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Editorial note

Iris Goldner Lang*

CELEBRATING THE 20TH ANNIVERSARY OF THE CROATIAN YEARBOOK OF EUROPEAN LAW AND POLICY: THE ROLE OF EU LAW AND ACADEMIC WRITING IN TIMES OF CHANGE

Europe is changing. Policies and rules that seemed socially, morally, politically and legally unacceptable twenty years ago have over the past years become permissible and, in the eyes of many, even necessary. Europe's truths are shifting into new and sometimes obscure territories. We are in the midst of sometimes conflicting political and social changes and movements whose end result is difficult, if not impossible, to predict. These changes could shake the foundations of European liberal democracies, human rights, freedoms and the rule of law. Paradoxically, the European continent feels simultaneously more integrated and more divided than ever.

The ongoing changes could have transformative effects on EU law. In order to understand EU law, as a social construct, it is important to critically observe and analyse these changes and their effects. Then again, law is a powerful society-making tool. It can be both the consequence of social transformation and its driver. Consequently, EU law has become the new battleground of change in Europe. In this context, it is essential to understand and interpret EU law not just textually, as mere words on paper, but in line with basic Union principles, aims and values, including justice and respect for human rights.

Here, a brief digression about divergent views on the nature of law seems in order. In 1958 the Harvard Law Review published a debate between two law scholars, HLA Hart and Lon L Fuller, whose contention relied on the following summary of the case of *Grudge Informer*.[1] According to Hart, in 1944, a German woman, who wanted to get rid of her husband, denounced him to the Nazi authorities by alleging that he had

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[1] Herbert Lionel Adolphus Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 Harvard Law Review 593; Lon L Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart' (1958) 71 Harvard Law Review 630.

made insulating remarks about Hitler and the Nazi regime, while being on leave from the army. The husband was found guilty of having violated two Nazi statutes for making such remarks and was sentenced to death. After the war, the woman was prosecuted for her deed. Her defence was that she had acted in accordance with the law that was in force at that time and, consequently, that she had not committed a crime. The court decided that 'the sentencing judge should be acquitted, but that the wife is guilty since she utilized [...] a Nazi "law" which is contrary "to the sound conscience and sense of justice of all decent human beings" to bring about the death or imprisonment of her husband'.[2] In other words, the court established that, even though what she did was lawful at the time of the Nazi regime, that law itself was against human conscience and justice. Put differently, the court suggested that there is something above the law.

Without going into details of the Hart-Fuller debate, we can say that Hart considered that law and morality could exist independently and that, as a result, there could be unjust laws which would still be valid. Unlike Hart, Fuller viewed law as inherently linked to moral standards internal to law and referred to this as the 'internal morality of law.[3] According to Fuller, law needed to adhere to a sense of fairness and justice in order to be legitimate.

There is a clear link between the Hart–Fuller debate and the discussion on the transformation of law in contemporary Europe. Fuller's arguments about the internal morality of law, which suggest that there is something higher than the legal norm itself, set two conditions for the validity of existing and new national and EU rules. First, EU Member States' and EU rules need to adhere to the internal morality of the Union's legal order, enshrined in Articles 2 and 3 TEU, as well as other Treaty articles. Second, the interpretation and application of these rules need to follow the same internal logic of the system. Otherwise, the rules fail the internal morality test and cannot constitute valid and applicable law. Thus, the internal morality of the Union's legal order acts as a safety valve, allowing only those legal changes that respect the foundations of European liberal democracies and precluding those that would have a negative effect on these foundations.

However, the internal morality of the Union's legal order is not enough to justify its existence and its rules. Contemporary challenges in Europe and the world demand novel and original legal answers and justifications that need to be responsive to current problems and that

[2] Hart (n 1) 619.

[3] Fuller (n 1) 645.

are acceptable to society, while at the same time capturing the internal morality of the system. Harari rightly stated:

> The only place rights exist is in the stories humans invent and tell one another. These stories were enshrined as self-evident dogma during the struggle against religious bigotry and autocratic governments. Though it isn't true that humans have a natural right to life or liberty, belief in this story curbed the power of authoritarian regimes, protected minorities from harm and safeguarded billions from the worst consequences of poverty and violence. It thereby contributed to the happiness and welfare of humanity probably more than any other doctrine in history. Yet it is still a dogma.[4]

Consequently, the power of the EU's dogma, or the internal morality of the Union's legal order – however you choose to call it – depends on its ability to be credible and resonant to contemporary challenges.[5] Fulfilling the demands of credibility and responsiveness to today's problems in Europe might be a difficult task, but it is necessary if we want to ensure the sustainability of the EU's legal order and European liberal democracies. Responding to contemporary challenges could result in certain alterations in the internal logic of the EU's legal order, as it is not static. However, there are certain 'fixed points', as named by John Rawls, which represent our basic convictions about certain issues and to which any legal transformation needs to adhere to be legitimate.[6] These 'fixed points' of the legal systems of the EU and its Member States should not be transgressed.

What is our role, as legal scholars and academics, in this challenging moment of potential transformations? We have the responsibility to take note of the current challenges and do what we do best as our vocation: teach, write and publish, with a view to educating future jurists, stimulating critical thinking and discussions on EU's values, principles and roles, and informing policymakers and practitioners. If successful, our teaching and academic writing could affect tomorrow's policies and practices and make a change for the better.

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[4] Yuval Noah Harari, *21 Lessons for the 21st Century* (Penguin Random House 2018) 215.

[5] César Rodríguez-Garavito, 'Human Rights 2030: Existential Challenges and a New Paradigm for the Field' (2021) New York University School of Law Public Law and Legal Theory Research Paper Series Working Paper Nos 21-39.

[6] John Rawls, *A Theory of Justice* (Harvard University Press 1971) 17–18. Rawls states: 'There are questions which we feel sure must be answered in a certain way. For example, we are confident that religious intolerance and racial discrimination are unjust. We think that we have examined these things with care and have reached what we believe is an impartial judgment not likely to be distorted by an excessive attention to our own interests. These convictions are provisional fixed points which we presume any conception of justice must fit'.

In the uncertain times Europe faces, academic journals need to promote both academic freedom and academic social responsibility. Academic freedom implies that academic journals should not align with only one particular ideological perspective and accept only such papers. Instead, academic journals should enable a free exchange of ideas, intellectual openness and curiosity, diversity of thought, competing points of view and counterarguments. At the same time, academic freedom does not authorise writing that denies human rights or relies on false or fabricated arguments. The commitment of academic journals to the truth is becoming highly relevant today, as it is increasingly difficult to distinguish truth from lies. Responsible academic writing implies honesty and ethics in one's research and argumentation. It also entails a commitment to social justice and social progress. Academic writing, just like (EU) law, needs to be responsive to current challenges, compliant with basic ethical standards as its 'fixed points', and credible in order to respond to today's challenges in Europe and worldwide.

The Croatian Yearbook of European Law and Policy (CYELP) represents one such bastion of independent academic writing and critical thinking on EU law and policies. Today, as CYELP celebrates its 20th anniversary, we remember, with pride and gratitude, all its editors-in-chief, executive editors, members of the Editorial Board, reviewers, student assistants, readers and numerous authors from more than thirty countries round the world, many of whom presented their papers at the annual Jean Monnet Seminars on 'Advanced Issues of European Law', organised in Dubrovnik by the Department of European Public Law of the Faculty of Law in Zagreb. All of them have contributed to CYELP's growth and success, as one of the leading European academic journals on EU law and policy, indexed in the strongest databases such as WoS–ESCI and Scopus, which ranked it as a Q2 journal. I would especially like to single out and thank its editors-in-chief, starting with its founder and conceptual creator, Judge Siniša Rodin, followed by Advocate General Tamara Čapeta, then by Judge Tamara Perišin and myself, and now led by Associate Professor Melita Carević. I am also immensely grateful to all its executive editors who have worked so diligently over the past years and who have made CYELP even better, more visible and modern, introducing important novelties in CYELP's work, such as 'Online First', which enables all accepted articles to be published immediately online and ahead of print. Here, special thanks go to Assistant Professor Nika Bačić Selanec and Dr Davor Petrić, now joined by Dr Antonija Ivančan, as well as to one of our former executive editors Filip Kuhta. I am also most grateful to CYELP's excellent language reviser and copyeditor, Mark Davies, and its library and database coordinator, Aleksandra Čar. I am confident that future generations of CYELP's team members, especially

its editors-in-chief and executive editors, will continue this impressive work, further enhancing CYELP's quality and increasing its readership.

Over the past twenty years, CYELP has witnessed all the important transformations of EU law and policies. Many of CYELP's writings closely followed Croatia's transformation into a fully fledged EU Member State from the start of accession negotiations until Croatia's accession to the EU on 1 July 2013 and onwards. Its articles have reflected on many EU transformations triggered by Treaty amendments, different legislative reforms and judgments of the Court of Justice of the European Union. CYELP has analysed various EU crises including constitutional, financial, refugee and rule-of-law ones. Its articles have as well discussed the transformations of EU law caused by security and climate change threats, the use of digital technologies and other global challenges.

Today, as CYELP enters its third decade, Europe's reality is marked by new types of challenges. CYELP will continue to encourage novel and original writings addressing these problems and other relevant and contemporary matters in EU law and policies. As there is a growing number of issues encompassed by EU law, and as EU law is becoming increasingly complex, CYELP is open both to new topics and to the clarification of current discussions on EU law and policies. CYELP is looking for more knowledge and insights, hopefully helping to move our society forward.

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THE EUROPEAN PARLIAMENT'S PROPOSAL FOR AN EU STATE OF EMERGENCY CLAUSE: A COMPARATIVE AND CONSTITUTIONAL ANALYSIS

Guido Bellenghi*

Abstract: Following the Conference on the Future of Europe, the European Parliament presented a proposal to reform the Treaties, aiming to expand the competences of the EU in emergency contexts and enhance parliamentary participation in the adoption of emergency measures. Notably, the Parliament suggests introducing a new state of emergency clause, modelled on similar provisions included in national emergency laws. This proposal reveals several issues associated with the attempt of transposing the conceptual categories and legal schemes of national emergency law into EU law. Drawing from examples of EU Member States' emergency laws, this article analyses these issues from a comparative perspective, focusing on the equilibrium between the recognition of extraordinary powers and the construction of appropriate constitutional safeguards. Furthermore, it critically assesses the proposal's potential implications for EU constitutional law, discussing in particular the trajectory of EU integration, the role of the adjudicature, and the constitutional design of EU competence.

Keywords: emergency, state of emergency, Treaty reform, competence, Conference on the Future of Europe.

1 Introduction

On 22 November 2023, after the Conference on the Future of Europe, the European Parliament (hereinafter: the Parliament) adopted a Resolution for the amendment of the Treaties.[1] Amongst the 245 amendments proposed, four concern the action of the European Union (hereinafter: EU) within emergency contexts. First, the Parliament proposes to elevate protection against cross-border health threats and civil protection

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[1] European Parliament, 'Report on Proposals of the European Parliament for the Amendment of the Treaties' (2023) 2022/2051(INL). The resolution is based on a report drafted by the Committee on Constitutional Affairs (AFCO), in particular by the five rapporteurs Guy Verhofstadt, Sven Simon, Gabriele Bischoff, Daniel Freund, Helmut Scholz, and was published in the Official Journal on 24 July 2024 (C/2024/4216).

from supporting competences[2] to areas of shared competence.[3] Second, with its proposal, the Parliament calls for the establishment of a Defence Union including military units under the operational command of the EU, to be deployed, with the consent of the Parliament itself, if a Member State is a victim of aggression.[4] Third, the proposed reform includes an amendment of the procedure enshrined in Article 78(3) TFEU, which is the legal basis allowing the Council to act in the event of 'an emergency situation characterised by a sudden inflow of nationals of third countries'.[5] Whilst the Parliament currently holds only a right to be consulted, the amended provision would also assign to the Parliament the right of initiative to be shared with the European Commission (hereinafter: the Commission).[6] Fourth and finally, the Parliament proposes to delete Article 122 TFEU,[7] which includes two special emergency mechanisms[8] allowing the Council to take extraordinary measures in emergency contexts[9] with very limited parliamentary involvement.[10] In the Parliament's proposal, the deleted Article 122 TFEU would be replaced by a new Article 222(1) TFEU, enshrining a state of emergency clause resembling those typically contained in national constitutions. Indeed, the new provision would allow the Parliament and the Council to grant, for a predetermined period of time, 'extraordinary powers' to the Commission in the case of emergency.[11]

The changes proposed by the Parliament follow two main threads. First, they tend to expand the emergency competence of the EU, designating the protection against cross-border health threats and civil protection as areas of shared competence, establishing a Defence Union with new civilian and military capacities, and allowing the Commission

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[2] Article 6(a) and (f) TFEU. For the respective legal bases, see Articles 168(5) and 196(2) TFEU.

[3] European Parliament (n 1) 70 and 74.

[4] ibid 52, 53 and 55.

[5] See, for instance, 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.

[6] European Parliament (n 1) 100.

[7] ibid 119–120.

[8] Case C-848/19 P *Germany v Poland* ECLI:EU:C:2021:598, para 62.

[9] For a contrasting view, see Merijn Chamon, 'The Use of Article 122 TFEU: Institutional Implications and Impact on Democratic Accountability' (European Parliament 2023) Study Requested by the AFCO Committee PE 753.307, 19–21, where the author considers Article 122(1) TFEU as 'an exceptional but not an emergency clause'.

[10] The Parliament is excluded from the procedure envisaged by Article 122(1) TFEU, whereas it merely has a right to be informed of the decision taken by the Council under Article 122(2) TFEU.

[11] European Parliament (n 1) 186.

to exercise general emergency powers not limited to specific policy areas. Second, the amendments pursue the democratisation of emergency powers by enhancing the Parliament's role in the adoption of emergency measures. This proposal therefore addresses critical concerns raised by various commentators, relating to both the limited emergency competences of the EU[12] and the marginalisation of the Parliament in the procedures for the adoption of emergency measures.[13]

Crucially, by including a state of emergency clause, the proposal provides an institutional dimension to the growing scholarly debate concerning the potential constitutionalisation of a general emergency competence assigned to the EU.[14] It seeks to answer, from the perspective of the EU legal order, the longstanding question concerning the optimal balance between extraordinary powers and constitutional safeguards. This requires navigating the tension between the nature of emergencies and the constitutional design of EU competence. On the one hand, emergencies are typically unpredictable and transboundary,[15] in that they consist of sudden shocks rapidly escalating and producing cross-sectoral cascading effects. On the other hand, under the principle of conferral,[16] the competence of the EU is based on powers that are attributed in advance to the Union by its Member States, and these powers are typically organised in the Treaties along policy-specific lines, whereby different titles and chapters contain specific legal bases for each policy area.

