU. The Court of Justice confirmed the interchangeability of the terms 'third country' and 'third State' in the Treaty. In the Court of Justice's reasoning, if a country is a State, then Kosovo should be treated as a State. However, to avoid such a paradox,[58] the Court of Justice reassured the EU Member States that '[the] treatment of Kosovo as a third country does not affect the individual positions of the Member States as to whether Kosovo has the status of an independent State'.[59] In other words, the Court of Justice notes that Kosovo might be considered as a country within the BEREC Regulation, but this does not mean that it is automatically recognised as a State in the sense of international law.[60] In coming to this conclusion, the Court of Justice

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54 *Spain v Commission* (n 24) para 30.

55 *Spain v Commission* (n 37) para 39.

56 Carlos Santaló Goris, 'C-632/20 *P, Spain v Commission*: What is Kosovo for the EU? A Third Country? A Third State? Aren't Both Concepts the Same?' (2023) European Institute of Public Administration <https://www.eipa.eu/blog/op-ed-c-632-20-p-spain-v-commission-what-is-kosovo-for-the-eu-a-third-country-a-third-state-arent-both-concepts-the-same/#> accessed 18 November 2023.

57 ICJ, 'Statute of the International Court of Justice', Art 59.

58 Giulio Fedele, 'A Country, but not a State? The Apparent Paradox of International Statehood in Case C-632/20 P, Spain v Commission (Kosovo)' [2023] European Papers 537, 542; Kushtrim Istrefi, 'Kosovo is a Country, and a Country Means a State, Rules the Court of Justice of the European Union' (2023) EJIL: Talk! <https://www.ejiltalk.org/kosovo-is-a-country-and-a-country-means-a-state-rules-the-court-of-justice-of-the-european-union/> accessed 18 November 2023; Avdylkader Mucaj and Shefki Shterbani, 'CJEU Rules that There is no Difference between the Notion of a Third Country and a State in EU Law' [2023] European Public Law 275.

59 *Spain v Commission* (n 24) para 52.

60 AG Kokott made clear that the contested decision does not recognise Kosovo as a State. In supporting her conclusions, AG Kokott observed that the Decision of the Commission contains two footnotes stating that the designation is 'without prejudice to positions on status, and is in line with UNSCR 1244/1999 and the ICJ Opinion on the Kosovo declaration of independence'. These two footnotes correspond in essence with Recital 17 of the SAA and Article 2 of the SAA. Spain v Commission (n 37) Opinion of AG Kokott ECLI:EU:C:2022:473, para. 38.

referred to the ICJ advisory opinion on Kosovo[61] and particularly to the SAA provisions, Recital 17 and Article 2 of the Kosovo SAA respectively, which clearly state this position.[62]

The non-recognition of Kosovo as a 'State' by five EU Member States raises further questions concerning the future accession of Kosovo to the EU. On 15 December 2022, Kosovo's Prime Minister Albin Kurti submitted a bid for Kosovo to join the European Union.[63] According to Article 49 of the TEU, any European State which respects certain values that are common to EU Member States and promotes them may apply to become a member of the Union. Article 49 TEU requires three conditions for candidate countries to be fulfilled: i) being a European State; ii) respecting and promoting values in Article 2 TEU; and iii) conditions of eligibility agreed upon by the European Council (known as the Copenhagen Criteria). While the concept of 'European' generally combines geographical, historical and cultural elements which all contribute to a European identity,[64] Article 49(1) allows only States to apply for membership. The Lisbon Treaty does not define what constitutes a State or whether recognition by other Member States is necessary to join the EU. Scholars argue that the concept of the 'State' is one that is in line with international

[61] ICJ, 'Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion' [2010] ICJ Reports 2010. In this advisory opinion, the ICJ ruled that the declaration of independence of Kosovo adopted on 17 February 2008 did not violate international law. Kassoti argues that 'The ICJ merely gave an affirmative answer to the considerably narrower question of the accordance of Kosovo's unilateral declaration of independence with international law – without touching upon questions of Statehood or recognition'. Kassoti argues that it is unclear why the Court of Justice relied on this case to support its argument and 'did not really invoke relevant international legal practice'. Eva Kassoti, 'Of Third "States", "Countries" and Other Demons – The CJEU's Judgment in Case C-632/20 P *Spain v Commission (Kosovo)*' (2023) EU Law Analysis <http://eulawanalysis.blogspot.com/2023/02/of-third-states-countries-and-other.html> accessed 18 November 2023.

[62] Recital 17 of the SAA with Kosovo reads 'Noting that this Agreement is without prejudice to positions on status, and is in line with UNSCR 1244/1999 and the ICJ Opinion on the Kosovo declaration of independence'. While Article 2 of the SAA with Kosovo reads as follows: 'None of the terms, wording or definitions used in this Agreement, including the Annexes and Protocols thereto, constitute recognition of Kosovo by the EU as an independent State nor does it constitute recognition by individual Member States of Kosovo in that capacity where they have not taken such a step'.

[63] Reuters, 'Kosovo formally applies to join EU' (15 December 2022) <https://www.reuters.com/world/europe/kosovo-submits-eu-membership-application-2022-12-15/> accessed 19 November 2023.

[64] Commission, 'Enlargement Strategy and Main Challenges 2006 – 2007, including annexed special report on the EU's capacity to integrate new members' (Communication) COM (2006) 649 final, 18; Dimitry Kochenov, 'EU Enlargement Law: History and Recent Development: Treaty – Custom Concubinage?' [2005] European Integration Online Papers <http://eiop.or.at/eiop/pdf/2005-006.pdf> accessed 19 November 2023, 10.

law.[65] According to the Montevideo Convention, a State is usually defined in international law as an entity with 'a permanent population; a defined territory; and a capacity to enter into relations with other States'.[66]

In the case of Kosovo, the statehood condition is not fulfilled because five EU Member States have not recognised Kosovo as an independent State. The Court of Justice recognised Kosovo as a 'third country' but did not acknowledge the recognition of Kosovo as an independent State by the EU and by individual EU Member States.[67] Without the five EU Member States' recognition, even though the EU has signed an SAA with Kosovo, there is no possibility of becoming a member of the EU because a decision in enlargement policy must be unanimous.[68] One of the main reasons why the SAA with Kosovo was not signed by the EU Member States as a mixed agreement was the fear of veto by the five EU Member States.[69]

6 Conclusion

This case provides an interesting contribution from the perspective of EU external relations. Firstly, it is the first case pronouncing the differences between a State and a country. Unlike the General Court, which interpreted in a broader sense the notion of a 'third country', the Court of Justice ruled that the terms 'third country' and 'third State' are used interchangeably in many EU and TFEU provisions without any distinction in their use.[70] Consequently, the Court of Justice held that such a distinction does not exist as a matter of EU primary and secondary law. In the Court of Justice's view, 'third country' and 'third State' are the same for the purpose of EU legislation dealing with external relations.

However, in analysing the case of Kosovo, the Court of Justice was careful not to acknowledge the recognition of Kosovo as an independent State. The Court of Justice ruled that Kosovo is considered a 'third country' within the meaning of Article 35(2) of the BEREC Regulation, though it is not recognised as an independent State. To support this argument, the Court of Justice referred to the ICJ advisory opinion and Recital 17

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[65] Dimitry Kochenov, *EU Enlargement and the Failure of Conditionality. Pre-accession Conditionality in the Fields of Democracy and the Rule of Law* (Kluwer Law International 2008) 24; Friedrich Erlbacher, 'Article 49' in Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (OUP 2019) 311-318; Susanna Fortunato, 'Article 49' in Hermann-Josef Blanke and Stelio Mangiameli (eds), *The Treaty on European Union (TEU): A Commentary* (Springer 2013) 1359.

[66] Montevideo Convention on Rights and Duties of States (1933) <https://www.ilsa.org/Jessup/Jessup15/Montevideo%20Convention.pdf> accessed 18 November 2023.

[67] Istrefi (n 53).

[68] According to Article 49(1), an applicant State addresses its application to the Council, which acts unanimously after consulting the Commission and receiving the consent of the European Parliament.

[69] Van Elsuwege (n 16) 394.

[70] *Spain v Commission* (n 37) para 39.

and Article 2 of the SAA with Kosovo. In conclusion, while this case has significance for the NRA of Kosovo participating in BEREC, its implication for Kosovo's future accession remains open due to the issue of whether Kosovo constitutes a State as required by Article 49 TEU.

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THE ROLE OF THE EUROPEAN COUNCIL IN THE EU-TURKEY STATEMENT: DRIVEN BY INTERESTS

Havva Yesil*

Abstract: The core principle of intergovernmentalism has always been that the decisions and actions of EU Member States drive European integration. The EU's normative decision-making process is centred on supranational mechanisms. This leads to a confrontation between new intergovernmentalism and supranationalism. The 2015 refugee crisis demonstrated that domestic concerns significantly influenced EU integration. Therefore, this article examines the power of the European Council in the conclusion of the EU-Turkey Statement (2016), which is pertinent to the continuing discussion on the function of the European Council in the context of the increasing new intergovernmentalism of the EU.

Keywords: EU migration law, European Council, EU-Turkey Statement, Syrian refugee crisis, new intergovernmentalism, migration governance

1 Introduction

The uprisings of the Arab Spring in 2010 and the conflict in Syria caused millions of people to seek sanctuary in Europe, often using irregular migration means to achieve this. Once the refugee crisis turned into a significant crisis for the EU in 2015, the EU common migration policy problems and the differences in the migration policies of Member States began to come to the fore. European countries responded to migration flows at national, regional, and sometimes international levels. This approach has played a role in constructing a common migration policy and in debate on the integration of Europe. Moreover, when the EU built the common migration policy at the EU level, there was a discussion regarding which institution holds more power in Brussels among the quadrangle of the European Commission (EC), the European Parliament (EP), the European Council (EUCO), and the Council.[1]

The basic assumption of intergovernmentalism has been that EU Member States' decisions and actions shape European integration. The normative decision-making process of the EU focuses on supranation-

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DOI: 10.3935/cyelp.19.2023.534.

[1] Daniel Thym and Kay Hailbronner, 'Legal Framework for EU Asylum Policy' in Kay Hailbronner and Daniel Thym (eds), *EU Immigration and Asylum Law*. (Commentary, 2nd edn, CH Beck/Hart/Nomos 2016).

al procedures. This creates tension between new-intergovernmentalism and supranationalism. Creating consistent solutions to crises has always been a difficult task for the EU. However, the 2015 refugee crisis showed that domestic interests weighed heavily on EU integration. Therefore, this paper investigates whether the EUCO had the authority to conclude the EU-Turkey Statement (2016) (hereinafter: Statement), which is relevant to the ongoing debate about what role the EUCO played in the context of emerging intergovernmentalism in the EU. In order to build a strong background of the rising power of EUCO, this research focuses on the new-intergovernmentalism in political science.

This paper is organised as follows. In section 2, I review the political science literature on new intergovernmentalism in order to sketch the context within which the EU Member States responded to the Syrian refugee crisis. After outlining the concept of new intergovernmentalism, in section 3 I explain the role of the EUCO both as a driving force behind the EU's decision-making process, and in changing the governance of the EU. Having a general framework of new intergovernmentalism and the role of EUCO, in section 4 I explain how new intergovernmentalism played out during the refugee crisis. Then, section 5 analyses how the EUCO reached a deal with Turkey in light of discussions in the literature and cases from the CJEU. To conclude, in section 6, the main findings of this research will be summarised. Drawing on the explanation that the rising power of the EUCO serves individual Member States' interests, and, in light of the literature and cases, this article concludes that Member States used the EUCO to conclude the Statement while simultaneously seeking to achieve their national demands.

2 Key concept: new intergovernmentalism in literature

The EU Member States' priorities regarding the Syrian refugee crisis and their effects on the EU's decision-making system entail a further analysis of new intergovernmentalism and political science debates within the Union. In this section, I will analyse various scholars' approaches to the new intergovernmentalism theory.

The theory of new intergovernmentalism regards as paramount the decisions and actions of European Member States in European integration. This theory is based on the concept of interest inherent in the States. It also aims to balance between the intergovernmental and supranational actors within the EU. Compared to traditional intergovernmentalism, this entails a significant increase in joint authority and control at the EU level, which was previously believed impossible. It emphasises the importance of gathering Member States under a single roof. Intergovernmentalism draws attention to the importance of interstate bargaining in the integration process. The theory focuses on the nation State, aiming to

improve its own conditions and then protecting its national interests.[2] In this respect, common arrangements exist as long as they serve the State's interest as a dependent variable. While the Member States' interests and priorities were shaped in accordance with national sovereignty, the extent of the influence of European integration remains insufficiently evaluated. Despite the fact that the proponents of the intergovernmentalist method do not make the problem of legitimacy the central focus of discussions on integration, they discuss the legitimacy of the Union as it coincides with the interests of the Member States.

In the 1980s, when European integration focused on the internal market, supranationalism and intergovernmentalism were the dominant theories of European integration. Interstate negotiations that cannot be isolated from external factors are accepted as a critique of the intergovernmental theory. Therefore, the theory of liberal intergovernmentalism developed by Andrew Moravcsik appears as a more comprehensive study to explain the period of the 1990s.[3] Liberal intergovernmentalism claims that the enlargement process results from negotiations and unanimous decisions between governments acting with rational choices. Moravcsik uses the liberal approach to explain domestic preferences regarding economic interests.[4] Liberal intergovernmentalism is composed of national preferences, intergovernmental bargaining, and the role of EU institutions. In his article, he includes his criticisms of neo-functionalism.[5] His rational theory explains that Member States and/or governments focus on cooperation at the EU level to protect their interests.

Moravcsik's theory successfully explains the critical steps in integration regarding certain significant points, namely 'economic interest, relative power, credible commitments'.[6] He mostly defends European integration as a series of rational responses by national leaders to limits and opportunities caused by the rise of an interdependent world economy (economic interest). Some authors argue that the theory inadequately addresses the issue of how domestic preferences form at the EU level. Forster argues that liberal intergovernmentalism neither separates the States nor clarifies governments' motivations in intergovernmental bargaining.[7] Schimmelfennig considers liberal intergovernmentalism as a version of the 'rationalist institutionalism' approach explicitly used to explain European integration. According to him, the theoretical foundations

[2] Andrew Moravcsik, 'Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach' (1993) 31(4) Journal of Common Market Studies 473.

[3] Andrew Moravcsik, 'Negotiating the Single European Act: National Interests and Conventional Statecraft in the European Community' (1991) 45 International Organization 19.

[4] ibid.

[5] Andrew Moravcsik, 'Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach' (1993) 31(4) Journal of Common Market Studies 473.

[6] Craig Parsons, 'Review of the Choice for Europe: Social Purpose and State Power from Messina to Maastricht, by A Moravcsik' (1999) 17(1) French Politics and Society 74–78.