This contribution analyses the Parliament's proposal for a state of emergency clause from both a comparative and EU constitutional perspective. In doing so, it tests the extent to which it is possible to engage

[12] The Group of Twelve, 'Sailing on High Seas: Reforming and Enlarging the EU for the 21st Century' (2023) Report of the Franco-German Working Group on EU Institutional Reform 32; Salvatore F Nicolosi, 'Emergency Legislation in European Union Law' in Ton Van den Brink and Virginia Passalacqua (eds), *Balancing Unity and Diversity in EU Legislation* (Edward Elgar Publishing 2024) 79; and Julia Fernández Arribas, 'Regulating European Emergency Powers: Towards a State of Emergency of the European Union' (Jacques Delors Institute 2024) Policy Paper 295 14.

[13] Jonathan White, 'Constitutionalizing the EU in an Age of Emergencies' (2023) 61 Journal of Common Market Studies 781, 788–789; Vivien A Schmidt, 'European Emergency Politics and the Question of Legitimacy' (2022) 29 Journal of European Public Policy 979, 981; and Andreas Maurer, 'Improving Urgency Procedures and Crisis Preparedness within the European Parliament and EU Institutions: Rationales for Democratic, Efficient and Effective Governance under Emergency Rule' (European Parliament 2022) Study Requested by the AFCO Committee PE 730.838 55.

[14] White (n 13); Stefan Auer and Nicole Scicluna, 'The Impossibility of Constitutionalizing Emergency Europe' (2021) 59 Journal of Common Market Studies 20; and Christian Kreuder-Sonnen, 'Does Europe Need an Emergency Constitution?' (2023) 71 Political Studies 125.

[15] Arjen Boin, 'The Transboundary Crisis: Why We Are Unprepared and the Road Ahead' (2019) 27 Journal of Contingencies and Crisis Management 94.

[16] Article 5(2) TEU.

with the emergency discourse under EU law by means of conceptual categories and legal schemes traditionally belonging to the sphere of national emergency law. In order to achieve its objectives, the article first provides an overview of the relevant comparative theoretical framework, focusing on some essential conceptual tools that are necessary to engage with the emergency legal discourse. These conceptual tools serve to analyse the proposed Article 222(1) TFEU by testing its key constituent elements against the yardstick offered by Member States' emergency laws (Section 2). Such an analysis then allows us to assess, from an EU constitutional perspective, crucial issues arising from the minimalistic character of the proposed clause, focusing specifically on aspects of systematicity, judicial review, and competence (Section 3).

2 Comparative analysis of the proposed state of emergency clause

2.1 Conceptual framework

The EU Treaties incorporate a number of provisions that can be triggered in the event of an emergency.[17] It is possible, in particular, to distinguish at least three different types of emergency clauses:[18] first, emergency legal bases that empower EU institutions to take extraordinary measures in emergency circumstances;[19] second, emergency derogation clauses that allow the Member States to depart from EU law in the event of an emergency;[20] and third, emergency cooperation clauses that prescribe cooperation between the Member States or between the Member States and the Union in the case of emergency.[21] These three types of clauses can be compared to three different models to be found outside the EU legal order. First, emergency legal bases entrust public authorities with emergency powers and thus recall the emergency clauses typically found in national constitutions. Second, emergency derogation clauses allow derogation from Treaty standards, resembling emergency clauses typically foreseen by human rights instruments.[22] Third and finally, emergency cooperation clauses establish mutual obligations similar to those contained in the provisions of some international treaties.[23]

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[17] These include Article 42(7) TEU and Articles 66, 78(3), 122(1) and (2), 107(2)(b) and 3(b), 143, 144, 213, 222, and 347 TFEU.

[18] This distinction is proposed by Bruno De Witte, 'EU Emergency Law and Its Impact on the EU Legal Order' (2022) 59 Common Market Law Review 3, 5.

[19] See, for instance, Articles 78(3) and 122 TFEU.

[20] See, for instance, Articles 144 and 347 TFEU.

[21] See, for instance, Article 222 TFEU.

[22] Article 15 European Convention on Human Rights; Article 4 International Covenant on Civil and Political Rights; and Article 27 American Convention on Human Rights.

[23] See, for instance, Article 5 of the North Atlantic Treaty.

The proposed Article 222(1) TFEU reads:

> In the event of an emergency affecting the European Union or one or more Member States, the European Parliament and the Council may grant the Commission extraordinary powers, including those to enable it to mobilise all necessary instruments. In order for an emergency to be declared, the European Parliament shall act by a majority of its component members and the Council shall act by a qualified majority, on a proposal from the European Parliament or the Commission.
>
> That decision, by which an emergency is declared and extraordinary powers are granted to the Commission, shall define the scope of the powers, the detailed governance arrangements and the period during which they apply.
>
> The European Parliament or the Council, acting by a simple majority, may revoke the decision at any time.
>
> The Council and the Parliament may, in accordance with the procedure set out in the first subparagraph, review or renew the decision at any time.

The proposed provision empowers EU institutions to act within an emergency. It therefore must, from an EU law standpoint, constitute an emergency legal basis. Following the parallel drawn above, the benchmark for the assessment of each of its components must thus be found in national laws. In particular, attention should be paid to national 'formal emergency law', understood as those provisions of national law that define the substantive and procedural limits governing the adoption of each ad hoc emergency measure.[24] Whereas a comparison with all existing national laws on a global scale goes beyond the scope of this article, the focus is here placed on examples drawn from the formal emergency laws of EU Member States.[25] In this respect, the constitutions of most

[24] Andrej Zwitter, 'The Rule of Law in Times of Crisis: A Legal Theory on the State of Emergency in the Liberal Democracy' (2012) 98 Archives for Philosophy of Law and Social Philosophy 95, 100. Ad hoc emergency measures adopted in specific emergency contexts constitute instead 'material emergency law'.

[25] For methodological transparency, it must be preliminarily noted that, to ensure the feasibility of the research, the analysis contained in this contribution is primarily based on the literal interpretation of national emergency laws. This approach may not provide an exhaustive account of how specific provisions of national emergency law have evolved in the institutional practice or case law of a given Member State. For instance, in the case law of the Romanian Constitutional Court, the threats posed by economic shocks are explicitly considered to pertain to the sphere of national security, as explained by Bogdan Iancu, 'Romania: The Vagaries of International Grafts on Unsettled Constitutions' in Anneli Albi and Samo Bardutzky (eds), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law: National Reports* (TMC Asser Press 2019) 1074. Therefore, this article acknowledges the need for further research also encompassing the practical application and interpretation of national emergency laws.

EU countries include provisions dealing with emergencies ('constitutional accommodation').[26] Such provisions can take the form of either state of emergency clauses,[27] which allow a temporary emergency regime to be established during which extraordinary powers are conferred upon the executive and where certain constitutional safeguards are suspended,[28] or clauses exceptionally empowering the executive with law-making powers to adopt ad hoc acts addressing urgent situations.[29] In some countries, formal emergency law is partially or entirely contained in legislation ('legislative accommodation')[30] that may be adopted by the legislator on the basis of a specific clause enshrined in the constitution[31] or even in the absence of an ad hoc constitutional mandate.[32]

To the extent that framing within national constitutional traditions acts as the 'motor'[33] to develop principles of EU law, understood as 'a *ius commune* built with the bricks of the comparative law method',[34] it can be affirmed that, with its new Article 222(1) TFEU, the Parliament proposes the constitutional accommodation of emergencies by means of a state of emergency clause. A comparative analysis of the emergency regime proposed by the Parliament can thus be based on the indicators offered by legal literature for the analysis of national emergency clauses,[35] focusing

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[26] Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge University Press 2006) 35.

[27] For instance, Article 16 French Constitution; Article 48 Greek Constitution; Article 50 Hungarian Constitution; Article 19 Portuguese Constitution; and Article 116 Spanish Constitution.

[28] Nicos Alivizatos and others, 'Respect for Democracy Human Rights and Rule of Law during States of Emergency: Reflections' (Venice Commission 2020) CDL-PI(2020)005rev-e para 5; and Zoltán Szente, 'How to Assess Rule-of-Law Violations in a State of Emergency? Towards a General Analytical Framework' (2024) Hague Journal on the Rule of Law.

[29] Article 23 Danish Constitution; Article 101(2) Croatian Constitution; Article 44(1) Greek Constitution; Article 77(2) Italian Constitution; and Article 115(1) Romanian Constitution.

[30] Gross and Ní Aoláin (n 26) 66. See also John Ferejohn and Pasquale Pasquino, 'The Law of the Exception: A Typology of Emergency Powers' (2004) 2 International Journal of Constitutional Law 210, 216–217.

[31] For instance, Article 116(1) of the Spanish Constitution was the legal ground for the adoption of the *Ley Orgánica 4/1981, de 1 de junio, de los estados de alarma, excepción y sitio.*

[32] See, for instance, the French *Loi n° 55-385 du 3 avril 1955 relative à l'état d'urgence.*

[33] Joana Mendes, 'EU Law Through the State Lens' (*Verfassungsblog*, 20 March 2024) <https://verfassungsblog.de/eu-law-through-the-state-lens/> accessed 26 November 2024.

[34] Koen Lenaerts, 'Interlocking Legal Orders in the European Union and Comparative Law' (2003) 52 The International and Comparative Law Quarterly 873, 906.

[35] See the various indicators identified by Nicole Questiaux, 'Study of the Implications for Human Rights of Recent Developments Concerning Situations Known as States of Siege or Emergency' (United Nations – Economic and Social Council – Commission on Human Rights – Sub-Commission on Prevention of Discrimination and Protection of Minorities 1982) E/CN.4/Sub.2/1982/15 <https://digitallibrary.un.org/record/36782> accessed 26 November 2024; Valentina Faggiani, 'Los Estados de Excepción. Perspectivas Desde El Derecho Constitucional Europeo' (2012) 9 Revista de Derecho Constitucional Europeo 181,

in particular on state of emergency clauses and considering the best practices recommended by the Venice Commission.[36] These indicators essentially concern how the notion of emergency is defined ('ontology of emergency' or '*jus ad tumultum*') and how an emergency is handled by the legal order once it manifests itself ('phenomenology of emergency' or '*jus in tumultu*').[37] Largely applying the model developed by Bjørnskov and Voigt,[38] the analysis carried out in this article focuses on six fundamental components of state of emergency clauses. These are (i) the grounds to invoke the emergency, the power to (ii) declare and (iii) end the emergency, (iv) the exercise of emergency powers, (v) their content and function, and (vi) control mechanisms.

2.2 The grounds to invoke a state of emergency

Identifying the grounds that may trigger a state of emergency means defining what a certain legal order understands as 'emergency'. Across EU Member States, the emergency definitional framework varies widely. The vast majority of formal emergency laws refer at least to security threats of external and internal origin. These are typically war[39] and internal upheavals.[40] Many Member States also explicitly include calamities and natural disasters within the notion of emergency.[41] Some national emergency laws, moreover, refer to threats to fundamental values such as democracy, the rule of law, and human rights,[42] or threats to

198–223; and Christian Bjørnskov and Stefan Voigt, 'The Architecture of Emergency Constitutions' (2018) 16 International Journal of Constitutional Law 101.

[36] Alivizatos and others (n 28).

[37] Guillaume Tusseau, 'The Concept of Constitutional Emergency Power: A Theoretical and Comparative Approach' (2011) 97 Archives for Philosophy of Law and Social Philosophy 498, 503 and 512; and Evan J Criddle and Evan Fox-Decent, 'Human Rights, Emergencies, and the Rule of Law' (2012) 34 Human Rights Quarterly 39, 49.

[38] Bjørnskov and Voigt (n 35).

[39] Article 117 Croatian Constitution; Article 36 French Constitution in conjunction with Article L 2121-1 of the French Defence Code; Article 115(a) German Basic Law; Article 48(1) Greek Constitution; Article 48(1)(a) Hungarian Constitution; Article 78 Italian Constitution; Article 62 Latvian Constitution; Article 229 Polish Constitution; Article 32(1) *Ley Orgánica 4/1981* (Spain); and Chapter 15 Swedish Instrument of Government.

[40] Article 36 French Constitution in conjunction with Article L 2121-1 of the French Defence Code; Article 48(1)(b) Hungarian Constitution; Article 28(3)(3) Irish Constitution; Article 62 Latvian Constitution; Article 230(1) Polish Constitution; and Article 13(1) *Ley Orgánica 4/1981* (Spain).

[41] Article 5(1) Constitutional Act of 22 April 1998 No 110/1998 (Czech Republic); Article 117 Croatian Constitution; Article 35 German Basic Law; Article 53 Hungarian Constitution; Article 3 Government Emergency Ordinance 1/1999, as approved and amended by Law No 453/2004 (Romania); and Article 4(1) *Ley Orgánica 4/1981* (Spain).

[42] Article 91(1) German Basic Law; Article 11(1) *Par ārkārtējo situāciju un izņēmuma stāvokli* (Latvia); Article 144 Lithuanian Constitution; Article 8(1) *Lei Orgânica nº 1/2012* (Portugal); and Article 13(1) *Ley Orgánica 4/1981* (Spain).

public health,[43] whereas less common are references to threats to the environment,[44] the economy,[45] and property.[46] Alternatively, rather than focusing on the event from which a threat stems or the interest which is threatened, some national emergency laws adopt functional-structural definitions considering the inherent characteristics of the threat, such as its exceptionality, seriousness, suddenness, and urgency.[47] Finally, some Member States' laws attach legal relevance to the territorial extent of an emergency. For instance, the German Basic Law provides for two different states of internal emergency depending on whether one or more *Länder* are affected.[48]

Whilst in all Member States formal emergency laws envisaging a state of emergency provide (at least minimal) definitional elements qualifying the notion of emergency, this is not the case for the proposed Article 222(1) TFEU. In light of this provision's formulation, two observations concerning the grounds to invoke Article 222(1) TFEU can be drawn. First, following a literal interpretation, Article 222(1) TFEU could be triggered regardless of whether the emergency affects one or more Member States. This is line with most of the Member States' formal emergency laws which foresee that an emergency may threaten just part of their territory and affect the whole or part of their population.[49] Second, fol-

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[43] Article 5(1) Constitutional Act of 22 April 1998 No 110/1998 (Czech Republic); Article 2(1) 2017 Emergency Act (Estonia); Article 3 *Valmiuslaki/beredskapslagen*, Act No 1552/2011 (Finland); Article 4(2) *Par ārkārtējo situāciju un izņēmuma stāvokli* (Latvia); Article 48 Lithuanian Constitution; Article 5(1) Constitutional Act No 227/2002 Coll (Slovakia); and Article 4 *Ley Orgánica 4/1981* (Spain). In that respect, 17 Member States have a constitutional emergency clause flexible enough to cover pandemics, as highlighted by Maria Diaz Crego and Silvia Kotanidis, 'States of Emergency in Response to the Coronavirus Crisis: Normative Response and Parliamentary Oversight in EU Member States during the First Wave of the Pandemic' (European Parliament Research Service 2020) Study PE 659.385 1.