[7] Anthony Forster, 'Britain and the Negotiation of the Maastricht Treaty: A Critique of Liberal Intergovernmentalism' (2002) 36(3) Journal of Common Market Studies 347.

of rationalist institutionalism align harmoniously with the fundamental tenets of liberal intergovernmentalism. Therefore, the theory can be analysed from the perspective of international relations in the same way as Moravcsik's studies emphasised the European Community's international dimension.[8]

Nevertheless, a new form of intergovernmentalism has gradually emerged since the Maastricht era. In the 2010s, Puetter et al introduced a new intergovernmental approach to explain European integration in times of crisis.[9] 'New intergovernmentalism' refers to the domination of the EUCO in the decision-making process in the EU. The new engagement of Member States has diminished 'traditional' supranationalism which envisages an increase in the power of supranational actors such as the EC and the European Court of Justice in hierarchical actions.[10] They define new intergovernmentalism as the rise of the EUCO's decision-making role. The claims regarding new intergovernmentalism show that the Member States have taken the lead in governing the EU.[11] The new intergovernmentalists criticise the traditional intergovernmentalist approach as always focusing primarily on power in the decision-making process. Traditional intergovernmentalists followed the path, assuming the process was concerned with the desire for power, whether through profit bargaining in the Council or budget maximisation for the bureaucracy as Schmidt emphasises in her research.[12]

Puetter grounds his approach to new-intergovernmentalism on 'deliberation and consensus'.[13] New intergovernmentalism advocates the guidance of deliberation and consensus in EU decision-making. He explains deliberative intergovernmentalism in the institutional change of the EUCO as mainly driven by consensus actions. In the new form of the EUCO under new intergovernmentalism, EUCO became an executive actor dealing with mid- and long-term decision-making and intergovernmental-based executive decisions. Puetter's analysis of new intergovernmentalism provides a comprehensive argument to explain the leading

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[8] Andrew Moravcsik and Frank Schimmelfennig, 'Liberal Intergovernmentalism' in Antje Wiener, Tanja A Börzel and Tomas Risse (eds), *European Integration Theory* (3rd edn, OUP 2009).

[9] Uwe Puetter, Dermot Hodson and Christopher J Bickerton, *New Intergovernmentalism: States and Supranational Actors in the Post-Maastricht Era* (OUP 2015).

[10] Sweet Alec Stone & Sandholtz Wayne, 'European Integration and Supranational Governance' (1997) 4(3) Journal of European Public Policy297.

[11] Sergio Fabbrini, *Which European Union? Europe after the Euro Crisis* (CUP 2015). Uwe Puetter, Dermot Hodson and Christopher J Bickerton, *New Intergovernmentalism: States and Supranational Actors in the Post-Maastricht Era* (OUP 2015).

[12] Vivien A Schmidt, 'The "New" EU Governance: "New" Intergovernmentalism Versus "New" Supranationalism Plus 'New' Parliamentarism' (2016) 5(5) Les Cahiers du Cevipol <www.cairn.info/revue-les-cahiers-du-cevipol-2016-5-page-5.htm> accessed 25 March 2022.

[13] Uwe Puetter, 'The Centrality of Consensus and Deliberation in Contemporary EU Politics and the New Intergovernmentalism' (2016) 38(5) Journal of European Integration 601, <http://dx.doi.org/10.1080/07036337.2016.1179293> accessed 28 November 2021.

role of institutional reforms during the euro crisis[14] which led to a political crisis within the EU. The countries that easily survived the crisis did not want to help the debt-ridden Member States. Hence, the countries affected by the crisis felt alone in and excluded from the Union.[15] The EUCO predominantly focused on reaching consensus in policy deliberation during the main discussion on the euro crisis. It effectively managed the crisis in cooperation with the Eurogroup. The crisis shows how the preferences of Member States and/or governments were shaped in accordance with their financial interests and Europe's legitimacy concerns. Accordingly, during the euro crisis, the EUCO took the role of ultimate decision-maker. As a result, Puetter sees new intergovernmentalism as a helpful concept with deliberative and consensus tools for dealing with the crisis under the current institutional framework.[16]

In the meantime, Hodson has made significant contributions to the concept regarding the euro crisis and to Puetter's claims on new intergovernmentalism.[17] He clarified three aspects of new intergovernmentalism in the euro crisis. First, governments responded to the challenge of managing the crisis in line with their commercial benefits. Second, the institutional preferences of Member States proved the significance of deliberation and consensus via the EUCO and *de novo* bodies. For example, the European Central Bank (ECB) and the permanent European Stability Mechanism (ESM) were empowered. Lastly, the crisis also proved the EC's scepticism about the Union's integration. The Commission became a supranational institution reluctant to take charge of dealing with the crisis rather than having the role of maximising competence.[18] Therefore, new intergovernmentalism argues that European integration has consolidated the delegation of new powers to the EUCO without traditional supranationalism.

3 The European Council: the driving force of new intergovernmentalism

The EUCO is the most intergovernmental EU organ, comprising top political leaders of Member States. It is responsible for defining the 'EU's overall political direction and priorities'.[19] Since it is not a legislative institution of the EU, it calibrates the EU's policy agenda in accordance with

[14] ibid.

[15] Benjamin M Friedman, 'The Pathology of Europe's Debt' (2014) 61 The New York Review of Books.

[16] ibid.

[17] Dermot Hodson, 'The New Intergovernmentalism and the Euro Crisis: A Painful Case?' [2019] SSRN Electronic Journal <http://dx.doi.org/10.2139/ssrn.3412326> accessed 28 November 2021.

[18] ibid.

[19] European Council <www.consilium.europa.eu/en/european-council/> accessed 1 October 2021.

the identified matters and required actions.[20] After the Maastricht Treaty, the EUCO supported the EU's enlargement policy. Hence, it extended the decision-making areas under the Community method and new intergovernmentalism.[21] Jean Claude Piris, who was Director General of the Council Legal Service, explained the empowerment of the EUCO and its rising efficacy as an outcome of not only the legal measures but also political reality.[22] As European integration progressed, the EUCO, which met for the first time on 11 March 1975 in Dublin, steadily increased the frequency of its sessions. Then, the importance of the EUCO began to be more widely recognised. Although the EUCO lacked official powers or even existence under the EU Treaties, a body comprising all heads of State/government clearly has enormous authority and influence.[23]

The EUCO's primary role is to map out the EU's overall direction and give political leadership in order to achieve it. It was not anticipated that the EUCO would play a direct role in legislative decision-making. It is expressly stated in Article 15(1) TEU that it 'shall not exercise legislative functions'.[24] Though not directly participating in legislation, it has a significant impact on legislative and policy development. The EC generally has strong motivation to collaborate with the EUCO when it comes to dealing with crises. As these crises are politically sensitive issues, they must be handled at the highest political level possible – that is, by the heads of State and government as part of the intergovernmental EUCO. Consequently, the EU's activities are expanding, and so is its informal authority to carry out these extra duties.

On the other hand, the EUCO has an influence on determining the content of legislation under Article 31(2) TEU. Although the EUCO is not involved in the day-to-day functioning of the Council, it is frequently consulted on contentious issues. The Council can request the EUCO to make a decision by unanimously approving it.[25] A decade after the Lisbon Treaty came into effect, the EUCO has solidified its place as the EU's most important institutional body. When we look at the euro crisis, Europe faced the most serious threat to its economic stability since the foundation of the EEC. It prompted several of the political, legal, and institutional reactions within the Union. The financial upheaval in the United States and Europe in 2007 showed that the EU lacked the 'firepower' to deal with a

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[20] European Council, Council of the European Union, 'European Council' <www.consilium.europa.eu/en/european-council/#> accessed 18 October 2021.

[21] Uwe Puetter, Dermot Hodson and Christopher J Bickerton, *New Intergovernmentalism: States and Supranational Actors in the Post-Maastricht Era* (OUP 2015).

[22] Jean-Claude Piris, *Lisbon Treaty: A Legal and Political Analysis* (CUP 2010) 208.

[23] Armin Cuyvers, 'The Institutional Framework of the EU' in *East African Community Law* (Nijhoff 2017).

[24] ibid.

[25] Article 31 TEU.

huge sovereign debt crisis.[26] When Greece's debts were due to default in 2009, the crisis had officially begun. After Greece, the threat of sovereign debt defaults from Portugal, Italy, Ireland, and Spain grew to the point that they could no longer be ignored. Germany and France, the EU's two most (economically) powerful members, did tremendous work to aid these Member States.[27]

The heads of Member States/governments recognised that further reforms would eventually be required to resolve the euro crisis, and that they would be unable to manage this process themselves. Therefore, the EUCO took on the leadership position of crisis management in addition to its many other responsibilities. When the first Greek bailout package was agreed at a meeting in March 2010, a statement of heads of States and/or governments gave the new EUCO president the authority to establish a taskforce to study long-term adjustments of the European Monetary Union.[28] The EU heads of government developed a strong sense of commitment in the crisis by working together through the EUCO. Euro summits, where the Euro area heads met frequently to respond to the financial crisis, provided a critical forum for its members to formulate responses to the extraordinary volatility and major issues confronting the continent.[29] When considering the EUCO's complex and nuanced performance in the Eurozone crisis, there is no doubt that the heads of State or government played a major role in shaping a resolution to the crisis. The heads of State undertook the crisis management responsibilities on their own, even though this was not their official function under the Treaty.

Since the beginning of the Euro crisis and the subsequent responses to it, scholars have adopted various perspectives on EUCO domination. Most of these observers have reflected on the intergovernmental orientation of the EUCO. One starting point for an analysis of the rising power of the EUCO involves reviewing the literature on the subject.

According to Puetter, the EUCO has acquired the leading role in policy-making processes, and meetings with the heads of Member States are at the heart of this process.[30] He also discusses the extent to which the EUCO has been relying on the legislative structure of the EU during the exercise of its leadership role. He considers the rising power of the EUCO as linked with the EU's activity in new areas such as the Common Foreign and Security Policy (CFSP). The EUCO has not only transformed

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[26] Paul Craig, 'The Financial Crisis, the European Union Institutional Order, and Constitutional Responsibility' (2015) 22(2) Indiana Journal of Global Legal Studies 257.

[27] Mark Dawson and Floris de Witte, 'Constitutional Balance in the EU after the Euro-Crisis' (2013) 76(5) Common Market Law Review 817.

[28] Statements by the Heads of State and Government of the Euro Area, Brussels 25 March 2010.

[29] General Secretariat of the Council, *Rules for the Organisation of the Proceedings of the Euro Summits*, 2013, (Publications Office of the European Union).

[30] Uwe Puetter, *The European Council and the Council: New Intergovernmentalism and Institutional Change* (OUP 2014).

into an institution from a forum for the purpose of creating consensus on the integration process, but it has also evolved into a focal point for decision-making with direct intervention in EU governance.[31] Puetter criticises the ongoing proliferation of *de novo* bodies, which he views as another result of the EUCO's rising power. There is no doubt that the EUCO objectifies its idiosyncratic way of decision-making due to continuing works and actions to build a common policy.[32]

Federico Fabbrini analyses the EUCO's role under the domination of big powers among the Member States. He sees the rise of the EUCO as problematic since the big players are taking a commanding role in the decision-making process, particularly the EU's economic governance.[33] Indeed, the EUCO has been transformed into a role with a powerful presidency, dominated by major countries such as Germany. Thus, the presidency may obtain a freestanding position in order to perform in line with the Member States' preferences.[34] In this way, as Fabbrini observes, permanent leadership under the Member States' political direction significantly increases the EUCO's influence in the policy-making process and legitimacy roles within the EU structure.

In addition, as a political powerhouse, the EUCO is fuelled by the power of the participating leaders at home and by the dynamic nature of their informal meetings. The Lisbon innovation of a stable president plays a crucial part in this power transmission. With no executive powers, and 'no fiscal responsibilities', the role of the President of the EUCO is to facilitate collaborative decision making.[35] Kelemen explains this point: 'member countries were eager to establish a permanent President of the EUCO, in part because they wished to prevent the President of the EC from becoming the EU's de facto leader on the international arena'.[36] For this reason, the President of the Council, who was to be directly connected to the Member States, would assume an intergovernmental form of leadership, as an alternative source of EU leadership.

In order to clarify the EUCO's political leadership responsibilities, Beach and Smeets designed a new institutionalist leadership (NIL) mod-

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[31] Uwe Puetter, 'The European Council the Centre of New Intergovernmentalism' in Christopher J Bickerton, Dermot Hodson and Uwe Puetter (eds), *The New Intergovernmentalism: States and Supranational Actors in the Post-Maastricht Era* OUP 2015).

[32] ibid.

[33] Federico Fabbrini, 'Austerity, the European Council, and the Institutional Future of the European Union: A Proposal to Strengthen the Presidency of the European Council' (2015) 22(2) Indiana Journal of Global Legal Studies.

[34] ibid.

[35] European Council, Council of the European Union, 'The President's Role' <www.consilium.europa.eu/en/european-council/president/role/> accessed 20 October 2021.

[36] R Daniel Kelemen, 'The Impact of the Lisbon Treaty: From Misdiagnosis to Ineffective Treatment' in Anna Södersten (ed), *The Lisbon Treaty 10 Years On: Success or Failure?* (Swedish Institute for European Policy Studies 2019).

el[37] which stressed that the EUCO is seen as a control room, shaping the broad boundaries of agreements. They also list the duties of EUCO's political leadership, including agenda setting, providing political momentum, and brokering to ensure agreement on the final settlement. Even so, while the EUCO cannot discuss major EU reforms under Article 15 TEU, scholars describe the current EU law-making process as a machine room that includes the Council (ministerial – ambassador and specialists), the Council Secretariat, and the EC (and sometimes the EP).[38] Formal reform procedures were never substantially addressed when the euro crisis arose. Instead, significant reforms were implemented via informal procedures. Because of the sensitive nature of the issues and the way in which the solutions were implemented, the heads of States and governments in the control room closely monitored the negotiations. A new institutional framework was therefore avoided by using existing EU law-making procedures, albeit in a EUCO-dominated format that relied heavily on informal collaboration amongst EU institutions to provide instrumental leadership in the machine room.[39]

With respect to the literature on the rising power of the EUCO, the informal crisis management procedures created to cope with the euro crisis and dominated by the EUCO were used to manage the refugee crisis. I shall now endeavour to advance the EU's analysis of the refugee problem in the context of new intergovernmentalism.

4 The refugee crisis and the new intergovernmentalism

The EU has been facing a number of crises, starting with the Eurozone debt crisis of 2009, and then followed by the humanitarian crisis caused by the displacement of refugees in 2015. Regarding the management of asylum seekers and the enormous influx of refugees, there has been discord among Member States concerning the application of established asylum legislation and the pursuit of policies outlined in the Schengen Agreement and Convention. These policies aimed to eliminate border controls and establish a unified visa policy among participating nations. While several Member States adopted a more welcoming position, others, such as Poland and Hungary, strongly objected to the open-door policy. The divergence of Member State/government approaches to managing the refugee crisis led to disrupted power dynamics within the EU institutions.

During the euro crisis, the Member States of the European Union implemented contentious reforms and made significant choices. However, when it comes to the Common European Asylum System, the process of

[37] Derek Beach and Sandrino Smeets, 'New Institutionalist Leadership: How the New European Council-Dominated Crisis Governance Paradoxically Strengthened the Role of EU institutions' (2020) 42(6) Journal of European Integration 837 <http://dx.doi.org/10.1080/07036337.2019.1703966> accessed 28 November 2021.

[38] ibid.

[39] ibid.

reform has been characterised by a sluggish pace, despite the evident and urgent need for such reforms. In the Schengen crisis, European countries lack agreement on how to address the challenge collectively at hand. The terrorist attacks in Paris in November 2015 caused the situation in Europe to deteriorate significantly. France immediately announced a state of emergency and strengthened all of its internal land and air borders, and these measures extended into 2017.[40] Early in September 2015, Germany, the most popular final destination for refugees, also adopted temporary border controls.[41] Furthermore, politicians appear to be too terrified of anti-immigrant attitudes in the general public to bridge the gap between differing national views on shared border and migration control. The migration crisis has exposed serious political divisions in attitudes toward minorities and diversity in all EU countries.[42] The topic of immigration is used by political parties to energise the electorate, resulting in a greater polarisation of society.[43]

This section therefore discusses new intergovernmentalism, focusing on how the EU Member States responded to the migration crisis and how these responses paved the way for the Statement. The EU's response to the refugee crisis, in which security concerns prevailed over the EU's values and principles, is consistent with the findings of the theory of new intergovernmental. New intergovernmentalism anticipates the more centralised governance role of the EUCO.[44] In this research, the engagement of the EUCO in the migratory crisis verifies the managing method of new intergovernmentalism as a system of governance.

The Maastricht Treaty and Lisbon Treaty play a crucial role in bringing immigration and asylum policies to the intergovernmental level within European integration. The primary expectation from these policies should be prioritising human rights and EU values. However, in 2015, as the migrant crisis arose at the borders of the EU, Member States prioritised intergovernmental actions to address their concerns about domestic border security. The European governance process in the field of immigration and asylum policy was welcomed as an essential step in the right direction through the lens of supranationalism. The expectation was that it would eliminate the discriminatory policies followed by EU

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40 Loi n° 2016-1767 du 19 décembre 2016 prorogeant l'application de la loi n° 55-385 du 3 avril 1955 relative à l'état d'urgence (1).

41 Council of the European Union, 11986/15.

42 Richard Wike, Bruce Stokes and Katie Simmons, 'Europeans Fear Wave of Refugees Will Mean More Terrorism, Fewer Jobs' (Pew Research Centre 2016) <www.pewresearch.org/global/2016/07/11/europeans-fear-wave-of-refugees-will-mean-more-terrorism-fewer-jobs/> accessed 1 April 2022.

43 Polskie Forum Migracyjne, *Poland: Locals Fear Reception of Refugees Will Bring Social Tensions, Poll Finds* (Polskie Forum Migracyjne 2016).

44 Sandrino Smeets and Natascha Zaun, 'What Is Intergovernmental about the EU's "(New) Intergovernmentalist" Turn? Evidence from the Eurozone and Asylum Crises' (2020) 44(4) West European Politics 1 <http://dx.doi.org/10.1080/01402382.2020.1792203> accessed 28 November 2022.

Member States and exclusionary approaches such as foreign, immigrant or anti-Islam ones.[45] In this context, some scholars argue that readmission agreements were perceived as mechanisms that could play a role in transferring the EU's norms, standards, and regulatory structures to the neighbouring and surrounding countries.[46] However, it should be noted that these supranational policies (such as readmission agreements) carried out by the EC included the pursuit of security and restrictive elements as much as intergovernmental policies. In my view, this strategy additionally assisted the legitimisation of the exclusionary measures implemented to justify exemption from following the Schengen regulations.

The heads of Member States have exercised leadership roles, inevitably enhancing the EU policy-making area and constraining sovereignty in order to set the political trajectory of the EU.[47] Significant divergence exists among members regarding how to proceed to engage in international cooperation on matters of security and foreign policy. It is acknowledged that these members have been affected by shared policies, necessitating a certain degree of exertion of power. When we look at the literature, Smeets and Zaun ascribe differences in the formation of EU asylum policy to Member States rather than the Commission in the refugee crisis.[48] While they accept that there were differences in reform processes during the crises, they focus on two important differences between new and old intergovernmentalism: 'the different role of the EUCO' and 'the different role of supranational expertise'.[49] Regarding the first point, the heads of Member States/governments have replaced the community method of decision-making with the intergovernmental scheme. In the asylum crisis, they determine the involvement of the EUCO as an obstacle to progress in decision-making. In the meantime, the heads of States/governments, acting as a sort of barrier, were less concerned with the procedures of the process and more focused on the content. In contrast, the Member States were hindered from making progress in Justice and Home Affairs due to the reluctance of political leaders to solve issues like relocation schemes and asylum procedures.[50] Furthermore, Fabbrini argues that disagreements among the Member States within the Council undermined any efforts to reform the CEAS, and despite the positive support of the EUCO, the Commission's proposals to improve the system, including the introduction of a permanent relocation mechanism to increase the soli-

[45] Stephen Zunes, 'Europe's Refugee Crisis, Terrorism, and Islamophobia' (2017) 29(1) Peace Review 1.

[46] Beyza Cagatay Tekin, 'Düzensiz Göçün Yönetimi Konusunda Varilan Türkiye – Ab Mutabakatinin Avrupa Birliği'nin Uluslararasi Kimliği Üzerindeki Etkileri' (2017) 39(11) Marmara Üniversitesi İktisadi ve İdari Bilimler Dergisi.

[47] Uwe Puetter, *The European Council and the Council: New Intergovernmentalism and Institutional Change* (OUP 2014).

[48] Smeets and Zaun (n 44) 1.

[49] ibid.

[50] ibid.

darity, were not achieved.[51]

Regarding the institutional changes during the migration crisis, Bonjour et al provide a framework on how new perceptions in migration governance are shaped in line with three crucial scopes: 'the dynamics of preference formation of member states and EU institutions, the relative power and influence of member states and EU institutions, and their impact on the domestic politics and policies of member states'.[52] They analyse the intergovernmental findings on the migration crisis in light of the 'venue shopping theory'. This theory refers to national governments seeking new policies in line with their preferences and aims.[53] This view of intergovernmentalism finds expression in the control that Member States exercise over migration policies and in their reluctance to accept new migrants. In this way, Member States' restrictions thereby shape the integration process. Then, once they accomplish their demands, European integration results in inadequate solutions to deal with the crisis of asylum and migration. Consequently, the figure of 'Fortress Europe' draws the intergovernmental actions in European cooperation based on the limitation mind-sets of Member States, particularly to securitise their borders in the face of refugee flow.[54] In relation to the evolution of Member States' preferences, Bonjour et al discovered that reliance on domestic reasons for decision-making posed challenges. This is because the actions adopted at the EU level, which align with the interests of Member States, may not necessarily correspond to the required course of action. For instance, Member States responded to the refugee crisis by securing their borders. This approach created more limitations in decision-making at the EU level and led to the human rights of migrants being ignored.[55]

Furthermore, Hodson and Puetter analyse challenger governments like Hungary during the crisis from the perspective of new intergovernmentalism.[56] They propose the term 'challenger governments' to describe what happens when parties led by leaders who are strongly critical of the current integration track create governments in their own right or serve as senior coalition partners. According to their findings, these governments have found a way to avoid dealing with the current migration problem, which has led to increased disequilibrium across the EU. These challenger governments, like Orban's government, maintain their oppo-

[51] Federico Fabbrini, 'The Future of the EU27' (2019) Special Issue on the Brexit Negotiations & the May Government, European Journal of Legal Studies 305.

[52] Saskia Bonjour, Ariadna Ripoll Servent and Eiko Thielemann, 'Beyond Venue Shopping and Liberal Constraint: A New Research Agenda for EU Migration Policies and Politics' (2017) 25(3) Journal of European Public Policy 409.

[53] Virginie Guiraudon, 'European Integration and Migration Policy: Vertical Policy‐making as Venue Shopping' (2000) 38(2) Journal of Common Market Studies 251.

[54] Bonjour, Ripoll Servent and Thielemann (n 52).

[55] ibid.

[56] Dermot Hodson and Uwe Puetter, 'The European Union in Disequilibrium: New Intergovernmentalism, Postfunctionalism and Integration Theory in the Post-Maastricht Period' (2019) 26(8) Journal of European Public Policy 1153.

sition to the EU. They see themselves as defenders of national interests against the Union. According to Hodson and Puetter, an increase in challenger governments caused the EU to tolerate the violations of EU values and 'normative consensus', which were undermined by their actions provided that they did not risk the EU's day-to-day decision-making system.[57] They claim that this opposition signals more disequilibrium within the Union rather than reaching limited consensus. New intergovernmentalism in dealing with the crisis provides a disequilibrium concept to grand theories. They refer to disequilibrium as a way to describe the rising turmoil within an institutionalised political system that is led by pro-integration consensus but sheltered from public dissatisfaction by policy outcomes. Their research moves beyond neo-functionalism by improving the concept of disequilibrium. Their analyses show that EU elites are creating short-term solutions to deal with the crisis, such as border closure. Since this response to the crisis heightened the disequilibrium, the EU is in danger both from these challenger states and their determination to pursue their domestic policies. [58]

Some scholars identified the response to the migration crisis as 'deliberate, legitimate and functional'.[59] Member States are eager to deal with the consequences of the breakdown of Schengen and the Dublin Regulation since they meet their main interest of stopping and reducing the influx of migrants and/or refugees to their lands.[60] To have a better understanding of the concept of new intergovernmentalism, this research entails further analysis of the role of the EUCO in the migration crisis. Therefore, the next sub-section focuses on the EUCO.

4.1 The European Council and Member States: engaging with the refugee crisis

As described above, the European Council is at the heart of new intergovernmentalism. Member States should work in cooperation to establish a common approach to address the refugee crisis as they are aware of the excessively politicised European policy. The power and individual characteristics of Member States can be decisive in the EUCO. Therefore, this section analyses the EUCO's involvement in the refugee crisis in light of the literature on new intergovernmentalism.

EU decision-making is commonly conducted within the triumvirate of the EC, EP, and the Council. However, when the Union is dealing with crises, which are sensitive for individual Member States, it has turned its face to the top political level to manage the divisions among the Member States within the intergovernmental form of the EUCO. Although im-

[57] ibid.

[58] ibid.

[59] Andrew Moravcsik, 'Preferences, Power and Institutions in 21st-century Europe' (2018) 56(7) Journal of Common Market Studies 1648.

[60] Moravcsik and Schimmelfennig (n 8).

migration rather pertains to domestic matters for all individual Member States, the EU has shared regulations for asylum seekers under the Schengen rules and Dublin system. It is evident that it was inappropriate to apply the Dublin system in the case of the massive influx. It also caused pushback from frontier countries like Italy and Greece. The German government initially followed a more welcoming approach and suspended the Dublin regulation in order to let Syrian refugees immediately into its territory. The solution was short lived. After a few weeks, Germany suspended the Schengen agreement and applied border controls to stem the refugee influx. This action triggered other Member States' reactions: many in turn refused asylum applications and opposed the implementation of the EU immigration rules.[61]

The part played by the EUCO in the refugee crisis differed from the one played in previous crises. The heads of governments and States sought to block entry rather than implement principles that might manage the refugee crisis, such as fair burden sharing. The reluctant Member States and insufficient cooperation on burden sharing caused the suspension of Schengen by some Member States such as Denmark and Austria. This led to a shadow being cast on the European integration project, in particular on free movement within the EU.[62] The refugee crisis raised an 'internal emergency' which signalled the failure of the Schengen Agreement which is one of the EU's biggest achievements for a closer Union.[63] The failure of Schengen resulted from another important dimension on the ground: terrorism. With anti-immigrant and anti-Muslim turmoil fuelled by terrorist attacks committed in European towns by Islamic State terrorists, the management of displaced people devolved into a 'political minefield', which has made it harder to take steps to save the Schengen system.[64] I may therefore claim that the failure of Schengen is not simply the result of a lack of trust and cooperation among Member States, but also of the struggle against terrorist attacks.

When the refugee crisis was at its peak in 2015, the Member States failed to distribute the refugees throughout the Union, and the asylum system under the Dublin regulation collapsed.[65] The EC proposed a 'relocation proposal for 120,000 refugees from Greece, Hungary and Italy'

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61 Liesbet Hooghe and Gary Marks, 'Grand Theories of European Integration in the Twenty-first Century' (2019) 26(8) Journal of European Public Policy 1113.

62 Ian Traynor, 'Is the Schengen Dream of Europe Without Borders Becoming a Thing of the Past?' *The Guardian* (London, 5 January 2016) <www.theguardian.com/world/2016/jan/05/is-the-schengen-dream-of-europe-without-borders-becoming-a-thing-of-the-past> accessed 28 October 2021.

63 Michela Ceccorulli, 'Back to Schengen: The Collective Securitisation of the EU Free-border Area' (2018) 42(2) West European Politics 302 <http://dx.doi.org/10.1080/01402382.2018.1510196> accessed 28 October 2021.

64 Bridget Carr, 'Refugees without Borders: Legal Implications of the Refugee Crisis in the Schengen Zone' (2016) 38(1) Michigan Journal of International Law 137.

65 Daniel Thym, 'The Refugee Crisis as a Challenge of Legal Design and Institutional Legitimacy' (2016) 53(6) Common Market Law Review 1545.

as an urgent response.[66] Although the EUCO supported this proposal, it failed to achieve some objectives, including the permanent quota system and Dublin Regulation revision.[67] The decision was adopted with a qualified majority vote by the Justice and Home Affairs Council rather than with a unanimous vote.[68] Puetter's assessment supports the contribution of this research that this action of the EU and reactions towards the relocation decisions undermined European deliberation and consensus-based decision-making.[69] After adopting this decision, EUCO former president Donald Tusk expressed the decision as 'political coercion'.[70] This interpretation stems from the fact that there exists a greater number of nations that hold a suspicious stance towards the establishment of a mandatory mechanism. He also signalled the consideration of cooperation with third countries like Turkey to securitise their external borders: 'All Member States will be ready to show more solidarity if they feel that Europe as a whole is ready to protect external borders more effectively. I mean that they are able to reduce this number of refugees, because that is the biggest fear today in Europe'.[71] Puetter raises questions about the guiding role of consensus and deliberation in the new activity areas of the EU from the perspective of new intergovernmentalism. He argues that this kind of non-consensual adoption quickly undermines the quality of the consensus decision-making system within the EUCO. Therefore, Member States and governments may pay no attention to solidarity to protect European integration. At the same time, progress in reforming the existing asylum system by consensus may be impossible at the EU level.[72]

Examining the experience gained during Donald Tusk's term as president of the EUCO between 2014 and 2019 which is the period of the refugee crisis, Hagemann claims that Tusk made a significant political contribution to the EU by laying the groundwork for a liberal, policy movement.[73] The role of president of the EUCO is more prominent during crises in order to accomplish governments' agreements. Hagemann points out that the EUCO and its president were mostly tasked with crisis management due to the pressing need to respond to a series of interconnected

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66 Commission, 'Refugee Crisis: European Commission Takes Decisive Action' (Press Release 2015).