[44] Article 4(2) Constitutional Act No 227/2002 Coll (Slovakia).

[45] Article 3(3) *Valmiuslaki/beredskapslagen*, Act No 1552/2011 (Finland). See however Anna Jonsson Cornell and Janne Salminen, 'Emergency Laws in Comparative Constitutional Law: The Case of Sweden and Finland' (2018) 19 German Law Journal 219, 246, noting that 'purely economic crises do not qualify as emergencies' under Finnish constitutional law.

[46] Article 5(1) Constitutional Act of 22 April 1998 No 110/1998 (Czech Republic); Article 48(1)(b) Hungarian Constitution; and Article 5(1) Constitutional Act No 227/2002 Coll (Slovakia).

[47] Such functional-structural definitions seem to be provided more often in clauses empowering the executive with ad hoc emergency law-making powers rather than in state of emergency clauses. See Article 18(3) Austrian Constitution; Article 44(1) Greek Constitution; Article 77(2) Italian Constitution; and Article 86 Spanish Constitution.

[48] Article 35(2) and (3) German Basic Law.

[49] Article 84(12) Bulgarian Constitution; Article 230(1) Polish Constitution; Article 19(2) Portuguese Constitution; Article 93(1) Romanian Constitution; and Article 4 *Ley Orgánica 4/1981* (Spain). Evidently, this does not apply to the state of war: see, for instance, Article 2(2) of the Constitutional Act No 110/1998 Coll (Czech Republic), establishing that '[w]hile

lowing a *lex specialis* reasoning, Article 222(1) TFEU, like national state of emergency clauses, would only act as an *ultima ratio* provision and would not be applicable if the emergency at stake is covered by a more specific emergency clause.

2.3 The power to declare an emergency

Across EU Member States, the power to declare an emergency is assigned either to the parliament,[50] the government,[51] or the head of state.[52] Where the power to declare is assigned to governments or heads of state, parliaments retain nonetheless important prerogatives, typically in the form of ex ante authorisation[53] or ex post ratification[54] of the declaration.

In this respect, the proposed Article 222(1) TFEU can be said to reflect Member States' legal traditions. It allows the EU's co-legislators, that is to say, the Parliament and the Council, to declare the existence of an emergency by means of a non-legislative procedure. The right of initiative is assigned alternatively to the Parliament and the Commission. Overall, Article 222(1) TFEU would thus create a significant concentration of powers in the hands of the Parliament.[55] Whilst this carries the typical risks associated with subjecting emergency declarations to democratic deliberation, namely long delays in emergency management and 'potentially fatal false negatives',[56] it is arguably consistent with the general approach followed by Member States' formal emergency laws. Importantly, moreover, entrusting the legislator with the power to declare

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the state of emergency and the state of national threat can be declared for the entire territory of the state or any part thereof, belligerency is always declared for the entire territory of the state only'.

[50] Article 7(1) Constitutional Act No 110/1998 Coll (Czech Republic); Articles 51(1) and 51/A(1) Hungarian Constitution; Article 28(3)(3) Irish Constitution; and Article 116(4) Spanish Constitution.

[51] Article 183(1) Cypriot Constitution; Article 5(1) Constitutional Act No 110/1998 Coll (Czech Republic); Article 6(1) *Valmiuslaki/beredskapslagen*, Act No 1552/2011 (Finland); Article 36(1) French Constitution; Articles 52(1) and 53(1) Hungarian Constitution; Article 62 Latvian Constitution; Article 232 Polish Constitution; Article 5(1) Constitutional Act No 227/2002 Coll (Slovakia); and Article 116(2) Spanish Constitution.

[52] Article 167(1) Belgian Constitution; Article 16(1) French Constitution; Article 87(9) Italian Constitution; Article 103(1) Dutch Constitution; Article 229 and 230(1) Polish Constitution; Article 134(e) Portuguese Constitution; Article 93(1) Romanian Constitution; and Articles 3(1) and 4(1) Constitutional Act No 227/2002 Coll (Slovakia).

[53] Article 138(1) Portuguese Constitution.

[54] Article 93(1) Romanian Constitution; and Article 231 Polish Constitution.

[55] In contrast, see Article 116(4) of the Spanish Constitution, which allows the parliament to act only exclusively at the proposal of the government.

[56] Kreuder-Sonnen (n 14) 133.

the emergency is in line with the best practices recommended by the Venice Commission.[57]

2.4 The power to declare the end of an emergency

Rather than assigning the power to declare the end of an emergency to a specific institution, the formal emergency laws of most Member States provide that states of emergency automatically expire after a certain period of time. For this purpose, they require the inclusion of a 'sunset clause' in the declaration of emergency. In addition, formal emergency laws often set duration limits that cannot be exceeded by sunset clauses.[58] Some formal emergency laws, moreover, envisage a maximum period of validity not only for the state of emergency but also for the specific emergency measures that may be adopted during the state of emergency itself.[59] Importantly, the maximum duration of emergency regimes tends to be longer where parliaments have had a decisive role in the declaration of emergency, and vice versa.[60] Finally, once expired, states of emergency can normally be prolonged, subject to certain safeguards such as parliamentary authorisations[61] and overall time limits for prolongation.[62] In this regard, unlike the constitutions of some non-EU countries,[63] the national emergency laws of EU Member States do not incorporate mechanisms such as Ackermann's 'supermajoritarian escalator'. The latter would be a clause providing for increasingly high voting thresholds for successive renewals of states of emergency.[64]

The proposed EU state of emergency clause allows the Parliament and the Council to revoke the state of emergency by a simple majority at

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[57] Alivizatos and others (n 28) paras 36 and 80–84.

[58] For instance, the state of siege and state of urgency in France last a maximum of 12 days (Article 2(3) *Loi n° 55-385*), whereas a state of alarm in Spain lasts a maximum of 15 days (Article 116(2) Spanish Constitution).

[59] Article 115k(2) and (3) German Basic Law; Article 48(1) Greek Constitution; Article 50(5) Hungarian Constitution; and Article 48(3) Luxembourgish Constitution.

[60] In Spain, the state of alarm, which is declared by the government, lasts only 15 days, whereas a state of exception, which requires the parliament's authorisation, may last up to 30 days, and a state of siege, which is declared by the parliament, does not have a constitutionally determined time limit; in Poland, a state of emergency, which is declared by the president but can be annulled by the parliament, may last up to 90 days, whilst a state of natural disaster, which is declared by the Council of Ministers, has a maximum duration of 30 days.

[61] Article 183(6) Cypriot Constitution; Article 36(2) French Constitution; Article 48(3) Greek Constitution); Article 53(3) Hungarian Constitution; Article 47(3)(c) Maltese Constitution; Article 232 Polish Constitution; and Article 116(2) Spanish Constitution.

[62] Article 48(3) Luxembourgish Constitution; and Article 230 Polish Constitution.

[63] See, for instance, Article 37(2)(b) of the South African Constitution.

[64] Bruce Ackerman, 'The Emergency Constitution' (2004) 113 The Yale Law Journal 1029.

any time.[65] From a comparative perspective, the proposed Article 222(1) TFEU requires the Parliament and the Council to set a time limit for a state of emergency but, unlike most Member States' emergency laws, does not specify a maximum duration for states of emergencies or for the ad hoc emergency measures adopted by the Commission. As is the case with a minority of Member States' emergency laws,[66] their duration would therefore be left to the discretion of the institutions. This solution complies with the best practices recommended by the Venice Commission, which only require that a specific time limit be included in the declaration of emergency but do not prescribe the establishment of maximum time limits at constitutional level.[67] Finally, disregarding scholars' recommendations[68] but following the example of Member States' laws, the proposed Article 222(1) TFEU does not include a supermajoritarian escalator, allowing instead the renewal of the EU state of emergency through a procedure subject to the same voting thresholds required for the declaration of emergency in the first place.

2.5 Who exercises emergency powers

In EU Member States, for reasons of efficiency,[69] the exercise of emergency powers is typically a prerogative of the executive. The role of the executive is however not always identical, since EU countries' formal emergency laws rely on different schemes of 'Madisonian checks and balances'.[70] This means that the exercise of emergency powers is subject, to various degrees, to institutional interaction between the executive and the legislator. Such a dialectic might be characterised by a strong concentration of powers in the hands of the executive, following the 'presidential' model envisaged by Article 16 of the French Constitution. Alternatively, one can speak of a 'parliamentary' model for countries, such as Germany, where emergency law assigns a particularly active role to the national parliament.[71]

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[65] Somewhat similar clauses can be found in the German Basic Law, which, in states of internal emergency and states of tension, assigns the right to rescind at any time any emergency measure to the *Bundesrat* and the *Bundestag*, respectively (see Articles 35(3) and 80a(2)).

[66] For similar mechanisms in Member States' emergency laws, see Article 16 French Constitution; Article 103(3) Dutch Constitution; and Article 116(4) Spanish Constitution.

[67] Alivizatos and others (n 28) para 78.

[68] Kreuder-Sonnen (n 14) 134 and Fernández Arribas (n 12) 15.

[69] Zwitter (n 24) 100.

[70] Tom Ginsburg and Mila Versteeg, 'The Bound Executive: Emergency Powers during the Pandemic' (2021) 19 International Journal of Constitutional Law 1498, 1502.

[71] Faggiani (n 35) 198.

The state of emergency designed in the proposed Article 222(1) TFEU would arguably reflect an intermediate approach. On the one hand, it would allow the legislator to set certain limits to the granting of emergency powers to the Commission, requiring the Parliament and the Council to determine the scope of the powers, the arrangements governing their use, and their period of application. On the other hand, from a comparative perspective, it would envisage less strict substantive and procedural conditions than those required by some national laws: as for the substantive conditions, one can think of the obligation for the legislator to define the territorial extension of a state of emergency, foreseen by Article 116(4) of the Spanish Constitution but not by the proposed Article 222(1) TFEU; with regard to the procedural conditions, some Member States' formal emergency laws, like the Croatian Constitution,[72] provide for higher voting requirements than the proposed Article 222(1) TFEU. In addition, from an internal perspective, the limits to the granting of powers provided for in Article 222(1) TFEU would be less stringent than those set by the main paradigm of delegation under EU law, namely Article 290 TFEU, which requires legislative acts to define the objectives, content, scope, and duration of the delegation of powers.[73]

2.6 Content and function of emergency powers

2.6.1 Content

Emergency powers have two main types of content. First, they may restrict fundamental rights and freedoms. Across EU Member States, formal emergency laws list either the rights and freedom that may be restricted (positive list approach)[74] or those that may not be restricted (negative list approach).[75] Since all EU Member States are parties to the European Convention on Human Rights (hereinafter: ECHR), fundamental rights limitations during emergencies are in principle also subject to Article 15 ECHR, save for reservations made at the ratification.[76] Second, emergency powers impact the internal division of powers amongst

[72] Article 17(1) Croatian Constitution.

[73] Merijn Chamon, 'The EU's Dormant Economic Policy Competence: Reliance on Article 122 TFEU and Parliament's Misguided Proposal for Treaty Revision' (2024) 49 European Law Review 166, 184.

[74] Article 183(2) Cypriot Constitution; Article 48(1) Greek Constitution; Article 145 Lithuanian Constitution; Article 103(2) Dutch Constitution; Article 233(3) Polish Constitution; and Article 55 Spanish Constitution.

[75] Article 57(3) Bulgarian Constitution; Article 17(3) Croatian Constitution; Article 130 Estonian Constitution; Article 54(1) Hungarian Constitution; Article 233(1) Polish Constitution; Article 19(6) Portuguese Constitution; and Article 16(2) Slovenian Constitution. See Gross and Ní Aoláin (n 26) 58 and Questiaux (n 35) para 83.

[76] On this point, see Faggiani (n 35) 223–225.

institutions. From a horizontal perspective, formal emergency laws may exceptionally confer power to adopt acts with the force of law to the executive. When the scope of these acts is not pre-determined by the legislator,[77] it is typically subject to ex post parliamentary ratification.[78] In this respect, some formal emergency laws lay down a taxonomy of emergency measures that may be adopted,[79] whereas others follow a *pleins pouvoirs* approach, setting as the only limit to emergency measures the general principles governing emergency law, including necessity and proportionality.[80] From a vertical perspective, federalism and decentralisation are often (temporary) 'victims'[81] of emergency law, in that the normal division of competences between the central authorities and local entities may be altered,[82] typically in favour of the former.[83]

The formulation of the proposed Article 222(1) TFEU is, as will be extensively discussed below,[84] quite minimalistic. In particular, once adopted, this provision would allow the Commission to exercise 'extraordinary powers, including those to enable it to mobilise all necessary instruments'. Two observations can be drawn in this regard. First, whereas the reference to 'all necessary instruments' recalls a traditional *pleins pouvoirs* approach, the new clause would arguably be, compared to Member States' emergency laws, unprecedented in its broadness. Indeed, it appears from the choice of the word 'including' that such necessary instruments would not exhaust the toolkit at the disposal of the Commission.[85] In other words, a literal reading suggests that the Commission's emergency powers would not be limited to those strictly necessary to overcome the emergency. Second, it is not clear to what extent the extraordinary powers assigned to the Commission could derogate from EU primary law. With respect to fundamental rights, in the absence of either

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[77] Article 105 Belgian Constitution; Article 50(3) Hungarian Constitution; and Article 116(4) Spanish Constitution.

[78] Article 48(5) Greek Constitution; Article 234(1) Polish Constitution; and Article 108(3) Slovenian Constitution.

[79] Article 11 *Ley Orgánica 4/1981* (Spain).

[80] Article 16 French Constitution; Article 78 Italian Constitution; and Article 28(3)(3) Irish Constitution.

[81] Gross and Ní Aoláin (n 26) 60.

[82] Article 103(2) Dutch Constitution. For a different approach, see Article 19(7) of the Portuguese Constitution.

[83] Articles 91(2) and 115c(1) German Basic Law.

[84] See Section 3.

[85] Whilst this wording may recall the current Article 222(1) TFEU ('[t]he Union shall mobilise all the instruments at its disposal, including the military resources made available by the Member States'), the latter is evidently narrower in that it refers to the instruments *at the disposal* of the EU, that is, those made available to the EU by the ordinary Treaty framework.

a list of (non-)derogable rights[86] in Article 222(1) TFEU or any emergency derogation clause in the EU Charter of Fundamental Rights, it remains obscure whether and to what extent the Commission's extraordinary measures would be exceptionally allowed to interfere with collective and individual rights.[87] In the same vein, it is not clear whether such measures could derogate from the EU's own constitutional identity.[88] Moreover, the formulation of Article 222(1) TFEU raises the question of how triggering this clause could alter the horizontal and vertical division of powers. This question will be specifically addressed below.[89]

2.6.2 Function

Emergency powers can legitimately be exercised only for the purpose of overcoming an emergency and restoring normalcy. This conception of emergency powers dates back to the Roman dictatorship, where the consuls could hand emergency powers over to the dictator only *rei gerendae causa*, that is, to temporarily deal with the emergency with a view to restoring the *status quo ante*.[90] Following the firm rejection of Carl Schmitt's sovereign dictatorship, which instead envisaged emergency powers as an expression of *pouvoir constituent*,[91] such a conservative function of emergency powers is nowadays broadly accepted[92] and made explicit in several constitutions.[93] It brings three corollaries, that are amply reflected in Member States' formal emergency laws. First, emergency powers

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[86] A negative list approach is recommended by Kreuder-Sonnen (n 14) 135 and Fernández Arribas (n 12) 17.

[87] Chamon (n 73) 184.

[88] On the EU's constitutional identity, see Case C-156/21 *Hungary v Parliament and Council* ECLI:EU:C:2022:97, para 127, and the comment by Matteo Bonelli, 'Constitutional Language and Constitutional Limits: The Court of Justice Dismisses the Challenges to the Budgetary Conditionality Regulation' (2022) 7 European Papers 507, 518–519.

[89] See Section 3.3.

[90] Ferejohn and Pasquino (n 30) 212. It is precisely on the basis of the Roman dictatorship that Machiavelli also shaped its (conservative) emergency model: see Niccolò Machiavelli, *Discourses on Livy* (Harvey C Mansfield and Nathan Tarcov trs, The University of Chicago Press 1996) 74.

[91] On this point, see Giorgio Agamben, *Stato Di Eccezione* (Bollati Boringhieri 2003) 45–46.

[92] See, *ex multis*, Giuseppe Marazzita, *L'emergenza Costituzionale: Definizioni e Modelli* (Giuffrè 2003) 251; Ferejohn and Pasquino (n 30) 210; Gross and Ní Aoláin (n 26) 21 and 174; Victor Vridar Ramraj, 'The Constitutional Politics of Emergency Powers' in Mark V Tushnet and Dimitry Kochenov (eds), *Research Handbook on the Politics of Constitutional Law* (Edward Elgar Publishing 2023) 164; and Pavel Ond ejek and Filip Horák, 'Proportionality during Times of Crisis: Precautionary Application of Proportionality Analysis in the Judicial Review of Emergency Measures' (2024) 20 European Constitutional Law Review 27, 31. This is also referred to as the 'principle of purpose limitation' by Szente (n 28).

[93] Article 48(5) Greek Constitution; Article 228(5) Polish Constitution; and Article 19(4) Portuguese Constitution.

must always be temporary.[94] Second, their exercise must be subject to the principles of necessity and proportionality.[95] Third, the constitutional and institutional framework cannot be permanently changed by means of emergency powers. The latter principle, which has been called 'institutional continuity',[96] typically materialises through clauses that prohibit, during emergencies, the modification of the constitution,[97] the dissolution of the parliament,[98] and the amendment of formal emergency law.[99]

Compared to national emergency laws, the conservative function of the proposed EU state of emergency clause is less prominent. First, whilst the emergency powers granted to the Commission would always be temporary, their length would be left to the unlimited discretion of the Parliament and the Council, since the new Treaty clause would envisage no maximum duration. Second, although every action of EU institutions must always respect the principle of proportionality,[100] as explained above,[101] the regrettable formulation of the proposed clause seems to suggest that the EU could adopt measures that go beyond what is strictly necessary to overcome the emergency.[102] Third, in the new Article 222(1) TFEU there would be no provisions recalling those constitutional clauses that aim at safeguarding institutional continuity. For instance, one could have thought of a clause expressly prohibiting the use of emergency powers outside a factual emergency or enshrining an obligation for EU

[94] See above Section 2.4.

[95] Article 17(2) Croatian Constitution; Article 4(1) *Valmiuslaki/beredskapslagen*, Act No 1552/2011 (Finland); Article 48(2) Luxembourgish Constitution; Article 228(5) Polish Constitution; Article 19(4) and (8) Portuguese Constitution; Article 5(2) Constitutional Act No 227/2002 Coll (Slovakia); Article 16(1) Slovenian Constitution; and Chapter 15, Article 5(1) Swedish Instrument of Government.

[96] Faggiani (n 35) 207.

[97] Article 115e(2) German Basic Law; Article 147(2) Lithuanian Constitution; Article 228(6) Polish Constitution; Article 289 Portuguese Constitution; Article 152(3) Romanian Constitution; and Article 169 Spanish Constitution.

[98] Article 64(2) Bulgarian Constitution; Article 131(1) Estonian Constitution; Article 16(5) French Constitution; Article 115h(3) German Basic Law; Article 48(7) Hungarian Constitution; Article 48(5) Luxembourgish Constitution; Article 228(7) Polish Constitution; Article 172(1) Portuguese Constitution; Article 89(3) Romanian Constitution; and Article 116(5) Spanish Constitution.

[99] Article 228(6) Polish Constitution.

[100] Article 5(4) TEU.

[101] See above Section 2.6.1.

[102] On this point, see instead the more convincing proposal for an EU state of emergency clause put forward by Fernández Arribas (n 12) 20. Not only does that author observe that the clause should exclusively allow the adoption of 'appropriate measures to the extent strictly required by the exigencies of the situation', but she also purposefully chooses the verb 'react' instead of 'act' in relation to EU emergency action 'to emphasise the preservative character of the State of Emergency, in line with the principles of the constitutional [accommodation] model'.

institutions to declare the end of the state of emergency once the factual emergency is over.[103] In the same vein, the new clause would not explicitly prohibit the establishment of permanent mechanisms, bodies, or agencies by means of emergency powers. This is remarkable when considering the judgment in *Pringle*, where the Court of Justice of the European Union (hereinafter: the Court) held that the emergency clause of Article 122(2) TFEU could not serve as a legal basis for the establishment of a permanent mechanism like the European Stability Mechanism.[104]

2.7 Control mechanisms

Typical control mechanisms over the exercise of emergency powers are parliamentary oversight and judicial review. As apparent from the above,[105] across EU Member States, parliaments often play a key role in deciding upon the declaration and duration of emergency regimes, as well as limiting the exercise of emergency powers.

Article 222(1) TFEU would reflect this approach, allowing the Parliament and the Council to review their declaration at any time.[106] Moreover, nothing would prevent the EU co-legislators from including a 'review clause' in the declaration of emergency. Such a clause could, for instance, oblige the Commission to submit a report to the Parliament in order to allow the latter to scrutinise the exercise of emergency powers.[107] Furthermore, under Article 226 TFEU, and according to the best practices recommended in the literature,[108] the Parliament could always create a temporary committee of inquiry to investigate the potential misuse of emergency powers.

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[103] For a similar clause, see Article 54(3) of the Hungarian Constitution.

[104] Case C-370/12 *Pringle* ECLI:EU:C:2012:756, para 65. In the literature, the Court's judgment is often criticised for it seems to ignore that the object of Article 122(2) TFEU is financial assistance. Therefore, the latter must be temporary in the sense that it must cease once the emergency situation is overcome, whereas the permanent nature of the mechanism that is activated to provide assistance in emergency cases is irrelevant. See Vestert Borger, 'EU Financial Assistance' in Fabian Amtenbrink, Christoph Herrmann and René Repasi (eds), *The EU Law of Economic and Monetary Union* (Oxford University Press 2020) 976; Chris Koedooder, 'The *Pringle* Judgment: Economic and/or Monetary Union?' 37 Fordham International Law Journal 111, 141. In fact, a permanent mechanism has the advantage of ensuring that resources and technical decision-making rules are already in place once the emergency occurs, improving the EU's preparedness and the effectiveness of its emergency response.

[105] See above Sections 2.3 and 2.4.

[106] Similarly, see Article 162(b) of the Portuguese Constitution.

[107] On review clauses, see Sean Molloy, Maria Mousmouti and Franklin De Vrieze, 'Sunset Clauses and Post-Legislative Scrutiny: Bridging the Gap between Potential and Reality' (Westminster Foundation for Democracy 2022) 6.

[108] Mihail Chiru, 'Parliamentary Oversight of Governments' Response to the COVID-19 Pandemic: Literature Review' (European Parliament Research Service 2023) Study PE 740.217 50.

Regarding judicial review, Member States' emergency laws explicitly reaffirm and protect the role of courts within emergency contexts. For instance, some constitutions provide that the activity of constitutional courts cannot be suspended during emergencies.[109] In the same vein, in accordance with the best practices recommended by the Venice Commission,[110] some constitutions explicitly[111] provide for centralised constitutionality review of the declaration of emergency. Concerning the damage suffered by individuals due to emergency measures, several formal emergency laws assign the related individual claims to the ordinary jurisdictional regime.[112] Finally, most constitutions do not allow for the establishment of extraordinary courts.[113]

The proposed Article 222(1) TFEU would not include any reference to the adjudicating role of the Court.[114] This entails that emergency measures adopted by the Commission would be subject to the ordinary judicial guarantees enshrined in the Treaties. Yet, given the absence of a definition of emergency and the broadness of the notion of 'extraordinary powers', it remains difficult to guess against which yardstick the CJEU could test the substantive legality of emergency declarations and emergency measures respectively. This will be further discussed below.[115]

3 The minimalistic choice of the Parliament and its potential implications for EU constitutional law

With the proposed Article 222(1) TFEU, the Parliament would opt to have the EU's formal emergency law regulated at Treaty level. Due to the rigid character of constitutions, the choice to have an emergency

[109] Article 115g German Basic Law and Article 52(2) Hungarian Constitution.

[110] Alivizatos and others (n 28) para 88.

[111] Article 129(6) Slovakian Constitution. In some Member States, this is considered as implicitly foreseen by the Constitutional framework. See, for Italy, Marazzita (n 92) 305–306 and, for Spain, Faggiani (n 35) 217–218.

[112] See, for instance, Article 20(1) *Par ārkārtējo situāciju un izņēmuma stāvokli* (Latvia); Articles 6 and 22 *Lei Orgânica nº 1/2012* (Portugal); and Article 3(1) *Ley Orgánica 4/1981* (Spain).

[113] Article 146 Belgian Constitution; Article 119(3) Bulgarian Constitution; Article 61 Danish Constitution; Article 148 Estonian Constitution; Article 102(2) Italian Constitution; Article 126(4) Romanian Constitution; Article 126(2) Slovenian Constitution; and Article 117(6) Spanish Constitution. Some exceptions are instead Article 48(1) of the Greek Constitution and Article 111(3) of the Lithuanian Constitution. Finally, some constitutions foresee military jurisdiction in time of war. See Article 84 Austrian Constitution; Article 157 Belgian Constitution; Article 38(4)(1) Irish Constitution; Article 103(3) Italian Constitution; and Article 82 Latvian Constitution.

[114] Such a reference is instead recommended by Kreuder-Sonnen (n 14) 136.

[115] See Section 3.2.

clause at constitutional level helps shield the rule of law[116] and legal certainty[117] from the risks associated with 'legislative myopia', that is, the short-sighted choices often accompanying the rush to legislate which is typical of emergency scenarios.[118] In the Parliament's proposal, the price paid for this choice is the concentration of (too) many legally relevant features in one, relatively brief, clause.

Alternatively, the Parliament's proposal could have provided for a legal basis allowing the co-legislators to determine, within constitutional limits to be set in Article 222(1) TFEU itself, detailed institutional arrangements concerning the new emergency regime. This would have been in line with the best practices recommended by the Venice Commission[119] and the formal emergency laws of various Member States.[120] Moreover, the Parliament could have looked to the model offered by Article 291(3) TFEU which establishes a legal basis allowing the Parliament and the Council to determine the arrangements for the functioning of comitology in an 'organic law' ranking above 'normal' legislation.[121] To be clear, this is not to say that formal emergency law cannot be exhaustively regulated at constitutional level. In fact, several Member States do so, devoting either specific chapters of their constitutions[122] or entire constitutional acts[123] to emergency law. Yet, at EU level, such constitutional acts could be compared, in terms of form and content, to the Protocols attached to the Treaties,[124] but certainly not to one brief and generic clause such as the one contained in the Parliament's proposal. The Parliament's attempt to squeeze the EU's state of emergency clause into such a provision seems thus excessively minimalistic. From a constitutional

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[116] Ernst-Wolfgang Böckenförde, 'The Repressed State of Emergency' in Mirjam Künkler and Tine Stein (eds), Ernst-Wolfgang Böckenförde, *Constitutional and Political Theory: Selected Writings* (Oxford University Press 2017).

[117] Alivizatos and others (n 28) para 15; and Pablo Martín Rodríguez, 'A Missing Piece of European Emergency Law: Legal Certainty and Individuals' Expectations in the EU Response to the Crisis' (2016) 12 European Constitutional Law Review 265.

[118] Gross and Ní Aoláin (n 26) 68. On this issue in the EU legal order, see Auer and Scicluna (n 14) 27–28.

[119] Alivizatos and others (n 28) para 15.

[120] See, for instance, the Spanish *Ley Orgánica 4/1981* and the Portuguese *Lei Orgânica nº 1/2012.*

[121] Merijn Chamon, *The European Parliament and Delegated Legislation: An Institutional Balance Perspective* (Hart 2022) 154–157.

[122] Articles 48–54 ('Special Legal Orders') Hungarian Constitution; Chapter XI of the Polish Constitution; and Chapter 15 of the Swedish Instrument of Government. Instead, for a 'diffuse' approach, envisaging various emergency provisions spread across the Constitution, see Articles 35, 80a, 91, and 115a–115i of the German Basic Law.

[123] Constitutional Act of 22 April 1998 No 110/1998 (Czech Republic) and Constitutional Act No 227/2002 Coll (Slovakia).

[124] Protocols are part of EU primary law.

perspective, this causes crucial uncertainties concerning the Treaties' systematicity, judicial review, and the division of competences.