67 Eiko Thielemann, 'Why Refugee Burden-Sharing Initiatives Fail: Public Goods, Free-Riding and Symbolic Solidarity in the EU' (2018) 56(1) Journal of Common Market Studies 63.

68 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 [2015] OJ L239/146.

69 Puetter (n 13).

70 Ian Traynor, 'Detain Refugees Arriving in Europe for 18 Months, Says Tusk' *The Guardian* (London, 2 December 2015) <www.theguardian.com/world/2015/dec/02/detain-refugees-arriving--europe-18-months-donald-tusk> accessed 10 February 2022.

71 ibid.

72 Puetter (n 13).

73 Sara Hagemann, 'Politics and Diplomacy: Lessons from Donald Tusk's Time as President of the European Council' (2020) 31(3) European Journal of International Law 1105–1112.

multiple crises like the euro crisis and refugee crisis since 2008.[74] She listed three elements to show the president's power to manage the action plan and find consensus in the EUCO in light of the observations from Donald Tusk's and Herman Van Rompuy's term: a) divisions of Member States over policy issues; b) what extent these issues are essential for the Member States; c) norms and actions conducted in the EUCO regarding these issues. Furthermore, this study not only provides significant evidence that supports her research findings on the presidency role of the European Council (EUCO), but also adopts a broader perspective to illustrate the growing significance of the EUCO in the context of the refugee crisis. Although she contends that Donald Tusk is best described as a vital and powerful 'activist' voice for democracy at a critical period in European and international politics, I argue the president's role in the refugee crisis differs from previous crises. During the refugee crisis, the president of the EUCO took the leadership role of Member States rather than of the EU. Rather than seeking an EU-wide solution to the crisis, the president was employed by Member States to achieve a solution outside the EU with third countries.

On the other hand, regarding the relocation decision, Article 78(3) TFEU was applied for the first time during the 2015 migration crisis, when Italy and Greece, which are located on the EU's external borders, were confronted with enormous arrivals of asylum seekers escaping persecution or substantial damage.[75] In the meeting of the EUCO in April 2015, while some Member States, like Italy and Germany, agreed on a binding quota system, others were strongly opposed to the burden-sharing proposal. Furthermore, Germany's chancellor, Angela Merkel, supported this proposal which aimed at the compulsory distribution of refugees in line with the dimensions covering the unemployment situation, the size of the country, and the wealth of nations.[76] After a meeting on 23 September 2015, the EUCO agreed on the priorities and objectives and invited the EU institutions to create strong cooperation to deal with the refugee crisis and border securitisation.[77]

Afterwards, the Council introduced two temporary measures for the benefit of Greece and Italy.[78] Until the approval of the relocation decisions in support of Greece and Italy in 2015, the Dublin system lacked any constructive solidarity mechanism for responsibility sharing. The first

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[74] ibid.

[75] Article 78 of Treaty on the Functioning of the European Union (TFEU).

[76] Arkadiusz Nyzio, 'The Second Revival? The Visegrád Group and the European Migrant Crisis in 2015-2017' (2017) 50(5) Politeja 47–98 <www.jstor.org/stable/26564285> accessed 28 November 2021.

[77] European Council, Special meeting of the European Council, 23 April 2015, Statement.

[78] Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece [2015] OJ L248/80; 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 [2015] OJ L239/146.

measure was adopted on 14 September 2015 and the second on 22 September 2015. The Council adopted Decision 2015/1523 with a qualified majority vote, with the opposition of the Czech Republic, the Slovak Republic, Hungary, and Romania, and the abstention of Finland.

These decisions determined that the Syrians who entered the EU and were registered would be resettled in the EU Member States under the settled quotas. In accordance with the determined quotas, the burden on the shoulders of Italy and Greece would be shared by other Member States. These two decisions were based on Article 78 TFEU, which gives authority to the EU to take measures for the benefit of overwhelmed States. The decisions also laid down the principle of solidarity and fair burden sharing (Article 80 TFEU). Article 78(3) TFEU allows the Council to take temporary measures in the interest of the Member State(s) in question if one or more Member States face an emergency situation involving a sudden influx of nationals from third countries. The Slovak Republic and Hungary challenged in court the decision on its invalidity. Poland backed them up, and the Commission was joined by Belgium, Germany, Greece, France, Italy, Luxembourg, and Sweden to defend the Council.

While these decisions were welcomed by Member States such as Italy and Greece which are the entrance gates to the EU, Hungary, Poland, Czechia, and Slovakia opposed the decisions by stating that they would not accept even a single refugee. Even though the majority of Member States were willing to accept asylum seekers under the two emergency relocation schemes, Slovakia and Hungary refused and challenged Council Decision 2015/1601, which had been adopted by qualified majority. When the issue was brought before the CJEU by Hungary and Slovakia, the CJEU stated that the Member States must accept the refugees falling under their share; otherwise, they could be prosecuted for violating EU law. CJEU rendered a judgment in September 2017 (C-643/15 and C-647/15), whereby it rejected the case by addressing the legal foundation for the adoption of the decision, as well as procedural and substantive issues.[79] The Slovak Republic offered six legal arguments to support their case, while Hungary offered ten. The CJEU decided that the cases should be joined and that the arguments should be divided into three groups based on their legal basis. The first was that the contested decision did not have an appropriate legal basis in accordance with Article 78(3) TFEU. The second was that the decision was adopted with procedural issues that resulted in a violation of essential procedural rules, and the third was the substantive arguments.[80] Regarding the allegation of a contested decision under Article 78(3), provisional measures taken under Article 78(3) TFEU must be regarded as 'non-legislative acts' according to the CJEU, because they are not adopted at the conclusion of a legislative

[79] Joined Cases C643/15 and C647/15 *Slovak Republic and Hungary v Council of the European Union* ECLI:EU:C:2017:631.

[80] ibid, paras 206-345.

procedure (special or ordinary). 'Provisional measures' mentioned in Article 78(3) must be appropriately wide – to an extent to allow EU institutions to quickly and efficiently respond to an emergency situation fuelled by a sudden inflow of nationals from third countries. Although provisional measures implemented under Article 78(3) TFEU may, in principle, diverge from legislative acts, both the substantive and temporal nature of such changes must be limited.

The Court also pointed out the relocation mechanism as part of the Dublin system by confirming its applicability as follows: 'That mechanism is an integral part of that *acquis* and the latter therefore remains, in general terms, applicable'.[81] Furthermore, the Court emphasised the requirement of a fruitful remedy system under national law in light of Article 47 of the EU Charter of Fundamental Rights in opposition to every decision made by the national government during the relocation process. Ultimately and significantly, the CJEU construed the 'right to remain' based on the 1951 Refugee Convention as a particular manifestation of the principle of non-refoulement, therefore not prohibiting an applicant's migration from one Member State to another. The Court stated strongly again that the relocation mechanism exemplifies the principle of solidarity under Article 80 TFEU among the Member States. As a result, the EU's responsibility of solidarity in this area of law can be operable if the actions are adopted in accordance with a Treaty-based legislative procedure. However, it is obvious that the political and legal dimensions were defined together in the ruling. The principle of solidarity is clearly referenced in the list of EU values in Article 2 TEU. Also, the preamble of the Charter of Fundamental Rights of the EU states: 'the Union is founded on the indivisible universal values of human dignity, freedom, equality and solidarity'.[82] In other words, the CJEU avoided the view that solidarity was voluntary by emphasising the compulsory nature of solidarity among Member States. However, the rulings of the CJEU contradict the prior decisions in the context of solidarity. Especially, it claims in the *Pringle* case that Article 122(1) TFEU does not create an obligation for Member States to share financial liabilities emerging in the European Monetary Union (EMU) in accordance with the idea of solidarity.[83] Consequently, the self-contradiction of the Court in the context of the description of solidarity proves that the enforcement of solidarity relies on the subject matter. Some legal scholars support this finding with the analysis that the Court's innovative approach is politically sensitive and, in this respect, they claim that the Court aimed at combating a position taken by some Member States in favour of the free adoption of solidarity based on

[81] ibid, para 323.

[82] Charter of Fundamental Rights of the EU.

[83] Case C-370/12 Thomas Pringle v Government of Ireland and Others ECLI:EU:C:2012:756.

voluntary pledges.[84]

On the other hand, the Court did not go beyond the solidarity issues and did not make any useful contribution to EU asylum law and refugees' human rights. It was clear from the ruling that the subjects of the contested decision who are refugees were ignored by the Court. Except by referring to non-refoulement, the Court paid no attention to normative considerations and the refugees' fundamental rights. Labayle held similar views, expressing this approach as 'a regrettable input into the field of refugee law'. He also stated that the CJEU's judgment on the Council's decision to utilise a binding mechanism based on Article 78(3) TFEU supports the binding nature of solidarity in EU migration policy.[85] In terms of failed solidarity within the Union, Arriba-Sellier supports these research findings by defining the Court's decision and the Member States' approach as 'national egoism'.[86] The unwillingness of Member States and the low numbers of relocations on the ground in spite of the CJEU decision on enforcing solidarity confirmed the findings of this research that the EU is unable to find a common solution at the Union level in such highly politicised matters.

The EC began infringement procedures in an attempt to resolve the disagreement without resorting to the Court after a long series of relocation assessments and patiently encouraging these Member States to comply with their relocation responsibilities. When Hungary, Poland and Czechia did not implement the decision, the issue was brought before the CJEU by the Commission on the grounds that they had violated EU law.[87] More specifically, these three States failed to fulfil their obligations by pledging that a specified number of refugees from Greece and Italy could be transferred, and then failing to finish the relocation process by transferring refugees who had applied for international protection. The respondent States contested the infringement procedures' admissibility and substance before the Court. The Polish government intervened in

[84] Andrea Circolo, Ondrej Hamulak and Peter Lysina, 'The Principle of Solidarity between Voluntary Commitment and Legal Constraint: Comments on the Judgment of the Court of Justice of the European Union in Joined Cases C-643/15 and C-647/15. 9(2018)' (2018) 9 Czech Yearbook of Public & Private International Law 155.

[85] Henry Labayle, 'Solidarity Is Not a Value: Provisional Relocation of Asylum-seekers Confirmed by the Court of Justice (6 September 2017, Joined Cases C-643/15 and C-647/15 Slovakia and Hungary v Council)' (EU Immigration and Asylum Law and Policy, 2017) <https://eumigrationlawblog.eu/solidarity-is-not-a-value-provisional-relocation-of-asylum-seekers-confirmed-by-the-court-of-justice-6-september-2017-joined-cases-c-64315-and-c-64715-slovakia-and-hungary-v-council/> accessed 25 January 2022.
Obradovic Daniela, 'Cases C-643 and C-647/15: Enforcing Solidarity in EU Migration Policy' (*European Law Blog*, 2 October 2017) < https://europeanlawblog.eu/2017/10/02/cases-c-643-and-c-64715-enforcing-solidarity-in-eu-migration-policy/> accessed 25 January 2022.

[86] Nathan de Arriba-Sellier, 'Welcome Refugees, Adieu Solidarité' (*Leiden Law Blog,* 2017) <www.leidenlawblog.nl/articles/welcome-refugees-adieu-solidarite> accessed 28 January 2022.

[87] Joined Cases C-715/17 Commission v Poland, C718/17 Commission v Hungary, C-719/17 Commission v Czech Republic ECLI:EU:C:2020:257.

this case, claiming that the enforcement of obligatory relocation quotas under Council Decision 2015/1601 (Relocation Decision) would breach Article 72 TFEU. It was claimed that the relocation mechanism would jeopardise 'the responsibilities incumbent upon Member States with regard to the administration of law and order and the safeguarding of internal security'. In accordance with the interpretation of Article 72, Member States could opt out of EU law (in this case, the 2015 relocation decisions) whenever the existence of a prospective and serious threat to law, order, and security is proven. However, the Court refused to accept Article 72 as a provision that allows Member States complete discretion in applying or disapplying EU legislation, depending on their assessments of potential threats and risks to national order and security in 2020. Therefore, the Treaty does not carry 'an inherent general exception excluding all measures taken for reasons of law and order or public security' in EU law.[88] However, while it is undeniable that the aforementioned provision affirms the right of States and their need to preserve their own internal security, this does not imply that the States have unrestricted authority to do so. The Court noted that 'the scope of the requirements relating to the maintenance of law and order, or national security cannot therefore be determined unilaterally by each Member State, without any control by the institutions of the EU'.[89] In terms of the judgment on relocation mechanisms, the Court recognised that Member States retain broad discretion in determining whether an asylum claimant poses a threat to national security or public order. In addition, the Court emphasised the principle of individual assessment, which states that measures relating to the protection of internal order and security cannot be used in a generalised and arbitrary manner without being adequately anchored in the unique situation. As a result, three Visegrad countries have not consistently documented how many asylum seekers should be moved and assumed that all of them pose a national security threat. Finally, the Court rejected a generalised and inherent presumption that an application for international protection poses a threat to national security or public order. As a counterbalance, the Court emphasised the importance of investigating every individual case, which must be supported by 'consistent, objective and specific evidence'.[90] Jonas Borneman connects the Court's opposed approach against defendant Member States to the 'administrative nature of the relocation mechanism'.[91] However, from my point of view, it is clear that the CJEU once again avoided confronting the content of the highly politicised debate by shifting its attention to the administrative tasks that come along with relocation.

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88 ibid, para 143.

89 ibid, para 146.

90 ibid, para 159.

91 Jonas Borneman, 'Coming to Terms with Relocation: The Infringement Case against Poland, Hungary and the Czech Republic' (*European Law Blog*, 17 April 2020) <https://eumigrationlawblog.eu/coming-to-terms-with-relocation-the-infringement-case-against-poland-hungary-and-the-czech-republic/> accessed 1 February 2020.

While the immigration crisis caused the questioning of the EU's basic principles of solidarity, the rule of law, and the protection of human rights, it also brought to the surface problems such as unemployment and xenophobia. On the other hand, it also revealed the structural weakness of the Schengen system. As a matter of fact, there is still no common asylum policy that works well in the face of an extraordinary refugee influx.