3.1 The systematicity of emergency clauses as a key constitutional issue

For purposes of systematicity, the adoption of the proposed Article 222(1) TFEU would require framing this provision within the existing landscape of emergency clauses. Chamon has already observed that the amendment of Article 222 TFEU would result in an 'odd constellation' where paragraph (1) would act as *lex generalis* vis-à-vis the emergency clauses included in the other paragraphs.[125] In the same vein, it seems reasonable to assume that this provision would act as *lex generalis* also with regard to other emergency legal bases, such as Article 78(3) TFEU.[126] When considering the distinction drawn above between emergency legal bases and emergency derogation clauses,[127] however, one notes that the proposed text does not clarify what the relationship would be between Article 222(1) TFEU and derogation clauses, and in particular Article 347 TFEU, which allows the Member States to derogate from EU law 'in the event of serious internal disturbances affecting the maintenance of law and order, in the event of war, serious international tension constituting a threat of war'.[128] Defining this systematic relationship is of great importance to understand the legal limits to the operationalisation of Article 222(1) TFEU and the latter's implications for the trajectory of EU integration.

3.1.1 The operationalisation of Article 222(1) TFEU vis-à-vis emergency derogation clauses

States of emergency are by definition *ultima ratio* solutions, in that they presuppose the exceptionality of the threat, understood as the impossibility to overcome it by means of the other available legal tools.[129]

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[125] Chamon (n 73) 184. This author also discusses the potential implications deriving from the choice to incorporate this emergency clause within Article 222 TFEU, which belongs to Part Five of the TFEU and is devoted to the EU's external action.

[126] See above Section 2.2.

[127] See Section 2.1.

[128] On Article 347 TFEU, see Panos Koutrakos, 'Is Article 297 EC a "Reserve of Sovereignty"?' (2000) 37 Common Market Law Review 1339; and Constantin Stefanou and Helen Xanthaki, *A Legal and Political Interpretation of Articles 224 and 225 of the Treaty of Rome: The Former Yugoslav Republic of Macedonia Cases* (Routledge 2019).

[129] Alivizatos and others (n 28) para 17; Bogdan Aurescu and others, 'Report on the Democratic Control of the Armed Force' (Venice Commission 2008) Study no 389 / 2006 CDL-AD(2008)004 para 247; Ergun Özbudun and Mehmet Turhan, 'Emergency Powers' (Venice Commission 1995) CDL-STD(1995) 012 30; and Pieter van Dijk, Finola Flanagan

Like every state of emergency clause, Article 222(1) TFEU would act as an exceptional provision to be activated when all the other Treaty tools do not suffice and, therefore, as *lex generalis* vis-à-vis the other emergency clauses. At the same time, the Court has already acknowledged the 'wholly exceptional'[130] nature of Article 347 TFEU, in that (also) the latter is an *ultima ratio* provision meant to be triggered in those exceptionally serious circumstances where no other Treaty provision allows a threat to public order and security in a Member State to be managed.[131] This has even led one author to consider Article 347 TFEU as the actual EU state of emergency clause.[132]

Not clarifying the relationship between the proposed state of emergency clause and derogation clauses means leaving unanswered the question as to what provision would act as the ultimate safety valve in the system designed by the Treaties. In practice, this corresponds to the question whether a Member State could deviate, under a derogation clause and in particular Article 347 TFEU, from the Commission's emergency measures adopted on the basis of the new Article 222(1) TFEU. Over the past decades, various AGs[133] and commentators[134] have insisted that Article 347 TFEU would allow for derogation from *all* Treaty rules and *all* measures adopted on their basis. Yet, in *Kadi*, the Court made clear that Article 347 TFEU cannot be used to derogate from EU fundamental values,[135] now enshrined in Article 2 TEU. The proposed Article 222(1) TFEU would replace Article 122 TFEU, which is informed, at least in its first paragraph, by the notion of solidarity between the Member States; and it would, at the same time, 'broaden the solidarity clause'[136] already enshrined in the current Article 222 TFEU. The new state of emergency clause could thus itself be seen as an expression of solidarity

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and Jeffrey L Jowell, 'Opinion on the Protection of Human Rights in Emergency Situations' (Venice Commission 2006) CDL-AD(2006)015-e para 10; and Martín Rodríguez (n 117) 270.

[130] Case 222/84 *Johnston* ECLI:EU:C:1986:206, para 27.

[131] Case 222/84 *Johnston* ECLI:EU:C:1986:44, Opinion of AG Darmon (not published), para 5; Case C-128/22 *NORDIC INFO* ECLI:EU:C:2023:645, Opinion of AG Emiliou, para 53.

[132] Urlich Everling, 'The EU as a Federal Association' in Armin von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (Revised second edition, Hart; CH Beck; Nomos 2009) 731.

[133] Case C-72/22 PPU *Valstybės sienos apsaugos tarnyba and Others* ECLI:EU:C:2022:431, Opinion of AG Emiliou, para 112; Case C-120/94 *Commission v Greece* ECLI:EU:C:1995:109, Opinion of AG Jakobs, para 47; *Johnston*, Opinion of AG Darmon (n 131) para 5.

[134] Koutrakos (n 128) 1340.

[135] Case C-402/05 P *Kadi* ECLI:EU:C:2008:461, para 303. More generally, in Case C-808/18 *Commission v Hungary* ECLI:EU:C:2020:1029, para 214, the Court observed that the system of derogation clauses constituted by Articles 36, 45, 52, 65, 72, 346, and 347 TFEU cannot be interpreted as 'an inherent general exception excluding all measures taken for reasons of law and order or public security from the scope of European Union law'.

[136] Chamon (n 73) 184.

both between the Member States and between the Member States and the Union. Therefore, building on the relationship, already stressed by the Court,[137] between solidarity and Article 2 TEU, one could argue that no derogation from emergency measures would be allowed under Article 347 TFEU. A similar argumentation was put forward, *mutatis mutandis*, by AG Emiliou, who argued that, in light of the principle of sincere cooperation enshrined in Article 4(3) TEU, the derogation clause of Article 72 TFEU would not allow any departure from measures adopted pursuant to the emergency legal basis included in Article 78(3) TFEU.[138]

3.1.2 From national to intergovernmental in the name of solidarity; or, towards a supranational emergency law?

Not only does the question of systematicity impact the concrete aspect of the operationalisation of Article 222(1) TFEU, but it also has broader conceptual and constitutional implications concerning integration. Together, the emergency clauses contained in the Treaties have been referred to as 'EU emergency law'[139] or the '*sui generis* EU emergency constitution'.[140] Yet, scholars' recourse to these notions should not give the misleading impression that the EU Treaties incorporate a terminologically and conceptually coherent body of law governing the emergency action of the Union and its Member States. In fact, the current emergency clauses result from the rather disorganised stratification of multiple Treaty layers, where emergency action was first considered as mostly a Member States' prerogative[141] and then gradually evolved as an intergovernmental competence,[142] to be exercised, since Lisbon, in the name of solidarity.[143] This evolution was characterised by the progressive extension of the notion of emergency beyond security concerns, the consequent expansion of the EU emergency competences in fields such as economic policy and migration, and the gradual lowering of voting thresholds.[144]

Against this background, the Parliament proposes to make emergency responses mostly a supranational matter, whereby the Commission and the Parliament itself would arguably be entrusted with most

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[137] See Case C-157/21 *Poland v Parliament and Council* ECLI:EU:C:2022:98, para 147.

[138] *Valstybės sienos apsaugos tarnyba and Others*, Opinion of AG Emiliou (n 133) para 112.

[139] De Witte (n 18) 4.

[140] Nicolosi (n 12) 62.

[141] See, for instance, Articles 36, 48, 56, 135, and 224 EEC.

[142] See, for instance, Articles 73f, 100c, and 103a EC (Maastricht numbering).

[143] The references to solidarity in emergency action were introduced by the Lisbon Treaty. See Article 78(3) TFEU read in light of Article 80 TFEU, and Articles 122(1) and 222 TFEU.

[144] See, for instance, the historical evolution of Article 122 TFEU as represented by Chamon (n 9) 15–16.

of the powers envisaged by the new Article 222(1) TFEU. If no national derogation from emergency measures could ever be allowed, the reform might be seen as the natural culmination of the historical trajectory just described, and a crucial moment for European constitutionalism. Indeed, without going as far as defining 'he who decides on the exception' as 'sovereign',[145] it cannot be denied that emergency governance has considerably shaped key phases of European integration.

A key and intergovernmental role in this respect has been increasingly, and perhaps unduly,[146] played by the European Council.[147] The latter does not exercise legislative functions,[148] but this has not prevented it from exercising, especially within emergency contexts, a role akin to a legislative initiator.[149] Rather than challenging this invasive action in Court,[150] the Parliament seeks to carve out space for itself by means of an 'inelegant'[151] Treaty reform that ignores the role played by this intergovernmental institution. Yet, looking at the past fifteen years of emergency governance, this is arguably a missed opportunity. Where completely renouncing the political impetus provided by the European Council to overcome emergencies seems neither feasible nor desirable,[152] the Parliament could have instead proposed a clause clarifying once and for all the role of the European Council and its limits, in the interest of the rule

[145] This is the famous definition given in Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (MIT Press 1985). Observing that '[e]mergency rule should be decoupled from its associations with the sovereign figure, reversing the Schmittian move', see Jonathan White, *Politics of Last Resort: Governing by Emergency in the European Union* (Oxford University Press 2019) 18.

[146] Alberto Alemanno and Merijn Chamon, 'To Save the Rule of Law You Must Apparently Break It' (*Verfassungsblog*, 11 December 2020) <https://verfassungsblog.de/to-save-the-rule-of-law-you-must-apparently-break-it/> accessed 26 November 2024.

[147] Mark Dawson and Floris de Witte, 'Constitutional Balance in the EU after the Euro–Crisis' (2013) 76 The Modern Law Review 817, 830; Luuk van Middelaar, *Alarums & Excursions: Improvising Politics on the European Stage* (Agenda Publishing 2019) 178–183; Paul Dermine, *The New Economic Governance of the Eurozone: A Rule of Law Analysis* (Cambridge University Press 2022) 118; and Bruno De Witte, 'Legal Methods for the Study of EU Institutional Practice' (2022) 18 European Constitutional Law Review 637, 642–645.

[148] Article 15(1) TEU.

[149] Dawson and de Witte (n 147) 830.

[150] Note that in Joined Cases C-643/15 and C-647/15 *Slovakia and Hungary v Council* ECLI:EU:C:2017:631, para 145, later confirmed by Case C-5/16 *Poland v Parliament and Council* ECLI:EU:C:2018:483, para 85, the Court made clear that the conclusions of the European Council cannot constitute a ground for review of the legality of secondary legislation, including emergency measures.

[151] Chamon (n 73) 185.

[152] Bruno De Witte, 'Euro Crisis Responses and the EU Legal Order: Increased Institutional Variation or Constitutional Mutation?' (2015) 11 European Constitutional Law Review 434, 450.

of law and legal certainty.[153] This way, the Parliament would have added another, more credible stone to the gradual evolution of EU emergency competences without neglecting the reality of emergency politics.

3.2 Judicial review of emergency declarations

Under the established case law of the Court, when adopting a given measure, EU institutions' choice of legal basis must be based on objective factors amenable to judicial review, such as the aim and content of the measure.[154] This entails that, to declare an emergency under the proposed Article 222(1) TFEU, EU institutions would need to be able to demonstrate that the declaration's aim and content meet the need to address a genuine emergency. However, in the absence of a definition of emergency under Article 222(1) TFEU, the question arises as to whether and how the Court could test the substantive legality of a declaration under Article 222(1) TFEU. At least two options are conceivable.

First, the definition of what constitutes an emergency could be left to the discretion of EU institutions, embracing, to draw a parallel with US constitutional law, a 'political question doctrine'[155] that aligns with the view of various scholars on the matter of emergency law and judicial review.[156] In this respect, the Venice Commission accepted that, when no derogations from human rights are at stake, '[j]udicial control of the declaration of state of emergency may be limited to the control of the procedural aspects of the declaration'.[157] Nevertheless, even if one leaves aside that, as a matter of fact, derogations from fundamental rights are

[153] Exemplifying how this could be done, see the proposal put forward by Fernández Arribas (n 12) 20.

[154] Case C-300/89 *Commission v Council* ECLI:EU:C:1991:244, para 10.

[155] Graham Butler, 'In Search of the Political Question Doctrine in EU Law' (2018) 45 Legal Issues of Economic Integration 329. Recently, discussing the existence of a political question doctrine in EU law, see Joined Cases C-29/22 P and C-44/22 P *KS and KD* ECLI:EU:C:2023:901, Opinion of AG Ćapeta, para 113.

[156] See, to various extents, Eric A Posner and Adrian Vermeule, 'Crisis Governance in the Administrative State: 9/11 and the Financial Meltdown of 2008' (2009) 76 University of Chicago Law Review 1613, 1614; Richard A Posner, *Law, Pragmatism, and Democracy* (Harvard University Press 2003) 305–306 and 316–317; Oren Gross, 'Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?' (2003) 112 The Yale Law Journal 1011, 1034; Mark V Tushnet, 'Defending *Korematsu*? Reflections on Civil Liberties in Wartime' (2003) Wisconsin Law Review 273, 108; David Cole, 'Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis' (2003) 101 Michigan Law Review 2565, 2594; and Kim Lane Scheppele, 'The New Judicial Deference' (2012) 92 Boston University Law Review 89, 169–170.

[157] Alivizatos and others (n 28) para 86. On this point, see also Alan Greene, *Permanent States of Emergency and the Rule of Law: Constitutions in an Age of Crisis* (Hart Publishing 2018) 62.

often attached to emergency measures,[158] the Venice Commission itself also held that '[t]he emergency situations capable of giving rise to the declaration of states of emergency should clearly be defined and delimited by the constitution'.[159] The absence of a clear and reviewable definition of emergency, indeed, would open the gates to a 'permanent state of emergency',[160] in that it would potentially allow the declaration of a legal emergency in the absence of a factual emergency scenario, arguably endangering the rule of law and democracy.[161]

To prevent this from happening,[162] an alternative option for the Court would be to rely on existing Treaty emergency clauses to develop a definition of emergency. This would entail assessing whether and to what extent, across their emergency clauses, the Treaties are informed by one coherent understanding of the notion of emergency, possibly also based on Member States' common constitutional traditions. The Court would thus have to test whether it is possible to reach either a material definition, qualifying emergencies as, for instance, war, internal insurrections, and natural disasters, or a functional-structural one, focusing on features of emergencies such as seriousness, suddenness, exceptionality, and urgency. A material definition of emergency could well match the current structure of the Treaties, in the sense that the latter are already organised along policy-specific lines. Therefore, for instance, the Court

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158 On the impact of emergency law on fundamental rights within the EU, see Claire Kilpatrick, 'On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts' (2015) 35 Oxford Journal of Legal Studies 325 and Anastasia Poulou, 'Financial Assistance Conditionality and Human Rights Protection: What Is the Role of the EU Charter of Fundamental Rights?' (2017) 54 Common Market Law Review 991.

159 Özbudun and Turhan (n 129) 30. In this respect, see the argumentation of the Italian Constitutional Court in its recent Judgment No 146/2024 ECLI:IT:COST:2024:146, where the judges highlight the importance, for Italian parliamentary democracy, of respecting the *precise* conditions allowing the government to exercise extraordinary powers under Article 77 of the Constitution (although the latter is not a state of emergency clause but rather an emergency clause endowing the executive with the power to adopt acts with the force of law in extraordinary situations of urgency and necessity).

160 On the importance of reaching a degree of terminological consistency at EU level, see also Science Advice for Policy by European Academies, 'Strategic Crisis Management in the European Union' (2022) Evidence Review Report 11 23; European Commission, Directorate-General for Research and Innovation, *Strategic Crisis Management in the EU: Improving EU Crisis Prevention, Preparedness, Response and Resilience* (Publications Office of the European Union 2022) 54; and Valentina Faggiani, 'Los Estados de Excepción Ante Los Nuevos Desafíos: Hacia Una Sistematización En Perspectiva Multinivel' (2020) Federalismi.it 19, 27–28.

161 Auer and Scicluna (n 14) 27 and White (n 13) 788. On permanent states of emergency, see Greene (n 157); Agamben (n 91) 11; and Stéphanie Hennette Vauchez, *La Démocratie en État d'Urgence: Quand l'Exception Devient Permanente* (Seuil 2022) 95.

162 And to shield itself from accusations of excessive judicial deference within emergency contexts. For an example of the latter, see Anna Wallerman Ghavanini, 'The CJEU's Give-and-Give Relationship with Executive Actors in Times of Crisis' (2023) 2 European Law Open 284.

could develop a taxonomy of events that may occur within each field of EU competence. An example could be the 'sudden inflow of third-country nationals' envisaged as a typical migration emergency by Article 78(3) TFEU. However, a functional-structural approach would arguably be preferrable in that, with its flexibility, it would allow the difficulties associated with the unpredictability and transboundary nature of emergencies to be overcome.[163] Indeed, a threat would be qualified as an emergency based on its inherent characteristics, regardless of the event from which the threat stems or the sectoral interest that is threatened.

3.3 A (temporary) competence revolution

Within the current Treaty framework, the conceptual challenges associated with the nature of emergencies as typically unpredictable and transboundary threats are not confined to definitional issues. There is, in fact, an inherent tension between these features of emergencies and the current constitutional design of EU competence. Before turning to the ways in which the Parliament's proposal addresses this issue, it is necessary to analyse the reasons why this tension arises and how legal commentators have thus far proposed to solve it.

First, since emergency scenarios cannot be foreseen, it is in principle impossible to predict which measures will be necessary to overcome them. This is why states of emergency are primarily characterised by an increase in the executive's discretional power.[164] In an international organisation with limited powers like the EU, such discretion is inherently limited. For, under the principle of conferral,[165] the range of emergency measures that can be adopted crucially depends on which powers were, in the first place, conferred upon the EU by the Treaty drafters. Second, an additional layer of complexity lies in the typically transboundary nature of emergencies[166] and their cascading effects.[167] Indeed, emergencies initially affecting a certain interest of society may easily escalate and involve one or more other interests belonging to different sectors or areas. The COVID-19 pandemic, for instance, well exemplifies how quickly a health emergency can evolve into a broader socio-economic emergency. This cross-sectoral tendency of emergencies can hardly be accommodat-

[163] Böckenförde (n 116) 119; Zwitter (n 24) 97–99; and Science Advice for Policy by European Academies (n 160) 22.

[164] Christian Joerges, 'Integration through Law and the Crisis of Law in Europe's Emergency' in Christian Joerges, Damian Chalmers and Markus Jachtenfuchs (eds), *The End of the Eurocrats' Dream: Adjusting to European Diversity* (Cambridge University Press 2016) 311.

[165] Article 5(2) TEU.

[166] Boin (n 15).

[167] Science Advice for Policy by European Academies (n 160) 242.

ed by the EU Treaties,[168] which instead contain policy-specific legal bases[169] that determine the atomisation of the EU's emergency responses.[170] There is a mismatch, in essence, between the cross-sectoral challenges posed by emergency scenarios and the compartmentalised emergency legal toolbox of the EU. Such a mismatch drags both political institutions and the Court between a rock and a hard place. On the one hand, 'creative legal engineering'[171] and generous interpretations of emergency legal bases[172] are an easy target for allegations of 'competence creep'[173] and undue judicial deference.[174] On the other, strict adherence to a narrow understanding of the principle of conferral may undermine the output legitimacy of emergency responses,[175] in that effective but somewhat unorthodox regulatory strategies may not be considered as legally viable.[176]

In the aftermath of COVID-19, legal literature has hinted at various options to address this issue. For instance, the Court could expand its traditional choice of legal basis test for it to include, next to the aim and content of the measure, also the emergency context in which the measure was adopted.[177] In a similar vein, it has been suggested that the Court could read the principle of conferral in light of Article 7 TFEU,[178] which requires the EU to ensure consistency between its policies and activities, and thus afford, at the judicial level, recognition of emergency policy packages when assessing the legality of individual measures.[179]

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[168] Paul Dermine, 'The Planning Method: An Inquiry into the Constitutional Ramifications of a New EU Governance Technique' (2024) 61 Common Market Law Review 959, 979.

[169] De Witte (n 18) 16.

[170] Michael Dougan, 'EU Competences in an Age of Complexity and Crisis: Challenges and Tensions in the System of Attributed Powers' (2024) 61 Common Market Law Review 93, 118.

[171] Bruno De Witte, 'The European Union's COVID-19 Recovery Plan: The Legal Engineering of an Economic Policy Shift' (2021) 58 Common Market Law Review 635, 638.

[172] See, for instance, *Slovakia and Hungary v Council* (n 150) para 180.

[173] Stephen Weatherill, 'Competence Creep and Competence Control' (2004) 23 Yearbook of European Law 1; and Sacha Garben, 'Competence Creep Revisited' (2019) 57 Journal of Common Market Studies 205.

[174] Christian Joerges, 'Pereat Iustitia, Fiat Mundus: What Is Left of the European Economic Constitution after the *Gauweiler* Litigation?' (2016) 23 Maastricht Journal of European and Comparative Law 99, 106; Martín Rodríguez (n 117) 276; Päivi Leino-Sandberg and Matthias Ruffert, 'Next Generation EU and Its Constitutional Ramifications: A Critical Assessment' (2022) 59 Common Market Law Review 433, 464; White (n 13) 787; Kreuder-Sonnen (n 14) 129; and Wallerman Ghavanini (n 162) 286.

[175] Schmidt (n 13) 981–984.

[176] Dougan (n 170) 119–124.

[177] Chamon (n 9) 22–23.

[178] See *Hungary v Parliament and Council* (n 88) para 128.

[179] Dougan (n 170) 109 and 129.

Against this background, turning now to the Parliament's proposal, the blunt reference to '*extraordinary* powers'[180] in Article 222(1) TFEU must be read in the sense that these are powers that the Commission cannot *normally* exercise. Thus, there are two ways to interpret this clause. A first, less ambitious, reading would be that, in a state of emergency, the Commission could be granted powers that are normally assigned to other EU institutions. For instance, departing from the Court's long-established doctrine of nondelegation that shapes EU executive rulemaking, the Commission could be allowed to adopt emergency measures determining the 'essential elements' of a policy normally falling within the competence of the Parliament and the Council.[181] Taking a step further in this direction, one may wonder whether under Article 222(1) TFEU the Commission could be granted by the Parliament and the Council powers that do not fall within the competence of any of these institutions. An extreme example could be a case in which, to counter an emergency, the Commission was to adopt emergency measures belonging to the area of monetary policy, where the latter falls within the exclusive competence of the European Central Bank.[182] This interpretation of Article 222(1) TFEU would trigger the temporary nihilification of Article 13(2) TEU,[183] in that it would allow EU institutions to disregard the horizontal boundaries imposed by the Treaties in times of normalcy. However, this would not per se entail an alteration of the vertical division of competences set by Article 5 TEU. In other words, the emergency action of the Commission, as authorised by the Parliament and the Council, would invade the regulatory space of other EU institutions but not encroach on Member States' prerogatives.

The second reading of the proposed Article 222(1) TFEU would instead envisage an alteration of the vertical division of competences.[184] Following this reading, the possibility to derogate from the principle of conferral would turn this emergency clause into a sort of 'hypercompetence',[185]

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[180] Emphasis added.

[181] Under the nondelegation doctrine, executive rulemaking is instead confined to non-essential elements. See Case 25/70 *Köster* ECLI:EU:C:1970:115, para 6; Case C-240/90 *Germany v Commission* ECLI:EU:C:1992:408, para 37; Case C-355/10 *Parliament v Council* ECLI:EU:C:2012:516, para 76; and Case C-124/13 *Parliament v Council* ECLI:EU:C:2015:790, para 59. In the literature, see Dominique Ritleng, 'The Reserved Domain of the Legislature: The Notion of "Essential Elements of an Area"' in Carl Fredrik Bergström and Dominique Ritleng (eds), *Rulemaking by the European Commission* (Oxford University Press 2016).

[182] See *Pringle* (n 104) para 53; Case C-62/14 *Gauweiler* ECLI:EU:C:2015:400, para 46; and Case C-493/17 *Weiss* ECLI:EU:C:2018:1000, para 53.

[183] Article 13(2) TEU provides that '[e]ach institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them'.

[184] This could be either alternative or cumulative vis-à-vis the alteration of the horizontal division of powers.

[185] Chamon (n 73).

freed from the fundamental constraints governing Union action in times of normalcy. Thus, the (already blurred)[186] conservative aim of this state of emergency clause would be pursued by revolutionising the core principle underpinning the EU's multilevel governance system – in essence, for everything to stay the same, everything would have to change.[187]

Besides the likelihood of intense constitutional contestation,[188] such a radical choice arguably demolishes any chance of political feasibility for the Treaty amendment at stake.[189] Even practically, it remains difficult to see how, once an emergency occurs, the Commission could suddenly and effectively develop the expertise and, most of all, establish the institutional structures that are necessary to regulate fields that it has never regulated before.

A good example of the problematic issues associated with such a (temporary) competence revolution would be the coexistence of Article 4(2) TEU and the proposed Article 222(1) TFEU. Whilst a typical case encompassed by the notion of emergency is threats to national security, under Article 4(2) TEU 'national security remains the sole responsibility of each Member State'. This is reflected in the current Article 222 TFEU, read in light of its strongly intergovernmental implementing framework, which mandates Member States' cooperation and assigns only a coordinating and supporting role to the EU.[190] It is true that Article 4(2) TEU should not be read as enshrining any domain of Member States' exclusive competence[191] and that the EU has been recently developing its own security discourse,[192] within which security seems now understood as 'a

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[186] See above Section 2.6.1.

[187] This echoes the words ('*se vogliamo che tutto rimanga come è, bisogna che tutto cambi*') of Giuseppe Tomasi di Lampedusa in *Il Gattopardo* (Feltrinelli 1958).

[188] It is difficult, if not impossible, to see how such a constitutional arrangement could be favoured by the German Constitutional Court, in light of its *Maastricht* (BVerfG, Judgment of the Second Senate of 12 October 1993 – 2 BvR 2134/92, 2 BvR 2159/92) and *Lisbon* (BVerfG, Judgment of the Second Senate of 30 June 2009 – 2 BvE 2/08) decisions. This also raises the question, which cannot be addressed in this article, of the role national parliaments could and should play in a potential EU state of emergency.

[189] Dougan (n 170) 131.

[190] See Declaration (No 37) on Article 222 of the Treaty on the Functioning of the European Union and the preamble of Council Decision 2014/415/EU of 24 June 2014 on the arrangements for the implementation by the Union of the solidarity clause, OJ L 192.

[191] Bruno De Witte, 'Exclusive Member State Competences: Is There Such a Thing?' in Sacha Garben and Inge Govaere (eds), *The Division of Competences between the EU and the Member States Reflections on the Past, the Present and the Future* (Hart Publishing 2017) 70–71. For a contrasting view, see Enrico Peuker, 'Unionsrechtliche Regelungskompetenzen Im Bereich Der Nationalen Sicherheit. Zur Auslegung von Art. 4 Abs 2 S 3 EUV Unter Kritischer Würdigung Der EuGH-Rechtsprechung' (2023) 58 Europarecht 535, 544 ff.

[192] Ursula von der Leyen, 'Europe's Choice: Political Guidelines for the Next European Commission 2024-2029' 12–15. In the literature, see Editorial, 'The Passion for Security in European Societies' (2024) 61 Common Market Law Review 283, 287–288; and Holly

shared responsibility'.[193] However, the current Treaty design reflects the EU's lack of independent enforcement capacities, whereas entrusted with coercive powers, in the Weberian sense of the monopoly of violence,[194] are only national authorities, namely the police and, ultimately, the army.[195]

The example of national security serves thus to demonstrate that a radical shift within the system of emergency competences is only conceivable to the extent that it occurs within the context of a broader shift in the overall Treaty framework. To be sure, the vocabulary of national emergency law can certainly inspire the birth and evolution of a system of 'EU emergency law'. Yet, one should be careful in bluntly transposing the conceptual categories and legal schemes that apply within the nation State to the context of an international organisation like the (current) EU. In fact, overall, the Treaties do not seem flexible enough to accommodate an emergency clause that would, albeit only temporarily, set aside the principle of conferral. In the current system of conferred powers, a future EU emergency constitution may envisage a certain, higher than normal, degree of flexibility in endowing the EU executive with extraordinary powers. Yet, the principle of conferral would still require drawing some lines, defining at least the policy areas that would belong to the competence of the Member States in times of emergency.[196] Instead, going beyond conferral would require rethinking the EU's constitutional structure in much greater depth than what the Parliament does with its minimalistic proposal.

4 Conclusions

Emergency powers have long represented one of the most fascinating topics of constitutional law. However, the EU scholarly debate has only recently approached the issue of emergency law. The COVID-19 pandemic, the war in Ukraine, and the associated challenges have created a perfect storm, hitting Europeans with unprecedented force and prompting renewed focus on this critical area. In this context, the Parliament's proposal to amend the Treaties attempts to address two major concerns regarding emergency governance, namely the limited competences conferred upon the EU and the lack of democratic legitimacy of emergency measures.

Faulkner, W John Hopkins and Silke Clausing, 'To the RescEU? Disaster Risk Management as a Driver for European Integration' (2024) 30 European Public Law 1, 19–20.

[193] European Commission, 'Communication from the Commission on the EU Security Union Strategy' (2020) COM(2020) 605 final 26.

[194] Max Weber, 'Politics as a Vocation' (Lecture to the Free Students Union, Munich, 1919) <http://fs2.american.edu/dfagel/www/class%20readings/weber/politicsasavocation.pdf> accessed 26 November 2024.