The front-line States, especially the Balkan countries, combatted the influx by building fences, suspending Schengen, and implementing more border controls. These measures, which challenged EU values, seriously destabilised the established asylum system. Nonetheless, these different approaches show that the EU asylum system is not capable of governing an influx of refugees. The following steps taken by the EUCO supported the Member States' preferences.[92]

According to Article 80 TFEU, achieving a working common asylum system is the top goal of the Union, and solidarity and fair burden sharing is the way to achieve this goal. Solidarity is a mandatory rule under EU law, and it has been explicitly confirmed by the Court in the aforementioned cases about the relocation mechanism. Solidarity and fair burden sharing, as provided under Article 80 TFEU, should be fulfilled to the greatest extent that is practically and legally conceivable, not depending on Member States' interests.

The ongoing migrant crisis has pushed the EU and Member States to implement a series of measures, some of which were unplanned, while others were ineffective.[93] During the previous decade, the EU has witnessed an unprecedented escalation in the migrant population, which has shown itself through a variety of routes that terminate in Mediterranean Sea countries such as Turkey and Libya as the gateways to Europe. Having presented the new intergovernmentalism framework and conceptualised how the Member States responded to the refugee crisis and to what extent solidarity was considered by the Member States, it is now possible to analyse why the EU pursues cooperation with Turkey, especially regarding the role Turkey has played in the securitisation of the EU border in recent years.

Alongside the Member States' approach to keep the castle closed, the EUCO also started to work with Turkey on the migration flow.[94] Concerning the situations of frontier countries and reluctant Member States to implement the mandatory relocation scheme, the EU opted to implement

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[92] Claudia Morsut and Bjørn Ivar Kruke, 'Crisis Governance of the Refugee and Migrant Influx into Europe in 2015: A Tale of Disintegration' (2017) 40(2) Journal of European Integration 145.

[93] Bridget Carr, 'Refugees without Borders: Legal Implications of the Refugee Crisis in the Schengen Zone' (2016) 38(1) Michigan Journal of International Law 137.

[94] Claudia Morsut and Bjørn Ivar Kruke, 'Crisis Governance of the Refugee and Migrant Influx into Europe in 2015: A Tale of Disintegration' (2017) 40(2) Journal of European Integration 145.

more extreme measures, building on the existing EU-Turkey cooperation framework. Afterwards, in mid-October 2015, the EUCO cooperated with Turkey under a 'Joint Action Plan' derived from the responsibility-sharing mechanism.[95] In the following month, EU leaders and Turkey's prime minister met in Brussels to discuss the details of cooperation and to boost political and financial engagement with the refugee crisis.[96] In other words, the solidarity crisis within the EU proved that finding a common solution at the EU level seems impossible in the immediate future. This led to a search for a solution outside the EU borders. Externalisation of migration governance is the direct consequence of internal disagreement. In this case, the EU concluded that the best way to deal with the migration crisis was by outsourcing to a third country, in this case Turkey, to satisfy the problem of the Member States and asking it to keep refugees in Turkey alongside the control of migration routes to and from Europe's Eastern Mediterranean region.

Ultimately, the Statement was agreed on 18 March 2016 by the EUCO and Turkey in order to prevent the irregular migration flow from Turkey to Greece. In exchange, the EU agreed to pay EUR 6 billion and to remove the necessity for a visa for entry to the EU from Turkish citizens.[97] Questions have been raised about the compatibility of the EU-Turkey Statement with human rights. Other important issues relate to how the European Council concluded this deal with Turkey and where it derived its power to do so. While moving on to the specific topic of the Statement, the following section establishes the framework by discussing the role of the EUCO in concluding the Statement, and interactions between the EU and Member States in regard to asylum, migration, and border issues.

5 Discussion on the European Council role through the EU-Turkey Statement

The EU's international standing is threatened by several methodological weaknesses in reaching and implementing the Statement. According to the analysis of the EUCO's central role in new intergovernmentalism, a new stage of European integration has now been reached in the securitisation of migration in the EU by positioning the migration and asylum seeker movements as a prior security issue. It is possible to see the discourse and representation policies surrounding this new phase in the securitisation of migration within the EU and the methods used to implement this agreement.[98] The fact that the Statement was concluded by using an informal way via the EUCO points to the problem of disabling and stopping an important solidarity mechanism of the EU. The EU's for-

[95] European Council, European Council Conclusions, 15 October 2015.

[96] European Council, Meeting of the EU heads of State or government with Turkey, 29 November 2015.

[97] European Council, EU-Turkey Statement, 18 March 2016.

[98] Nika Bačić Selanec, 'A Critique of EU Refugee Crisis Management: On Law, Policy and Decentralisation' (2015) 11 Croatian Yearbook of European Law and Policy 73.

eign policy practices away from parliamentary decision-making processes undermine the EU's normativity. Then, Member States take the lead without any national and supranational democratic control mechanisms. As noted above by the literature review, Member States failed to create a common asylum policy at the EU level. Instead, Member States followed their own policy to keep refugees outside their borders. On the other hand, informal meetings were initiated by the EUCO and Turkey through the Member States' preferences. Here, the choice of unofficial and informal ways reminds us of the EU's reactions to the Euro crisis. Through the Statement, the EU used the intergovernmental way to benefit from the non-binding law over democratic legitimacy and the gradual solution that takes refuge behind claims of urgency and emergency. One of Bickerton's hypotheses in new intergovernmentalism, 'problems in domestic preference formation have become standalone inputs into the European integration process', obviously explains the prioritisation of national interests within EU policy.[99] I noted that Member States' actions eroded the control mechanisms in the euro crisis. Intergovernmental agreements hindered the EP by bailout packages and other emergency measures in order to manage the economic crisis that was spreading rapidly in the Eurozone, ignoring customary law.

Seminal contributions have been made by some authors to explore the position of the Statement in the EU. Schimmelfennig explains the different integration consequences of crises as 'variation in the structure of intergovernmental bargaining'.[100] The fiasco of decentralised institutions during a crisis is paralleled with the requirement to protect the EU's integrational outcomes.[101] The interests and preferences resulting from internal conflict have determined the response to the crises. The Statement results from a lack of consensus among Member States during the refugee crisis, which made externalising the crisis easier than resolving it internally. Critical commentaries have diverged widely on the EU's approach to negotiating the deal in recent years. The new intergovernmentalist perspective is at the heart of the explanation of the role of the EUCO in determining the increasing power and authority of Member States. Specifically, new intergovernmentalism explains the conclusion of the Statement through the EUCO. This has damaged supranational institutions since the Member States' role in resolving the Union's issues has been enhanced by the power of intergovernmentalism.[102] Member States' authority in determining the agenda relating to policymaking has increased in line with their interests through their endeavours within the

[99] Uwe Puetter, Dermot Hodson and Christopher J Bickerton, *New Intergovernmentalism: States and Supranational Actors in the Post-Maastricht Era* (OUP 2015).

[100] Frank Schimmelfennig, 'European Integration (Theory) in Times of Crisis. A Comparison of the Euro and Schengen Crises' (2018) 25(7) Journal of European Public Policy 969.

[101] ibid.

[102] Sergio Fabbrini and Uwe Puetter, 'Integration Without Supranationalisation: Studying the Lead Roles of the European Council and the Council in Post-Lisbon EU Politics' (2016) 38(5) Journal of European Integration 481.

EUCO. This has also caused a risky conflict between the EC, the EP, and the EUCO's priorities in the creation of a common policy at the EU level.

Gurkan and Roman support this research finding with an analysis of the EU institutions in accordance with the divisions of policy. As opposed to the EUCO, the EP took a different approach to EU collaboration with external partners on refugee crisis management. Notwithstanding these divisions in the EU, the key political groups in the EP called for a norms-based approach to migrants that put human rights and the right to asylum at its core. The EU–Turkey agreement is more an expression of civilian power resting on diplomatic and economic cooperation to achieve security interests than a normative one. The EU's principles and Treaty-based legal framework give it a normative character. In contrast, civilian power prioritised economic power and securitisation in dealing with the crises. While the EC followed the normative power to respond to the refugee crisis, the EUCO relied on civilian power. In dealing with Turkey, the Commission initially held on to the EU's normative structure. Then, the securitisation of the EU borders and achieving the interests of Member States weighed more heavily than the 'normative identity' of the EU.[103] Consequently, the Statement resulted from economic and diplomatic cooperation to bring the Member States' interests and securitisation to the same pool.

As noted above in section 4a, the domination of the European Council aimed to resolve the dilemmas by proposing relocation quotas in September 2015. In this attempt, the participation of the European Parliament was limited to exercise the consultation procedure role based on Article 289 TFEU. Some scholars, like Lehner, argue that the Statement is only the European Council's work, that the European Commission did not adopt a negotiating role, and that the consent of the European Parliament was not sought before a deal was reached.[104]

On the other hand, Smeets and Beach outline the informal way leading to the EU-Turkey deal by EU Member States.[105] They seek answers as to who has done more to conclude a 'half-baked solution' even where Member States managed this deal in accordance with their political interests.[106] The EC initially offered itself as 'Champions of the Community method' in the early stage of the crisis. Hence, they saw a rise of the EUCO as a threat.[107] They analysed the main objectives agreed under the Statement: funding, visa liberalisation, re-energising the accession pro-

[103] Seda Gürkan and Ramona Coman, 'The EU–Turkey Deal in the 2015 "Refugee Crisis": When Intergovernmentalism Cast a Shadow on the EU's Normative Power' [2021] Acta Politica <http://dx.doi.org/10.1057/s41269-020-00184-2> accessed 20 October 2021

[104] Roman Lehner, 'The EU - Turkey "Deal": Legal Challenges and Pitfalls' (2018) 57(2) International Migration 176.

[105] Sandrino Smeets and Derek Beach, 'When Success Is an Orphan: Informal Institutional Governance and the EU–Turkey Deal' (2019) 43(1) West European Politics 129.

[106] ibid.

[107] ibid.

cess, and the resettlement mechanism. They found the statement unique since it results from informal governance. Therefore, they raised criticism that informal governance at the institutional level could evolve from temporary to permanent in dealing with crises and EU reforms. As a result, they define the Statement as 'an orphan', with a non-binding, informal background.[108]

In dealing with the refugee crisis, the EU failed to follow the values of its supranational structure. The Statement is the crisis-based reform led by the EUCO. This research demonstrates the role of the EUCO in dealing with the crisis under new intergovernmentalism. One may clearly see that the deal indicates the security concerns of Member States and the rebirth of their prominence within the Union. The Statement provides us with new evidence that the expectation from European integration that broadens the supranational policy space in the EU, including immigration and asylum policies, have not come true. The functioning of the EU to bring Member States together on common ground to formulate supranational policies requires consensus among Member States. Therefore, domestic interests and preferences should not take precedence when making decisions at the EU level.

Although studies have been conducted by many authors, the role of the EUCO is still insufficiently explored in law scholarship. Given the legal and political literature on the EUCO role and new intergovernmentalism, I argue that the Member States employed the EUCO to reach a deal with Turkey and to protect their national interests. The rising power of the EUCO can be seen in the Statement through the manner in which it deploys informal governance. In particular, Member States directed these informal procedures in accordance with their interests. Regarding the aforementioned cases and Member States' responses to the refugee crisis, the EU has been unable to create any workable solution to manage the crisis so far. Instead, the EUCO has taken the leading role in seeking a solution outside the Union. Finally, the EUCO sat at the table with Turkey for a disappointing and unethical deal which is far from protecting refugees' human rights. The Statement which is the result of the Member States' separation highlights the power of the EUCO within the EU institutions. However, the refugee crisis in the EU cannot be resolved by bargaining with a third-country's government alone, nor should it. The Statement is no more than a stopgap solution to combat the crisis. Efforts to improve Turkey's ability to cope with the refugees are important, but it should not be viewed as a cheap alternative for EU governments' obligations. Redirecting the problem to the Turkish government does not mean the sharing of responsibilities and burden. The EUCO's power to deliver informal deals with Turkey explicitly undermines not only EU values and EU constitutional law but also Member States' duties.

[108] ibid.

With the perspective of EU institutional law, further important scholarship has been developed by Servent on the rise of the EUCO and the decrease of the EP in managing the refugee crisis. As explained by the literature on new intergovernmentalism, there has been a rise in the level of fragmentation over European integration, which has led to new intergovernmentalism that bypasses supranational frameworks.[109] The success of the EP is evaluated based on the level of recasting the problem as one of 'market integration' rather than a conflict in Member States' sovereignty.[110] The EUCO was viewed as the only way to get the best deal on the Dublin regulations. Although the EP was granted with veto or approval power in the legislative procedure under EU law, the EP was unable to have any impact on policy outcomes in the refugee crisis.[111]

It was clear that the EU's main institutions had different views on the issue. While securing Schengen's unrestricted regime and maintaining burden sharing for refugees were top priorities for the EC,[112] the EP stressed the need to treat refugees in accordance with human rights.[113] Asylum and migration policy disagreements can be overlooked as part of the EU's usual plurality, but these viewpoints are also taken by EU institutions. Despite the EP's emphasis on common European solutions and strong internal support, they were created to provide human rights credibility. But this was not enough to successfully manage the European refugee crisis. With the inability of the EU institutions to bring solutions, the EUCO took the leading role. Therefore, I claim that the Statement proves how the supranational institutions of the EU left the room when the EUCO and Turkey were conducting informal meetings. To conclude the Statement, the European Commission did not play its role and European Parliament's consent was ignored. The Statement was made after the EUCO came out in support of it to show how important Member States and their preferences are when making decisions. The refugee crisis caused not only a group of Member States who lie in the direction of Germany to strike a deal with Turkey on refugees, but also the Visegrad groups, which opposed the relocation scheme within the EU.

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[109] See section 3.

[110] Edoardo Bressanelli and Nicola Chelotti, 'The European Parliament and Economic Governance: Explaining a Case of Limited Influence' (2018) 24(1) The Journal of Legislative Studies 72-89.

[111] Kenneth Armstrong, '(Br)Exit from the European Union: Control, Autonomy and the Evolution of EU Law' [2021] SSRN Electronic Journal 309 <http://dx.doi.org/10.2139/ssrn.3806712> accessed 25 October 2021.

[112] Commission, 'Delivering on Migration and Border Management: Commission Reports on Progress Made under the European Agenda on Migration' (Press release 28 September 2016) (IP/16/3183) <http://europa.eu/rapid/press-release_IP-16-3183_en.htm> accessed 3 April 2022.

[113] European Parliament, 'European Parliament resolution of 10 September 2015 on migration and refugees in Europe 2015/2833(RSP)' <www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+MOTION+B8-2015-0837+0+DOC+XML+V0//EN> accessed 3 April 2022.

This paper has outlined how a review of the Statement demonstrates that an informal, non-binding agreement to stop the refugee influx resulted from minimising political discussions at the EU level, removing the political responsibility of heads of Member States or governments, and allowing the negotiations to be carried out within the framework of informal consultations. The decisions taken in Brussels, away from the established parliamentary control mechanisms, are controversial in terms of international law and EU law, due to the lack of real cosmopolitan solidarity among the European Member States.

Finally, in concluding the EU-Turkey Statement, one can see the rise of Member States' authority in determining policy-making according to their interests, via the European Council. The statement was more an expression of the power of Member States in the EUCO to achieve security interests rather than EU values. The Statement is the work solely of the EUCO, and the EC was unable to adapt the negotiator role under EU law. Consent of the EP was ignored to reach a deal with a third country. EU policymaking in these areas is now dominated by the Member States, rather than the EU, which means that national interests are the driving force. It is also an aspect of the disintegration of Member States in the refugee crisis. In addition, using an informal way to reach an agreement on this kind of sensitive subject raises the question of the rule of law in the EU, alongside the future of Europe. The EU, which could not reach consensus when it came to creating a common migration policy, easily confirmed the statement to keep refugees away from their lands.

6 Conclusion

The main premises and points of departure of the EU-Turkey Statement have been addressed in this research in light of the EUCO's activity. This study has analysed the role of the EUCO in the conclusion of the EU-Turkey Statement through the perspective of new intergovernmentalism. Its purpose has been to analyse the development of the EUCO within the EU and its evolution into a powerful organ. The policies for immigration and asylum have been heavily dependent on individual Member States due to concerns about the transfer of core sovereign powers in the EU. The migration and asylum policies pursued by the EU limit cosmopolitan solidarity with those seeking asylum from civil war, natural disasters, or economic hardships. This tendency leads to a race to the bottom among Member States. The reason behind the cooperation of intergovernmental and supranational institutions in the Statement has been the advancement of their position within domestic policy.

Sections 2 and 3 offer a summary review of new intergovernmentalism and the EUCO. In Section 4, I analysed the Member States' and EUCO's cooperation in their approach to dealing with the refugee crisis, and the manner in which new-intergovernmentalism was applied to migration governance by the Member States. Regarding the Member States'

approach to the refugee crisis, this study found that the Member States preferred an informal way to cope with the refugee crisis and concluded a deal with Turkey. Through the lenses of new intergovernmentalism, I designed a comprehensive framework to examine the EUCO power to govern the refugee crisis in the EU decision-making system.

And finally, in Section 5, I assumed that the Statement highlights the EUCO's growing power by implementing informal governance. The existing literature focuses on the most obvious components of EU crisis management rather than the more important ones. My analysis has moved beyond the purely political approach to the Statement and has concentrated on the application of new governmentalism to the refugee crisis, together with an evaluation of the rulings of the CJEU on Hungary, Poland, and the Czech Republic. The EU has been unable to come up with a practical solution to the refugee crisis and how the burden might be shared fairly among Member States. Instead, an alternative solution has been found outside the Union through the European Council, in line with the national demands of Member States. As I have explored in the entire study, in order to establish an agreement with Turkey and preserve their national interests, the Member States entrusted the EUCO with the task of negotiation.

In summary, this paper has examined whether the EUCO had the power to conclude a deal with Turkey in the light of new intergovernmentalism. As I have already underlined, the EU, which was unable to establish agreement on a common migration policy, readily confirmed the Statement to prohibit refugees' entrance to their lands, circumventing international refugee law and human rights law via an informal route.

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THE 'EX OFFICIO' DOCTRINE OF THE CJEU REVISITED: ON THE ACTIVE ROLE OF THE COURTS IN UNFAIR CONTRACT TERMS LAW – CRITICAL REMARKS ON THE *LINTNER* RULING (C-551/17) OF THE CJEU

Mónika Józon*

Abstract: The article searches for answers to whether the ex officio doctrine as revised in the Lintner ruling[1] of the CJEU in 2019 in response to the difficulties of Member State courts in marrying the requirements of the effective enforcement of Directive 93/13/EEC with the limits set by national civil procedural law may serve as an effective tool in providing justice to consumers. In this context, the paper will analyse the following aspects: a) What policies guide the CJEU in its answers provided to the questions referred to it by Member State courts on the obligation to act of their own motion and why no significant steps have been made in turning the ex officio doctrine into an effective judicial tool? b) Whose job is it to develop procedural rules acknowledging the procedural weakness of the consumer vis-à-vis business entities? c) What type of social justice promotes the ex officio doctrine under the Lintner ruling? d) Can the EU develop procedural rules to enhance the enforcement of Directive 93/13/EEC?

After the presentation in Section 1 of the ex officio doctrine followed by a historical review of the case law of the CJEU on the obligation of the Member State courts to assess the contract term fairness of their own motion, the paper will present in Section 2 the Lintner ruling. In Section 3 the author will assess the Lintner ruling along with the questions presented above and discuss whether the answers provided by the CJEU are as ground breaking as they may seem and whether the 'investigative' powers conferred by this ruling onto Member State judges may enhance in practice the effectiveness of judicial enforcement.

Keywords: EU consumer law, unfair terms law, acting of own motion, ex officio, Member State procedural autonomy, social justice, regulatory gap, C-551/17 Lintner.

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[1] Case C-511/17 *Györgyné Lintner v UniCredit Bank Hungary Zrt* ECLI:EU:C:2019:1141.

1 Introduction

The term *'ex officio'* is used synonymously with the term 'acting of own motion' in unfair contract terms law by the CJEU and the legal literature to describe the obligation of the Member State court to proceed with the unfairness control of standard contract terms in consumer contracts in the case before it, even when the consumer has not asked for such control.

To understand the evolution of the *ex officio* rule in the field of unfair contract terms law and the potential impact of the *Lintner* ruling of the CJEU on more effective enforcement of unfair contract terms law, we need first to understand the function and the limits of the *ex officio* duty of the courts within the continental judicial culture and then the type of consumer policy promoted by the CJEU in the field of unfair contract terms that frame together the right and obligation of the Member State court to proceed of its own motion in enforcing Directive 93/13/EEC. The choice of the CJEU to balance the degree of intervention and passivity of the national judge in guarding the rights of consumers under Directive 93/13/EEC is defined by major theoretical issues of civil procedural law that cannot be ignored.

In civil proceedings, party autonomy and judge passivity define the principle called party disposition.[1] With the application of rules that have not been invoked by the parties, the judge acts outside the ambit of the proceeding and this may generate conflicts between substantive EU law and national civil procedural law, resulting in a high volume of preliminary questions referred to the CJEU in search of guidance on how to handle such situations.

Furthermore, concerning the role of the court in the *ex officio* procedure, it is of central importance whether the court introduces new elements of law or new elements of facts. Although in the majority of the EU Member States the introduction of new elements of law is accepted under the principle of *jura novit curia*,[2] the parties still have control over the facts. However, in practice, it is difficult to treat separately the facts and the law. The main difficulty in preserving the litigants' control over the facts and the court's control over the law is that the facts advanced by the parties define the scope of applicable law.[3] National law may not preclude the court from introducing *ex officio* new elements of law stemming from EU law, but this may be problematic when the court does not have the

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1 Sacha Prechal and Natalya Shelkoplyas, 'National Procedures, Public Policy and EC Law. From Van Schijndel to Eco Swiss and Beyond' (2004) 5 European Review of Private Law 589, 595.

2 Anna Elisabeth Wallerman, 'Can Two Walk Together, Except They Be Agreed? Preliminary References and (the Erosion of) National Procedural Autonomy' (2019) 2 European Law Review 159.

3 Allison Östlund, *Effectiveness versus Procedural Protection. Tensions Triggered by the EU Law Mandate of ex officio Review* (Nomos 2019) 133.

factual elements of an EU-law-based claim.[4]

Various justifications may be advanced for or against the more active role of the judge in unfair contract terms law. The central argument in favour of the more active role of the judge in investigating additional facts and circumstances other than those advanced by the parties of the litigation is that the judge should act in the public interest even at the cost of the litigant's right to direct the litigation as long as this does not affect the rights of the parties to a fair hearing.[5] The principle of party disposition and the requirement of impartiality argue against the active role of the judge.[6] We also find arguments in between, acknowledging that acting in the public interest may not necessarily affect the parties' right to a fair hearing if the judge does this in a transparent way, allowing both parties to comment on new elements introduced by the court of its own motion.[7]

All these concerns also apply to the field of unfair contract terms law and this is why the Member States are reluctant to enact specific procedural rules to overcome the conflict between the requirements of Directive 93/13/EEC and national civil procedural law. However, with the lack of specific competence of the EU in the field of civil procedural law, it seems that the CJEU cannot offer more innovative solutions to Member State courts that would narrow the room for Member State procedural autonomy.

In unfair contract terms law, the *ex officio* obligation of judges to assess the unfairness of standard terms in consumer contracts goes beyond the principle of *iura novit curia*,[8] without undermining the requirement of the principle *audi alteram partem*.[9,10] As the case law reveals, the content and reach of the principle of effectiveness and effective judicial protection differ. Hence, effective judicial protection has a wider reach than the requirement of effectiveness, the rationale of the obligation of courts to act of their own motion shifting from ensuring the effectiveness of EU law to ensuring the integrity of judicial proceedings.[11]

In the name of Member State procedural autonomy, the CJEU has for too long avoided developing solutions on the content of the obligation of the courts to act of their own motion, in terms of investigative powers,

4 ibid 134.

5 ibid 113.

6 See Case C-137/08 *VB Pénzügyi Lízing Zrt v Ferenc Schneider* ECLI:EU:C:2010:401, Opinion of AG Trstenjak, para 110.

7 Östlund (n 4) 116 (the author refers to the principle of due notice in this context).

8 Case C- 618/10 *Banco Español de Crédito, SA v Joaquín Calderón Camino* ECLI:EU:C:2012:349.

9 Case C- 312/14 *Banif Plus Bank Zrt v Csaba Csipai, Viktória Csipai* ECLI:EU:C:2015:794, para 29-30.

10 Stephanie Law, ‚The Transformation of Consumers' Procedural Protection in Times of Crisis: Protection in Mortgage Enforcement Proceedings?' in Alan Uzelac and Cornelis Hendrik van Rhee (eds), *Transformation of Civil Justice. Unity and Diversity* (Springer 2018) 302.

11 Östlund (n 4) 224.

being always ready to answer questions of the referring courts by carefully staying close to what is allowed and possible under national civil procedural law. The lack of innovative judicial solutions from the CJEU has resulted in the delayed finding of solutions in the Member States, negatively impacting on the effectiveness of enforcement at the expense of consumers. The next part of the paper will present how the doctrine evolved in the jurisprudence of the CJEU on unfair contract terms law.

The CJEU developed a rule empowering Member State courts to proceed *ex officio* with the unfairness control of consumer contract terms from the provisions of Article 6(1) and Articles 7(1) of Directive 93/13/EEC, these two provisions being considered of a 'procedural nature'.[12] Later, the CJEU developed the right of the courts to act of their own motion in several steps into an obligation, justified by the policy aims of Directive 93/13/EEC. However, by qualifying in 2008[13] Article 6 as a provision of equal standing to national rules which rank as rules of public policy within the domestic legal system, the CJEU did not solve the conflicts between the implementing rules of Directive 93/13/EEC and civil procedural laws at Member State level.

In *Oceano*, the CJEU established that 'effective protection of the consumer may be attained only if the national court acknowledges that it has power to evaluate terms of this kind of its own motion'.[14] For a long time, the *Rewe* formula, the duty of sincere cooperation, was mentioned as a legal basis of the *ex officio* power of the courts.[15] The basis of this turn in the approach of the CJEU, without any concrete provision in the text of Directive 93/13/EEC, was the acknowledgement to compensate consumers against power imbalances *vis-à-vis* business entities on the grounds of public policy considerations. The cornerstone decision of the CJEU in *Mostaza Claro* opened a new era in the approach of the CJEU on the procedural autonomy of the Member State by introducing into the landscape the principles of effectiveness and equivalence.[16]

In two subsequent cases, the CJEU elaborated further the requirement of acting of its own motion, drawing at the same time its limits. In *Pannon*, the CJEU established that the national court is obliged to act of its own motion only 'where it has available to it the legal and factual

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[12] Law (n 11) 293 and 299.

[13] Case C-40/08 *Asturcom Telecomunicaciones* ECLI:EU:C:2009:615, para 52.

[14] Joined Cases *Océano Grupo Editorial SA v Roció Murciano Quintero (C-240/98) and Salvat Editores SA v José M Sánchez Alcón Prades (C-241/98), José Luis Copano Badillo (C-242/98), Mohammed Berroane (C-243/98) and Emilio Viñas Feliú (C-244/98)* ECLI:EU:C:2000:346, para 27.

[15] Case C-40/08 *Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira* ECLI:EU:C:2009:615, paras 39-48; Case C-413/12 *Asociación de Consumidores Independientes de Castilla y León v Anuntis Segundamano España SL* ECLI:EU:C:2013:800, paras 30, 53; Case C-381/14 *Jorge Sales Sinués and Youssouf Drame Ba v Caixabank SA and Catalunya Caixa SA (Catalunya Banc SA)* ECLI:EU:C:2016:252, paras 34-41.

[16] Case C-168/05 *Elisa María Mostaza Claro v Centro Móvil Milenium SL* ECLI:EU:C:2006:657, para 38.

elements (…)'.[17] However, in *Pannon*, the CJEU did not create an EU obligation for the courts to investigate. Then, in *VB Pénzügyi Lízing*, the CJEU added that the court must make an assessment of the contract terms in light of the requirements of the consumer protection objectives of the Directive[18] and established that a national court must investigate of its own motion whether a term conferring exclusive jurisdiction in a contract between a seller or supplier and a consumer, which is the subject of a dispute before it, falls within the scope of the Directive and, if it does, assess of its own motion whether such a term is unfair.[19] It further clarified that courts are also under the obligation to apply the Directive when they do not have all necessary information at their disposal by taking investigative measures in order to establish facts and obtain the information necessary to verify whether the Directive applies to the case before them. This investigative power of the courts has become settled case law.[20] However, *VB Pénzügyi Lízing* left open four main questions: a) the investigative powers in the unfairness assessment, because the referring Hungarian court did not ask the CJEU to rule on this issue; b) the moment when the obligation to investigate is triggered; c) whether the court must assess only the terms related to the subject matter of the dispute or the whole contract; and d) what kind of investigative measures the courts may take?[21]

In *Aziz*,[22] the CJEU went a step further and introduced the fundamental rights dimension into the policy discourses founding the *ex officio* doctrine in unfair contract terms law. In this case, the CJEU emphasised the social considerations in enforcing Directive 93/13/EEC. In another Hungarian case, in *Banif Plus*, the CJEU reiterated the fundamental rights dimension of the *ex officio* control and established that this rule must comply with Article 47 ECHR.[23]

A new seminal step in the policy of the CJEU was the rule established in *Banco Espaniol*, stating that the national judge must put aside the requirements of national procedural law if these render consumer protection granted under Directive 93/13/EEC impossible or excessively

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[17] Case C-243/08 *Pannon GSM Zrt v Erzsébet Sustikné Győrfi* ECLI:EU:C: 2009:35, para 35.