[195] Christian Kreuder-Sonnen and Jonathan White, 'Europe and the Transnational Politics of Emergency' (2022) 29 Journal of European Public Policy 953, 955.

[196] Kreuder-Sonnen (n 14) 136.

Any constitutional emergency powers regime aims at empowering and constraining the government in emergency scenarios. As Ramraj puts it, '[i]t creates the legal means of responding to exceptional threats, while limiting the scope for abuse'.[197] Each constitution, in essence, has to strike a delicate balance between the broadening of executive powers and the strengthening of democratic guarantees. If benchmarked against national emergency laws, the state of emergency clause proposed by the Parliament largely follows EU Member States' common constitutional traditions with regard to the powers to declare and end an emergency and the Madisonian checks and balances, in particular in terms of parliamentary oversight, surrounding the exercise of emergency powers by the executive. Yet, the proposed EU state of emergency clause seems less careful than national emergency laws with respect to the constitutional safeguards aimed at ensuring that the exercise of emergency powers remains confined to serving a conservative function rather than becoming an expression of *pouvoir constituent*. In this respect, the Parliament's proposal does not adequately address concerns about the potential establishment of an EU permanent state of emergency or, in other words, a situation where abuse of emergency powers transforms them into the ordinary mode of governance.[198]

From the perspective of EU constitutional law, the Parliament's attempt raises more questions than it answers. It shows that the traditional emergency law discourse, inextricably linked with the conceptual categories of the nation State, can only suit EU law to a limited extent. In fact, due to the EU's current constitutional design, emergency law in the EU context requires deep and detailed reflection on, *inter alia*, the trajectory of integration, the role of the judiciary, and the architecture of competences.

Suggested citation: G Bellenghi, 'The European Parliament's Proposal for an EU State of Emergency Clause: A Comparative and Constitutional Analysis' (2024) 20 CYELP 1.

[197] Ramraj (n 92) 167.

[198] See Auer and Scicluna (n 14) 22–25; Stella Ladi and Sarah Wolff, 'The EU Institutional Architecture in the Covid-19 Response: Coordinative Europeanization in Times of Permanent Emergency' (2021) 59 Journal of Common Market Studies 32, 36; Kreuder-Sonnen and White (n 195) 960–961; and Leino-Sandberg and Ruffert (n 174) 448.

INTERPRETING EU INTERNAL MARKET POWERS IN LIGHT OF ARTICLE 9 TFEU SOCIAL OBJECTIVES: IMPLICATIONS FOR THE ATTRIBUTION OF COMPETENCES

Silvia Giudici*

Abstract: The inclusion of the so-called 'horizontal social clause', namely Article 9 TFEU, in EU primary law imposes on the EU legislator an obligation to balance the objectives of a specific policy area with the social interests contained therein. For instance, when adopting internal market measures pursuant to Article 114 TFEU, the EU legislator would need to reconcile free trade aims and social interests. At the same time, this process also has consequences on the scope of EU competences. Hence, this article analyses which implications related to the scope of EU competences stem from the obligation to read Article 114 TFEU in light of Article 9 TFEU. In addition, it accounts for the consequences that this process entails for the division of powers between the EU and the Member States. The main argument proposed is that the obligation to read internal market powers in light of Article 9 TFEU not only influences the use of EU competences to pursue certain social objectives, but also leads to an expansion of EU harmonising powers in domains that remain of national competence. Thus, the division between EU and Member State competences becomes increasingly blurred. The Court of Justice of the EU has favoured this tendency by recognising on many occasions the possibility for the EU to rely on Article 114 TFEU, while developing a restrictive interpretation of the limitations of EU competences in social fields enshrined in the Treaties.

Keywords: EU competences, internal market, Article 9 TFEU, horizontal clauses, Article 114 TFEU, social market economy.

1 Introduction

The Treaty of Lisbon had many ambitious goals, including to better clarify the division of powers between the European Union (EU) and the Member States (MSs) and to give increasing attention to social aspects of the integration process. The Constitutional Treaty had already

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attempted to address the issue of competences.[1] Indeed, the Laeken Declaration mentioned the need 'to clarify, simplify and adjust the division of competence between the Union and the Member States in the light of the new challenges facing the Union'.[2] To tackle these challenges, the Treaty of Lisbon classified EU competences into three categories, namely exclusive, shared, and coordinating and complementary competences. Moreover, it included various provisions limiting EU powers in a series of fields that remain under the control of the MSs.[3] At the same time, Article 3(3) TEU emphasises the EU social dimension by stating that the EU should develop a 'social market economy', as well as by recognising the binding value of the EU Charter of Fundamental Rights, which includes rights that can be considered social rights.[4] Finally, the TFEU now includes some horizontal provisions requiring the EU to consider certain social values in all its actions and policies. The most relevant provision in this regard is Article 9 TFEU, also known as the horizontal social clause, which requires the EU to consider high levels of employment, social protection, social inclusion, education and training, and health protection in all its actions and policies.[5] At the same time, the Treaty of Lisbon has not attributed further competences in social policy to the EU.[6]

On the one hand, the issue of EU competences and the division of powers between the EU and the MSs are recurring topics in academic literature.[7] On the other hand, different scholars have analysed the role of Article 9 TFEU, trying to assess its capacity to reinforce the social

[1] Paul Craig, *The Lisbon Treaty: Law, Politics, and Treaty Reform* (OUP 2010) 155–158.

[2] Annex I to the Presidency conclusions. European Council meeting in Laeken [2001] SN 300/1/01 REV 1, 19.

[3] Loic Azoulai, 'The "Retained Powers" Formula in the Case Law of the European Court of Justice: EU Law as Total Law?' (2011) 4 European Journal of Legal Studies 192, 196.

[4] See, for instance, Bruno de Witte, 'The Trajectory of Fundamental Social Rights in the European Union' in Gráinne de Búrca and Bruno de Witte (eds), *Social Rights in Europe* (OUP 2005).

[5] Some of these objectives are also mentioned in other provisions of the Treaties referring to specific social policies.

[6] Maria Eugenia Bartoloni, 'The Horizontal Social Clause in a Legal Dimension' in Francesca Ippolito, Maria Eugenia Bartoloni and Massimo Condinanzi (eds), *The EU and the Proliferation of Integration Principles under the Lisbon Treaty* (Routledge 2014) 83.

[7] Takis Tridimas, 'Competence after Lisbon. The Elusive Search for Bright Lines' in Diamong Ashiagbor, Nicola Countouris and Ioannis Lianos (eds), *The European Union after the Treaty of Lisbon* (CUP 2012); Gareth Davies, 'Democracy and Legitimacy in the Shadow of Purposive Competence' (2013) 21 European Law Journal 2; Loic Azoulai (ed), *The Question of Competence in the European Union* (OUP 2014); Robert Schütze, 'EU Competences: Existence and Exercise' in Anthony Arnull and Damian Chalmers (eds), *The Oxford Handbook of European Union Law* (OUP 2015); Sacha Garben and Inge Govaere (eds), *The Division of Competences between the EU and the Member States: Reflections on the Past, the Present and the Future* (OUP 2017); Roberto Cisotta, 'Rigidità e flessibilità del sistema delle competenze dell'UE alla luce della prassi recente' (2022) 3 Diritto pubblico 703.

dimension of EU integration.[8] Legal scholarship has mainly dealt with the division of competences between the EU and the MSs and the role of horizontal clauses separately.[9] However, taking into account social values mentioned in Article 9 TFEU might actually affect the scope of EU action and the division of competences. Hence, the implications that horizontal clauses such as Article 9 TFEU could have on EU competences deserve further attention. Some recent developments are especially enlightening in this regard.

Therefore, this contribution explores the obligation to consider Article 9 TFEU when adopting internal market legislation and the implications for the scope of EU competences stemming from this duty. Such an analysis takes into account the consequences that this re-orientation of the internal market legal basis has on the division of powers between the EU and the MSs. The expansion of EU powers deriving from the broad interpretation of Article 114 TFEU is well known. However, this article explores the specific effects and dynamics that might take place when reading EU internal market competences in light of horizontal social objectives.

Two elements restrict the scope of this research. First, Article 9 TFEU represents an example of a horizontal clause capable of influencing the direction taken by EU action. Indeed, this provision pushes the EU to use its competences in ways that are conducive to the attainment of social objectives. Second, this analysis focuses exclusively on the competences attributed to the EU for the development of the internal market and especially Article 114 TFEU. Other legal bases enabling the EU to intervene to develop specific economic freedoms will also be considered when relevant to inform the discussion. The choice to focus primarily on Article 114 TFEU stems from the fact that the exercise of EU internal market powers can notoriously interact with other policy areas, giving

[8] Bartoloni (n 6); Niklas Bruun, Klaus Lörcher and Isabelle Schömann (eds), *The Lisbon Treaty and Social Europe* (OUP 2012); Catherine Barnard and Geert de Baere, 'Towards a European Social Union. Achievements and Possibilities under the Current EU Constitutional Framework' (2014) Euroforum Policy Paper; Václav Šmejkal, 'The Horizontal Social Clause of Art 9 TFEU and Its Potential to Push the EU towards Social Europe' (2016) Prague Law Working Papers Series 2016/III/1 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2896894> accessed 6 June 2024; Ane Aranguiz, 'Social Mainstreaming through the European Pillar of Social Rights: Shielding "the Social" from "the Economic" in EU Policy Making' (2018) 20 European Journal of Social Security 341; Karl-Peter Sommermann, 'Article 9 [Social Aims]' in Herman-Joseph Blanke and Stefano Mangiameli (eds), *Treaty on the Functioning of the European Union: A Commentary* (Springer 2021); Evangelia Psychogiopoulou, 'The Horizontal Clauses of Arts 8–13 TFEU Through the Lens of the Court of Justice' (2022) 7 European Papers 1357; Sybe de Vries and Rik de Jager, 'Between Hope and Fear: The Creation of a More Inclusive EU Single Market Through Art 9 TFEU' (2022) 7 European Papers 1405.

[9] One exception to this approach can be found in Eleftheria Neframi (ed), *Objectifs et compétences dans l'Union Européenne* (Bruylant 2013).

rise to so-called competence creep.[10] At the same time, the considerations elaborated in this article might inform the discussion about the use of other legal bases in ways that allow various objectives of the EU to be taken into account.[11] In other words, the exercise of the powers deriving from Article 114 TFEU constitutes a case study that is useful to determine more generally how considering Article 9 TFEU in all EU actions and policies can influence the relation between EU and MSs' powers. However, not all the considerations elaborated in this paper would be applicable if other horizontal clauses were to inform the exercise of EU competences.[12] Indeed, the analysis especially accounts for the specificities of social policy in the EU legal order. These areas are politically highly charged and are especially sensitive for the MSs since they are closely connected to the welfare functions traditionally performed at the national level. EU primary law also envisages explicit safeguards in favour of the MSs in these domains that are not present in other policy fields. Finally, since the paper attempts to understand how interpreting Article 114 TFEU in light of Article 9 TFEU shapes the attribution – and not the exercise – of competences, the principles of subsidiarity and proportionality governing the exercise of EU powers are not considered.

The main argument of this article is that reading Article 114 TFEU in light of Article 9 TFEU influences the use of EU internal market competences to pursue certain social objectives, thus questioning the correspondence between EU powers and objectives. In addition, it leads to an expansion of EU harmonising powers in domains that remain a formal national competence. While it has already been acknowledged that recourse to EU internal market powers contributes to blurring the division between EU and MSs' competences, this article demonstrates that Article 9 TFEU and the recent case law of the Court bring about two novelties in this regard. First, considering social interests when adopting internal market legislation becomes an obligation and not just a mere possibility for the EU. This would give the EU more occasion to integrate social objectives into its internal market legislation. Second, when Article 9 TFEU is taken into consideration, EU action might 'creep' towards areas of

[10] Stephen Weatherill, 'Competence Creep and Competence Control' (2004) 23 Yearbook of European Law 1; Sacha Prechal, 'Competence Creep and General Principles of Law' (2010) 3 Review of European Administrative Law 5; Sacha Garben, 'Competence Creep Revised' (2019) 57 Journal of Common Market Studies 205.

[11] Among others, Article 9 TFEU or other horizontal objectives could influence the use of the competences attributed to the EU for the definition of its budget. For instance, the use of legal bases aimed at defining the EU budget in light of the objective of protecting the rule of law has been examined in Marco Fisicaro, 'Protection of the Rule of Law and 'Competence Creep' via the Budget: The Court of Justice on the Legality of the Conditionality Regulation' (2022) 18 European Constitutional Law Review 334.

[12] These clauses are those contained in Articles 8–13 TFEU.

social policy where the Treaties expressly envisage various limitations to EU intervention. Thus, a potential clash between the need to respect the principle of conferral and the obligation stemming from Article 9 TFEU could arise. A particular understanding of the principle of conferral elaborated by the Court of Justice of the EU (CJEU), which is more concerned with authorising the use of internal market powers than respecting the limitations of EU competences in social fields enshrined in the Treaties, makes this phenomenon possible. Finally, due to the political salience of decisions taken in social fields, such a new reading of Article 114 TFEU might also raise issues connected to the legitimacy of the EU.

This article is structured as follows. The second section introduces Article 9 TFEU, especially its significance and the roles it can play in the case law of the CJEU. The third section analyses how an understanding of Article 114 TFEU, and more generally of EU internal market powers, has evolved both before and after the introduction of Article 9 TFEU. The fourth section identifies different dynamics that can lead to an extension of the scope of EU competences when Article 114 TFEU is read in light of Article 9 TFEU. The final section of the paper recalls the main findings and deals with the legitimacy problem that could arise from this expansion.

2 An introduction to Article 9 TFEU

2.1 The significance of Article 9 TFEU in the EU legal order

Article 9 TFEU reads as follows:

> [i]n defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health.

Before moving to an analysis of the central issues of the paper, it seems appropriate to offer a brief overview of such a provision. Its aim is to contextualise this clause, both in light of the adoption of the Lisbon Treaty and of more recent developments, as well as to understand the functions mainly played by Article 9 TFEU in the case law of the CJEU.

Article 9 TFEU is a clause applicable in a horizontal manner, meaning that it should not be considered only in a specific field of EU action.[13] Hence, the provision imposes an obligation on the part of the EU to consider the social objectives listed therein in all its actions and policies.[14] In

[13] The 'cross-cutting' nature of Article 9 TFEU was underlined in Case C-515/08 *Santos Palhota and Others* ECLI:EU:C:2010:245, Opinion of AG Cruz Villalon, para 51.