[18] Case C-137/08 *VB Pénzügyi Lízing Zrt v Ferenc Schneider* ECLI:EU:C:2010:659, para 49.

[19] ibid, para 56.

[20] *Banco Español* (n 9) para 44; *Mohamed Aziz*, para 47*; Banif Plus Bank* (n 10) paras 24 and 31; Case C-483/18 *Profi Credit Polska SA v Bogumiła Włostowska and Others* and Profi Credit Polska SA v OH ECLI:EU:C:2019:930, para 66.

[21] Jarich Werbrouck and Elise Dauw, 'The National Courts' Obligation to Gather and Establish the Necessary Information for the Application of Consumer Law: The Endgame?' (2021) 3 European Law Review 325, 330-333.

[22] Case C-415/11 *Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)* ECLI:EU:C: 2013:164.

[23] Case C-472/11 *Banif Plus Bank Zrt v Csaba Csipai, Viktória Csipai* ECLI:EU:C:2013:88, paras 28-30.

difficult.[24]

The rule was further elaborated in *Bondora*[25] when the referring courts asked the CJEU whether the Directive allows the court to ask the creditor for additional information relating to the terms of the agreement relied on in support of the claim, in order to carry out an *ex officio* unfairness review of those terms.[26] The CJEU answered the question affirmatively by considering that the national court requiring the applicant to produce the documents on which its application is based forms part of the evidential framework of the proceedings, and thus such a request does not infringe the principle that the subject matter of an action is defined by the parties.[27]

In *Lintner*,[28] the referring Hungarian court asked the CJEU to establish the limits of the obligation to act *ex officio* both in substantive terms (by asking whether each contractual term, meaning the whole contract, needs to be assessed of its own motion) and procedural terms (by touching the very heart of the doctrine of own motion – the investigative role of the judge stemming from Directive 93/13/EEC). In this case, the question arose whether Article 6 of Directive 93/13/EEC must be interpreted as meaning that a national court, hearing an action brought by a consumer seeking a declaration of unfairness of terms included in a contract between that consumer and a professional, is required to examine of its own motion and individually all the other contractual terms which were not challenged by that consumer in order to ascertain whether they can be considered unfair.[29] After ruling that only the terms which, although not challenged by the consumer's action, are connected to the subject matter of the dispute have to be examined ex officio,[30] the CJEU elaborated on the elements which the national court should take into consideration. Accordingly, the Member State court should not confine itself exclusively to the elements of law and fact provided by the parties in order to limit its examination to those terms.[31] Besides the obligation to investigate of its own motion whether a case before it comes within the scope of the Directive, the court must take measures of investigation to assess the substantive unfairness of certain clauses.[32] For this purpose, the court is required to take *ex officio* investigative measures in order to complete the case file, by asking the parties to provide it with clarifica-

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[24] Case C- 618/10 *Banco Español de Crédito SA v Joaquín Calderón Camino* ECLI:EU:C:2012:349.

[25] Case C- 453/18 *Bondora AS v Carlos VC* and Case C-494/18 *XY* ECLI: EU:C:2019:1118.

[26] ibid, para 32(1).

[27] ibid, para 52.

[28] Case C-511/17 *Györgyné Lintner v UniCredit Bank Hungary Zrt* ECLI:EU:C:2019:1141.

[29] ibid, para 20(1).

[30] ibid, para 44.

[31] ibid.

[32] ibid.

tions or documents, without altering the principle *audi alteram partem*.[33] The court should exercise its investigative power if the elements of law and fact contained in the case file raise serious doubts as to the unfairness of certain terms which, despite not having been challenged by the consumer, are connected to the subject matter of the dispute.[34]

In a subsequent ruling, *Kancelaria Medius*,[35] the CJEU had the chance to provide more clarifications to the Member States courts and could have further elaborated on the investigative role of judges. However, the CJEU remained vague on this matter. The CJEU established in this case by referring to *Lintner* (paras 36 and 37) that in the absence of legal and factual elements the court must be entitled to adopt of its own motion the measures of inquiry needed to establish whether a term in the contract which gave rise to the dispute before it comes within the scope of that directive and whether it is unfair, even when the consumer fails to appear in court.[36] The CJEU confirmed again that the principles of *party disposition* and *ne ultra petita* would be disregarded if national courts were required to ignore or exceed the limitations of the subject matter of the dispute as established by the forms of order sought and the pleas in law of the parties. It also established that the two principles, however, do not preclude the national court from requiring the applicant to produce the content of the document(s) on which its application is based, since such a request simply forms part of the evidential framework of the proceedings.[37] Although the CJEU seems to go further in clarifying what should be understood by 'serious doubt' that would justify own motion action by courts, it ultimately has not provided concrete guidance to Member State courts on this issue.[38] Concerning the actual possibilities of the courts, the CJEU is vague, stating that courts can take the necessary measures.[39]

2 The reasoning of the CJEU in *Lintner*

On 13 December 2007, Mrs Ggörgyné Lintner concluded with the Unicredit Bank Hungary Zrt a mortgage loan agreement denominated in CHF, but granted and repayable in HUF (the Hungarian national currency). On 18 July 2012, Györgyné Lintner sued Unicredit Bank Hungary, asking the Budapest High Court to declare the loan agreements void and non-binding by challenging the fairness of two contract terms giving the bank the right to amend unilaterally the agreement. When the Budapest High Court dismissed the action, Mrs Györgyné Lintner appealed this

[33] ibid, para 37.

[34] ibid, para 38.

[35] Case C-495/19 *Kancelaria Medius SA v RN* ECLI:EU.C:2020:431.

[36] ibid, para 38.

[37] ibid, para 45.

[38] ibid, para 46.

[39] ibid, para 46.

judgement at the Budapest Regional Court of Appeal, which ordered the court of first instance to reopen the procedure and adopt a new judgment. The Budapest High Court at this point asked guidance from the CJEU on three essential aspects of its obligation to act of its own motion:[40]

> Must Article 6(1) of [Directive 93/13] — having regard also to the national legislation requiring legal representation — be interpreted as meaning that it is necessary to examine each of the clauses of a contract individually in the light of whether it may be regarded as unfair, irrespective of whether an examination of all the terms of the contract is actually necessary in order to rule on the claim made in the action?
>
> If not, is it necessary, contrary to the suggestion in Question 1, to interpret Article 6(1) of [Directive 93/13] as meaning that, in order to find that the clause on which the claim is based is unfair, all the other terms of the contract must also be examined?
>
> If the answer to Question 2 is affirmative, does this mean that it is in order to be able to establish that the clause at issue is unfair that it is necessary to examine the entire contract, that is to say, that it is not necessary to examine each part of the contract individually for unfairness, independently of the clause disputed in the action?

Concerning the first question referred by the Hungarian court, the CJEU concluded that under Article 6(1) of Directive 93/13/EEC a national court is not required to examine of its own motion and individually all the other contractual terms, which were not challenged by that consumer, but must examine only those terms which are connected to the subject matter of the dispute, as delimited by the parties, where it has the legal and factual elements necessary for that task, as supplemented, where necessary, by measures of inquiry.[41] If the court does not have available to it all those elements, it will not be in a position to carry out that examination (Case C176/17 *Profi Credit Polska*, paras 46 and 47[42]).[43]

The CJEU further clarified that 'such examination must respect the limitations of the subject matter of the dispute, understood as being the result that a party pursues by its claims, in the light of the heads of claim and pleas in law put forward to that end'.[44] In support of this approach, the CJEU recalled that although the consumer protection aimed at by Directive 93/13/EEC requires positive intervention from the national court hearing the case, it is necessary for that protection to be granted that one of the parties to the contract to have brought court proceedings (Case

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[40] *Lintner* (n 29) para 20.

[41] ibid, para 44.

[42] Case C-176/17 *Profi Credit Polska SA w Bielsku Białej v Mariusz Wawrzosek* ECLI:EU:C:2018:711.

[43] *Lintner* (n 29) paras 26-27.

[44] ibid, para 28.

C32/14 *ERSTE Bank Hungary* para 63[45]). In the CJEU's view, the protection to be granted to the consumer of its own motion cannot go so far as to ignore or exceed the limitations of the subject matter of the dispute, as defined by the parties by their claims, in the light of their pleas, the national court not being required to extend that dispute beyond the forms of order sought and the pleas in law submitted to it, by analysing individually for unfairness all the other terms of a contract.[46] The CJEU argues in this regard that the principle of *ne ultra petita* would be disregarded if national courts were required under Directive 93/13/EEC to ignore or exceed the limitations of the subject matter of the dispute established by the forms of order sought and the pleas in law of the parties.[47] Nevertheless, the CJEU stressed that the national court must not interpret the claims in a formalistic manner, but must interpret their content in the light of the pleas of law relied on in support of them.[48]

Thus, in the CJEU's view, if the elements of law and fact in the file before the national court give rise to serious doubts as to the unfair nature of certain clauses, which were not invoked by the consumer, then it is for the national court to take, when necessary of its own motion, investigative measures in order to complete that case file, by asking the parties, in observance of the principle of *audi alteram partem*, to provide clarifications or documents necessary for that purpose.[49] Based on the above line of reasoning, the CJEU established in the case before it that such interpretation of the national court's obligation to act of its own motion should not prejudice the consumer's right under the applicable national law to bring a new court action if necessary concerning the unfairness of other terms of the contract, which were not the subject matter of an initial action or extend the subject matter of the dispute before the referring court (based on the initiative of the court or on the plaintiff's own initiative).[50]

Furthermore, the CJEU clarified that whether the consumer is represented by a lawyer does not affect the *ex officio* duty of the national court, hence an *ex officio* examination must be settled independently of the specific circumstances of each case (Case C429/05 *Rampion and Godard*, paras 62 and 65)[51] and added that when the court finds that the term is unfair, it is required, as a general rule, to inform the parties to the dispute of that fact and to invite each of them to set out their views on that matter, with the opportunity to challenge the views of the other party, in accordance with the formal requirements laid down in that re-

[45] Case C-32/*14 ERSTE Bank Hungary Zrt v Attila Sugár* ECLI:EU:C:2015:637.

[46] Lintner, para 30.

[47] ibid, para 31.

[48] ibid, para 33.

[49] ibid, para 37.

[50] ibid, para 39.

[51] Case C-429/05 *Max Rampion and Marie-Jeanne Godard v Ranfinance SA and K par K SAS* ECLI:EU:C:2007:575, para 40.

gard by the national rules of procedure (Case C472/11 *Banif Plus Bank*, paras 31 and 32,[52] and Cases C419/18 and C483/18 *Profi Credit Polska*, para 70), and that Directive 93/13/EEC does not exclude the possibility that such contractual terms may be applicable if the consumer, after having been informed of it by that court, does not intend to assert its unfair or non-binding status (Case C243/08 *Pannon GSM*, para 33).[53]

Nevertheless, the CJEU did not refer to an important point raised by AG Tanchev concerning the room of Member States regarding the *ne ultra petita* principles in the context of unfair contract terms litigation:

> the Court's case-law on the national court's *ex officio examination of unfair terms under Articles 6(1) and 7(1) of Directive 93/13 affects the operation of the principle that the subject matter of an action is delimited by the parties, in the sense that the national court is required to play an active role in raising ex officio the unfairness of terms in consumer contracts, even if this would have the result that under the national procedural law the court would go beyond the ambit of the dispute defined by the parties.* [54]

It is important to note that the CJEU does not raise the issue of the procedural weakness of the consumer, and AG Tanchev also remains cautious in this respect. AG Tanchev outlines the policy developed by the CJEU in its earlier case law on the obligation of the national courts arising out of Article 6(1) of Directive 93/13/EEC read in conjunction with its recital 24 and recalls that the system of protection introduced by Directive 93/13/EEC is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier. In order to guarantee the protection of the consumer intended by Directive 93/13/EEC, the imbalance which exists between the consumer and the seller or supplier may be corrected only by positive action unconnected with the parties to the contract. It is in the light of these considerations that this obligation for the national court is regarded as necessary for ensuring that the consumer enjoys effective protection in view of the not insignificant risk that he is unaware of his rights or encounters difficulties in enforcing them.[55]

In response to the second and third questions of the referring Hungarian court, examined together, the CJEU established that:

> Article 4(1) and Article 6(1) of Directive 93/13 must be interpreted as meaning that, while all the other terms of the contract concluded between a professional and that consumer should be taken into consideration in order to assess whether the contractual term forming the basis of a consumer's claim is unfair, taking such terms into account does not entail, as such, an obligation on the national court

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[52] Case C472/11 *Banif Plus Bank Zrt v Csaba Csipai and Viktória Csipa* ECLI: EU:C:2013:88.

[53] *Lintner* (n 29) para 42.

[54] ibid, para 47.

[55] ibid, paras 45-47.

hearing the case to examine of its own motion whether all those terms are unfair.[56]

The CJEU started its reasoning by recalling the test of unfairness defined in Article 4(1) of Directive 93/13/EEC, which requires the national courts when assessing a term, of which fairness is challenged by the consumer, to take into account all other terms of the contract (Case C472/11 *Banif Plus Bank*, para 41) that may be relevant for understanding that term in context, in so far as it may be necessary, for assessing whether that term is unfair (Case C377/14 *Radlinger and Radlingerová*, para 95[57]).[58] This, however, does not imply in the CJEU's view that the national court would be required to examine of its own motion those other terms individually for unfairness, as part of the assessment it makes under Article 6(1) of Directive 93/13/EEC.[59]

Based on the above reasoning the CJEU concluded that: a)

Article 6(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as meaning that a national court, hearing an action brought by a consumer seeking to establish the unfair nature of certain terms in a contract that that consumer concluded with a professional, is not required to examine of its own motion and individually all the other contractual terms, which were not challenged by that consumer, in order to ascertain whether they can be considered unfair, but must examine only those terms which are connected to the subject matter of the dispute, as delimited by the parties, where that court has available to it the legal and factual elements necessary for that task, as supplemented, where necessary, by measures of inquiry[60]

and that b)

Article 4(1) and Article 6(1) of Directive 93/13/EEC must be interpreted as meaning that, while all the other terms of the contract concluded between a professional and that consumer should be taken into consideration in order to assess whether the contractual term forming the basis of a consumer's claim is unfair, taking such terms into account does not entail, as such, an obligation on the national court hearing the case to examine of its own motion whether all those terms are unfair.[61]

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[56] ibid, para 49.

[57] Case C-377/14 *Ernst Georg Radlinger and Helena Radlingerová v. Finway as* ECLI:EU:C:2016:283.

[58] *Lintner* (n 29) paras 46 and 47.

[59] ibid, para 48.

[60] ibid, para 44.

[61] ibid, para 49.

3 Assessment

The ruling of the CJEU in *Lintner* may be qualified as a 'restatement' of its earlier case law, rather than a revolutionary or evolutionary step in terms of policy with its approach to the active role of private law courts in enforcing unfair contract terms law by providing more powers to the courts or more protection to consumers. Limiting the courts' obligation to assess unfairness of their own motion on the subject matter of the litigation while not referring to the public policy foundation of the own motion doctrine is a clear sign that the *Linter* ruling is a step back compared to the earlier case law of the CJEU.

In short, the CJEU established that Directive 93/13/EEC does not impose on the national courts a general, open-ended duty to police the fairness of a consumer contract beyond the subject matter of the dispute before it.[62] However, the CJEU refines the rule established in its settled case law that national courts are only obliged to carry out an *ex officio* assessment of unfairness if this can be determined upon existing elements of law and fact available to it, in the sense that the court should not be confined exclusively to the elements of law and fact provided by the parties,[63] but it can take (without being obliged) investigative measures if the existing elements of law and fact give rise to serious doubts as to the unfair nature of certain clauses not invoked by the consumer but related to the subject matter of the dispute[64] and calls for a non-formalistic (functional) interpretation of the consumer claims.[65] The CJEU does not provide further guidance to courts on what is understood under 'serious doubt' concerning the unfairness of a term. In addition, the CJEU reiterates that the fairness assessment must remain contextualised in order to assess the unfairness of a contractual term (on which the claim is based),[66] without this meaning that the *ex officio* obligation would imply the unfairness control of all terms in a contract.[67] In addition, the CJEU still leaves open the question concerning the limits of an investigative measure. As has been raised in the legal literature, the fact that the CJEU has not yet recognised the obligation of an *ex officio* hearing of witnesses or experts does not mean that such an obligation cannot exist.[68]

The limitation of the obligation of courts to act of their own motion with the unfairness assessment regarding the subject matter of the litigation enhances the status of the consumer seen under unfair contract terms law as an active market player, having available the possibility to sue the business entity using unfair contract terms in a civil law suit un-

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62 ibid, para 28.

63 ibid, paras 36 and 37.

64 ibid, para 33.

65 ibid, para 47.

66 ibid, para 47.

67 ibid, para 48.

68 Werbrouck and Dauw (n 22) 335.

der the traditional principles of civil procedural law. Not surprisingly, we do not find in the ruling any reference to the public policy[69] foundation of the doctrine of own motion considering consumer protection a public interest that would justify a more active role of the courts. By not referring to this cardinal issue in the ruling, the CJEU may reinforce the policy approach of those jurisdictions that have so far avoided considering the public policy foundation of the own motion doctrine.[70] Only in rare cases have Member States such as Portugal imposed on the judiciary the duty to apply consumer protection law based on the CJEU approach to public policy rules.[71] One may ask what justice or market consideration guided the CJEU when adopting this approach and when and by whom this gap will be clarified or supplemented.

The impact of *Lintner* in practice is less than envisaged at the time of its adoption. There have been no significant developments in subsequent case law on the issue of the investigative role of the judge, and the legal literature has not devoted too much space to the ruling so far. The debate seems to have calmed in terms of preliminary rulings on the issue of own motion after the CJEU clearly framed the message that consumer protection in the field of unfair contract terms is an issue of private law, a matter between the contracting parties, and hence is bound to the subject matter of the litigation between the consumer and the business entity.

The referring Hungarian court got from the CJEU what it wanted – the limits of its investigative role, and similarly courts in other Member States may welcome the conservative approach of the CJEU considering the long-lasting tension between national civil procedural law and the requirements arising from Directive 93/13/EEC in terms of the investigative obligations of national civil law courts.

The ruling of the CJEU in *Lintner* put the courts back in their traditional private law roles, according to which the task of the judge is limited to providing justice on the subject matter of the litigation, based on the evidence and arguments referred to it by the litigant parties. This is reasonable, and hence courts should not take the place of market surveillance authorities in monitoring unfair contract terms. More market regulations are needed rather than more investigative powers conferred on civil law courts.

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[69] Case C-227/08 *Martín Martín* ECLI:EU:C:2009:792, paras 19 and 20. With respect to the public policy argument, see Case C-168/05 *Mostaza Claro* ECLI:EU:C:2006:675, para 38 and Case C-40/08 *Asturcom Telecomunicaciones* ECLI:EU:C:2009:615, para 52.

[70] On the abandonment of the public policy consideration, see also Rita Simon, 'Consumer Protection and Public Interest' in Luboš Tichý, Michael Potacs (eds), *Public Interest in Law* (Intersentia 2021) 288; Emilia Miscenic, 'Currency Clauses in CHF Credit Agreements: A "Small Wheel" in the Swiss Loans' Mechanism' (2020) 6 Journal of European Consumer and Market Law 226; Emilia Miscenic, 'The Constant Change of EU Consumer Law: The Real Deal or Just an Illusion?' (2022) 70(3) Anali Pravnog Fakulteta u Beogradu 679, 696.

[71] Jacolien Barmard and Emilia Miscenic, 'The Role of the Courts in the Application of Consumer Protection Law: A Comparative Perspective' (2019) 44(1) Journal for Juridical Science 111, 129.

Without doubt, the ruling may be disappointing to consumers who tend to see in private law courts a kind of public authority, falsely expecting paternalism from the civil law judge, whereas Member State civil procedural law has never challenged its traditional principles under the impact of the doctrine of own motion developed by the CJEU. Under the *Lintner* case, it is clear that is not the task of the civil law judge to check of his or her own motion the fairness of the whole contract. The ruling is a clear and correct message to Member States that market surveillance in the field of unfair contract terms law should not be the task of civil law courts. But then whose job is it to police the market?

The policy message of the CJEU to the Member States is much stronger than the problem-solving potential of its interpretation on the questions referred to it by the Hungarian court. The refusal of the CJEU to turn the duty of 'own motion' into an effective tool for judges is a clear statement of position from it to the Member States that it does not want to intervene more in national civil procedural law. In this context, it is important to note that the CJEU reminds the Member States about the room under Article 8 of Directive 93/13/EEC to adopt or retain more stringent provisions compatible with the Treaty in the area covered by it in order to ensure a maximum degree of protection for consumers. It stresses that:

> Member States remain free to make provision in their national law, for a more extensive *ex officio* examination which their courts must carry out under the directive, in accordance with the reasoning set out in its judgment in paras 28 to 38.[72]

This may be qualified as an invitation to Member States to exercise their legislative power in this matter.

The questions remain: why do Member States consider that the time has not yet come to solve by legislation the conflicts between the requirements stemming from Directive 93/13/EEC and the national civil procedural law; why do Member States continue to ignore, despite the high economic, social and political costs connected to the weak enforcement of the directive within the context of national law, that the procedural weakness of the consumer demands specific rules? This is certainly a question of responsibility that for too long has been shifted by Member State legislators onto the judiciary in the name of the 'sanctity' and 'inviolability' of the integrity of national civil law and national civil procedural law.

Unfortunately, in this way, cardinal issues, such as redistribution policy and social justice, continue to remain unanswered in many Member States. This is not good for the stakeholders, including business entities who are affected by long-standing legal uncertainty, for judges who struggle with a high volume of appeals and recourse, for consumers who have lost trust in the judiciary, and the list goes on. Consumer over-in-

[72] *Lintner* (n 29) para 41.

debtedness affects the whole of society, including taxpayers. Nevertheless, surprisingly so far no state liability cases can be reported in the field of unfair contract terms law where consumers would have made state authorities liable for not acting and for not taking the steps allowed by EU law to issue mandatory legislation to abolish the procedural barriers in enforcing unfair contract terms law.

Access to justice does not always grant substantive justice, because in practice weak judicial protection draws limits on the effectiveness of unfair contract terms law and this ultimately raises justice concerns in the meaning of the Aristotelian division between corrective justice (this looks back at the interaction between the parties and provides reasons for restoring the parties' position[73]) and distributive justice (this provides solutions under which everyone has its share[74]). Maintaining procedural inequality further enhances the shift to more distributive justice in unfair contract terms law, started under the impact of the global financial crisis in 2008. This goes against the normative foundation of unfair contract terms law, as defined by the scope and wording of Directive 93/13/EEC, which is corrective justice.[75] Corrective justice deals with justice in interpersonal relations and does not deal with wider social aims; under corrective justice that has as its scope the maintenance and restoration of equality between the parties who enter a transaction, an injustice occurs by one party realising a gain and the other a loss.[76] Under the current model defended by the Member States and supported by the CJEU, procedural inequality raises obstacles to substantive justice.

There is a clear gap between the evolution of national judicial law under the impact of the 'own motion' doctrine of the CJEU and Member State civil procedural law. The reason for this is the weak integration of consumer policy considerations in Member State civil procedural law. Only Slovakia and Spain have amended their codes of civil procedure and enacted specific procedural rules under the impact of the judicial law developed by the CJEU, whereas other Member States (France, Latvia, Lithuania) have amended their substantive laws as a consequence of the *ex officio* doctrine.[77] In most Member States, no legislative impact can be identified, the issue being left to the domain of judicial law.

The reason behind this unsatisfactory development in continental civil procedural law is that civil procedural law which strictly defines the powers and obligations of the courts cannot be reformed via jurisprudence. Articles 6 (1) and 7(1) of Directive 93/13/EEC provide a proper

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[73] Ernest J Weinrib, *The Idea of Private Law* (OUP 1995) 62.

[74] Peter Benson, 'The Basis of Corrective Justice and Its Relation to Distributive Justice' (1992) 77 Iowa Law Review 535.

[75] Mónika Józon, 'Unfair Contract Terms Law in Europe in Times of Crisis: Substantive Justice Lost in the Paradise of Proceduralisation of Contract Fairness (2017) 4 *Journal of European Consumer and Market Law* 157, 164.

[76] Weinrib (n 74) 62.

[77] Law (n 11) 300.

legal basis in terms of substantive law for the unfairness test carried out by judges, but are insufficient to promote legislative steps at Member State level in the field of civil procedural law.

Under such circumstances, it clearly becomes imperative to enact specific procedural rules aimed at enhancing the effectiveness of unfair contract terms law, as advanced in the Fitness Check of Consumer Law[78] and also in the MPI report on the procedural protection of consumers under EU consumer law.[79]

However, before proceeding, the EU should clearly define what type of social justice is promoted under Directive 93/13/EEC and should stop transferring this task onto the CJEU or the Member State judiciary, because fixing social distribution issues related to Directive 93/13/EEC is not a task for the courts, but one for the legislative branch.[80] This task should not be transferred to the Member States either, who bear the high economic and political costs of consumer over-indebtedness, because regulating differently procedural law aspects of unfair contract terms at Member State level may distort competition on the internal market of the EU.

Nevertheless, for this, more innovative solutions are needed to overcome the missing legal basis of the EU to act in the field of civil procedural law. Until this happens, the *ex officio* review remains an incomplete mechanism to compensate for the procedural inequality of consumers. *Lintner* is a good starting point, but is not sufficiently innovative.

Various potential legal bases exist in the TFEU for developing specific procedural rules to enhance the effective enforcement of Directive 93/13/EEC, such as Article 19(1) TEU that formulates the duty of sincere cooperation established in Article 4(3) TEU in the field of procedural law, Article 114 TFEU, Article 352 TFEU, and Article 197(2) TFEU. The sector-specific legal basis could also be used as 'implied procedural competence'[81] for enhancing the effectiveness of substantive rules by procedural provisions. As the *ex officio* rule was developed from Articles 6 (1) and 7(1) of Directive 93/13/EEC, specific rules could also be developed from a sectoral legal basis and included into the text of Directive 93/13/EEC by the next revision. It would not be for the first time that the Commission codifies relevant EU case law in secondary mandatory law. Soft

[78] Civic Consulting, Study for the Fitness Check of EU Consumer and Marketing Law (European Commission 2017) 91.

[79] Max Planck Institute, An Evaluation Study of National Procedural Laws and Practices in Terms of Their Impact on the Free Circulation of Judgments and on the Equivalence and Effectiveness of the Procedural Protection of Consumers under EU Consumer Law (2017) 47.

[80] Critically on the missing social justice clarifications at EU level concerning Directive 93/13/EEC, see Andrea Fejős, 'Social Justice in EU Financial Consumer Law' (2019) 24 (1) Tilburg Law Review 68.

[81] The expression used by Schütze in search of the legal basis of procedural rules, in Robert Schütze, *European Union Law* (CUP 2015).

rules in the form of a Commission notice or other type of guidance to courts would not suffice against mandatory rules on Member State procedural laws.

Given the lack of EU measures, the ECtHR established at end of 2018 in *Merkantile* that the consumer protection aim of Directive 93/13/EEC as public policy may justify the enactment of specific procedural rules at Member State level. However, one cannot find the impact of this human right law decision in the EU legal literature on unfair contract terms law or on the reasoning of the CJEU on the own motion doctrine in unfair contract terms cases. It seems forgotten that procedural autonomy supposes that Member State procedural rules are applied in a way that does not impede the effectiveness of EU law. Procedural autonomy should indeed be interpreted in the meaning that 'based on the assumption that national civil procedural law may provide adequate procedural means oaswever, granting the effective enforcement of the EU, civil procedural law has a subordinated function to substantive law'.[82] The principle of procedural autonomy has proven to block changes in Member State civil procedural law.

However, the lack of legislative actions at EU level should not be an excuse for the Member States or their judiciary not to take the necessary approach and measures under the tools available to them within domestic law and under EU law as the case of Hungary testifies, instead of transferring the enforcement problems to the EU level. For example, Article 3(2) of the Hungarian Civil Procedural Code provides that *lex specialis* may override the traditional rule of civil procedural law that proclaims that the court is bound by the submissions and legal statements made by the parties. In this context, the question arises as to why the national implementing rules of Directive 93/13/EEC and the CJEU case law were not considered a sufficient legal basis by the Hungarian court ruling that the obligation to act on own motion overrides the traditional principles of civil procedural law. A further tool that could have been used by the Hungarian court to clarify its doubts without shifting the problem from the national to the EU level is the definition of unfairness under Article 4(1) of Directive 93/13/EEC read in conjunction with the rules of interpretation of contracts in the Civil Code, stating that the terms of the contract should not be interpreted individually but in their interplay, having regard to the scope of the contract. Nevertheless, it is not the job of the CJEU to exploit the potential of Member State law; this remains the task of the national judiciary. In the end, the Hungarian referring court achieved an interpretation that does not help it very much and does not make consumers better off under Hungarian civil procedural law.

The proceduralisation of unfair contract terms law has not brought with it the expected results. On the contrary, it has shifted the focus from substantive justice to procedural justice, which is a step locked by proce-

[82] Walter van Greven, 'Of Rights, Remedies and Procedures' (2000) 37 Common Market Law Review 502.

dural law barriers at the Member State level.[83] This was easier than fixing the social justice considerations of Directive 93/13/EEC needed for legislative measures to grant effective justice in terms of substantive justice.

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[83] Józon (n 76).