[14] Psychogiopoulou (n 8) 1365.

other words, Article 9 TFEU promotes the mainstreaming of social values in EU law.[15]

This provision also establishes connections with Article 3(3) TEU requiring the EU to develop a 'social market economy',[16] since it aims to balance the traditional economic objectives of the EU integration process with other social goals.[17] It has been argued that defining a list of social objectives in EU primary law gives them the same status as economic fundamental freedoms.[18] However, the practical application of Article 9 TFEU through the promotion of social values in EU law encounters two main obstacles: first, its vague wording does not allow us to clearly identify which obligations stem from it;[19] and second, EU competences in social fields remain limited.[20]

The European Social Pillar proclaimed in 2017[21] renewed the attention given to social objectives in the process of EU integration. The Pillar has a close relationship with Article 9 TFEU. On the one hand, the Pillar clarifies the content of Article 9 TFEU by identifying a series of social principles that should guide EU and MSs' actions. On the other hand, the horizontal social clause constitutes the legal foundation of the obligation to include the social principles mentioned in the Pillar in all EU actions.[22]

In practice, impact assessments are the instruments used to consider the objectives listed in Article 9 TFEU when the EU adopts binding legislation. Indeed, they allow for an evaluation of the positive and negative consequences of EU interventions, risks, opportunities and possible alternatives.[23] In particular, the social impact assessment tool is a relevant instrument to ensure that the objectives listed in the horizontal social clause are taken into account in EU actions.[24]

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[15] This expression is used in Aranguiz (n 8).

[16] See Alfred Müller-Armack, 'The Social Market Economy as an Economic and Social Order' (1978) 36 Review of Social Economy 325. For a discussion, see, for instance, Catherine Barnard and Sybe de Vries, 'The 'Social Market Economy' in a (Heterogeneous) Social Europe: Does it Make a Difference?' (2019) 15 Utrecht Law Review 47.

[17] Sommermann (n 8) 279.

[18] Valerie Michel, 'Les objectifs à caractère transversal' in Neframi (n 9) 202–204.

[19] De Vries and de Jager (n 8) 1422–1424.

[20] Loic Azoulai, 'The Court of Justice and the Social Market Economy: The Emergence of an Ideal and the Conditions for Its Realization' (2008) 45 Common Market Law Review 1335, 1337.

[21] Interinstitutional Proclamation on the European Pillar of Social Rights [2017] OJ C428/10.

[22] Aranguiz (n 8) 352–353.

[23] ibid 347.

[24] However, it can be difficult to quantify the effects of social policies. See Mark Dawson, 'Better Regulation and the Future of EU Regulatory Law and Politics' (2016) 53 Common Market Law Review 1209, 1224–1236.

Finally, it should not be overlooked that, when taking into account Article 9 TFEU, the EU is still subject to the constitutional constraints imposed by the Treaties, including the principle of conferral. Indeed, the objectives contained in the horizontal social clause should not be considered 'an independent source' of powers for the EU, but as interests that inform the exercise of the competences attributed to it.[25] Hence, Article 9 TFEU objectives can be 'pursued only to the extent and in the forms and procedures provided for in the specific Treaty rules related to the competences of the EU and its institutions'.[26] In this respect, the relation between the principle of attributed powers enshrined in Article 5 TEU and horizontal objectives is regulated by Article 7 TFEU. This provision requires the EU to 'ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers'. This confirms that pursuing the objectives listed in Article 9 TFEU should take place within the powers attributed to the EU. Conversely, these objectives do not justify the conferral of new competences to the EU.

2.2 The interpretative value of Article 9 TFEU in the case law of the CJEU

Article 9 TFEU can perform different functions in the EU legal order. If one looks at the CJEU case law, this provision plays a twofold role. First, it serves to justify restrictions to economic freedoms and fundamental rights and, second, it guides certain interpretations of EU law provisions. These two functions are examined in turn to demonstrate the capacity of the horizontal social clause to restrict other interests protected in the EU legal order.

Both the MSs and the EU itself might adopt restrictions to economic freedoms and fundamental rights. According to the CJEU, the interests listed in Article 9 TFEU have 'precedence over economic considerations, the importance of [these objectives] being such as to justify even substantial negative economic consequences'.[27] In particular, Advocate General Cruz Villalon maintained that the introduction of Article 9 TFEU required a modification of the traditional understanding that restrictions to EU law should be interpreted narrowly.[28] He held in particular that a

[25] Joris Larik, 'From Speciality to a Constitutional Sense of Purpose: On the Changing Role of the Objectives of the European Union' (2014) 63 International & Comparative Law Quarterly 935, 953–954.

[26] Sommermann (n 8) 277.

[27] Case C-452/20 *PJ v Agenzia delle dogane e dei monopoli e Ministero dell'Economia e delle Finanze* ECLI:EU:C:2022:111, para 50.

[28] *Santos Palhota* (n 13) para 53.

broad interpretation of the social interests justifying restrictions to economic freedoms should be a crucial factor in assessing the proportionality of the measure at stake.[29] While discussing this assertion is out of the scope of this contribution, it suffices here to mention that the Court has not followed this suggestion in its subsequent case law. Nonetheless, it has accepted that the objectives mentioned in Article 9 TFEU can justify restrictions to economic freedoms, also noting that national authorities have broad discretion in deciding the most appropriate means to pursue a certain social objective.[30]

In addition, the Court has referred to Article 9 TFEU to justify measures adopted at the EU level that restrict fundamental rights, such as the right to private and family life, the right to property and the freedom to conduct business.[31]

The second function performed by Article 9 TFEU is to require an interpretation of EU law that ensures the protection of the social objectives mentioned therein. For instance, health protection was the objective of the directive examined in *Léger*, concerning quality and safety standards or the collection, testing, processing, storage and distribution of human blood and blood components. This requires interpreting the provisions of the said directive to give effect to health protection interests.[32] In another case, it has been deemed an element to be considered when assessing the proportionality of the Italian sanctioning regime applicable to punish the selling of tobacco products to minors.[33] Other objectives listed in Article 9 TFEU, such as the safeguarding of levels of employment and the social protection of workers, supported the reasoning of the Court in other instances. These interests were considered as prohibiting discriminatory treatment enacted by a State that envisaged a less protective regime for certain categories of workers.[34] In other circumstances, the protection

[29] ibid, paras 53 and 55. In contrast, it has been argued that such an approach would be in contrast with the general rule that requires interpreting limitations to fundamental freedoms in a restrictive way. This rule should not be questioned by the relevance of the interests protected in Article 9 TFEU. See also Michel (n 18) 205.

[30] Case C-201/15 *Anonymi Geniki Etairia Tsimenton Iraklis (AGET Iraklis) v Ypourgos Ergasias, Koinonikis Asfalisis kai Koinonikis Allilengyis* ECLI:EU:C:2016:972, paras 71 and 78. However, the Court has found that the measure could not be considered compatible with EU law since it was not proportionate to the objective pursued.

[31] Case C-544/10 *Deutsches Weintor eG v Land Rheinland-Pfalz* ECLI:EU:C:2012:526; Case C-157/14 *Société Neptune Distribution v Ministre de l'Économie et des Finances* ECLI:EU:C:2015:823; Case C-547/14 *Philip Morris Brands SARL and Others v Secretary of State for Health* ECLI:EU:C:2016:325; Case C-477/14 *Pillbox 38 (UK) Limited, trading as Totally Wicked v Secretary of State for Health* ECLI:EU:C:2016:324.

[32] Case C-528/13 *Léger* ECLI:EU:C:2015:288, para 57.

[33] *PJ* (n 27) paras 49–51.

[34] Case C-389/20 *CJ v Tesoreria General de la Seguridad Social* ECLI:EU:C:2022:120, para 55.

of a high level of employment was considered to justify discriminatory treatment based on age.[35]

In conclusion, Article 9 TFEU supports interpretations of EU law that accord relevance to social objectives *vis-à-vis* economic freedoms and other interests. In practical terms, the horizontal social clause protects measures restricting economic freedoms and fundamental rights adopted at the EU and national level. While this interpretative function is of utmost relevance in the following discussion, the next paragraphs will show that these are not the sole roles that Article 9 TFEU can play.

3 The EU internal market powers in light of Article 9 TFEU

3.1 Limitations and possibilities related to the exercise of EU internal market competences before the introduction of Article 9 TFEU

As Article 4(2)(a) TFEU states, the EU has been conferred shared competence in the field of the internal market. In addition, Article 26 TFEU reaffirms that one of the objectives of the Union is to establish and ensure the functioning of the internal market. This constitutes an area where the four fundamental freedoms – free movement of goods, persons, services, and capital – are guaranteed. As mentioned in the introduction, the most important legal basis that EU institutions use to intervene in the internal market is Article 114(1) TFEU. This provision allows the Parliament and the Council to adopt 'measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States, which have as their object the establishment and functioning of the internal market'.[36]

The objective of the following discussion is to recall how the Court has not only limited the possibilities for the EU legislature to resort to Article 114 TFEU, but it has also allowed it to consider certain non-economic interests listed in Article 114(3) TFEU, namely a high level of protection of health, safety, the environment and consumers, in defining the measures to be taken.[37] This reconstruction is fundamental because the main rules set out in the case law mentioned below continue to be applicable, despite the adoption of the Lisbon Treaty and the introduction of Article 9 TFEU.

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[35] Case C-511/19 *AB v Olympiako Athlitiko Kentro Athinon* ECLI:EU:C:2021:274, para 39.

[36] Article 115 TFEU performs a similar function. However, it is not usually used since it would require unanimity to adopt measures.

[37] For a broader discussion, see Sybe de Vries, 'Recent Trends in EU Internal Market Legislation' in Tom Van Den Brink and Virginia Passalacqua (eds), *Balancing Unity and Diversity in EU Legislation* (Edward Elgar Publishing 2024) 27.

The first element to be discussed is under which conditions EU institutions should be able to resort to Article 114 TFEU to legislate. As the CJEU put it in the leading *Tobacco Advertising* case, Article 114 TFEU does not attribute to the EU a 'general power to regulate internal market' since that would run counter to the principle of conferral.[38] Indeed, certain minimum conditions established by the Court should be fulfilled before the EU could legitimately rely on its internal market powers.[39] In the same judgment, the CJEU for the first time struck down an act adopted on the basis of, *inter alia*, what is today Article 114 TFEU.[40] The case derived from an action for annulment promoted by Germany against Directive 98/43/EC, which prohibited certain means of promoting and advertising tobacco products. In that judgment, the Court clarified that Article 114 TFEU confers on EU institutions only the power to adopt measures that 'genuinely have as [their object] the improvement of the conditions for the establishment and functioning of the internal market'.[41] Hence, the presence of differences in MS legislations and hypothetical obstacles to the exercise of fundamental freedoms or competition were not sufficient to justify the adoption of EU legislation based on Article 114 TFEU.[42] On the contrary, the CJEU held that this legal basis could be relied upon only if the actual aim of the adopted measures was establishing the internal market.[43] The judgment also specified that Article 114 TFEU can be used to contrast the emergence of future obstacles to trade between the MSs only when they are 'likely and the measure in question must be designed to prevent them'.[44] On the other hand, EU measures can only be enacted when the distortion of competition is appreciable.[45]

However, in subsequent cases, the CJEU has usually deemed that the contested measures fulfilled the conditions laid down in *Tobacco Advertising*.[46] Two developments facilitated such a result. First, the Court

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[38] Case C-376/98 *Federal Republic of Germany v European Parliament and Council of the European Union (Tobacco Advertising)* ECLI:EU:C:2000:544, para 83.

[39] Respecting these conditions has been defined as a 'threshold requirement'. See Bruno de Witte, 'A Competence to Protect. The Pursuit of Non-market Aims through Internal Market Legislation' in Philip Syrpis (ed), *The Judiciary, the Legislature and the EU Internal Market* (CUP 2012) 36.

[40] Stephen Weatherill, 'The Limits of Legislative Harmonization Ten Years after Tobacco Advertising: How the Court's Case Law has become a "Drafting Guide"' (2010) 12 German Law Journal 827.

[41] *Tobacco Advertising* (n 38) paras 83–84.

[42] ibid, para 84.

[43] ibid, para 85.

[44] ibid, para 86.

[45] ibid, para 106.

[46] See Case C-491/01 *The Queen v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd* ECLI:EU:C:2002:741; Case C-210/03 *The*

has relaxed its standard of review. In this regard, it suffices to mention here that it admitted that the EU could adopt harmonising measures in situations having only a potential, and not actual, link with cross-border trade, as well as measures aimed at defining common rules that would facilitate cross-border economic activities and that would not exclusively remove obstacles to trade.[47] Second, the EU legislator has come to follow the 'drafting guidance' provided by the case law to ensure that the CJEU would validate its legislative choices.[48] As a consequence, while *Tobacco Advertising* imposed certain requirements on EU action, subsequent judicial developments demonstrate that these conditions have been interpreted in ways that offer broad leeway to the EU legislator to rely on Article 114 TFEU as a legal basis.

When the Court finds that EU legislation can be adopted on the basis of Article 114 TFEU, it has generally confirmed that such acts might aim at safeguarding other interests too. Indeed, even if in that specific case the EU could not rely upon that legal basis, since the *Tobacco Advertising* judgment, the Court has recognised that the EU is not prevented from adopting internal market measures 'on the ground that public health protection is a decisive factor in the choices to be made'.[49] In other words, provided that the EU can legitimately resort to Article 114 TFEU because a connection with the internal market exists, the use of this legal basis is possible even when a non-economic interest overrides the internal market purpose of a certain EU measure. This interpretation characterises the 'competence enhancing element' of the *Tobacco*

Queen, on the application of: Swedish Match AB and Swedish Match UK Ltd v Secretary of State for Health ECLI:EU:C:2004:802; Case C-154/04 *The Queen, on the application of Alliance for Natural Health and Nutri-Link Ltd v Secretary of State for Health (C-154/04) and The Queen, on the application of National Association of Health Stores and Health Food Manufacturers Ltd v Secretary of State for Health and National Assembly for Wales* ECLI:EU:C:2005:449; Case C-380/03 *Federal Republic of Germany v European Parliament and Council of the European Union (Tobacco Advertising II)* ECLI:EU:C:2006:772; Case C-301/06 *Ireland v European Parliament and Council of the European Union* ECLI:EU:C:2009:68; Case C-58/08 *The Queen, on the application of Vodafone Ltd and Others v Secretary of State for Business, Enterprise and Regulatory Reform* ECLI:EU:C:2010:321; Case C-583/11 P *Inuit Tapiriit Kanatami and Others v Parliament and Council* ECLI:EU:C:2013:625; Case C-358/14 *Republic of Poland v European Parliament and Council of the European Union* ECLI:EU:C:2016:323; *Pillbox* (n 31); *Philip Morris* (n 31); Case C-220/17 *Planta Tabak-Manufaktur Dr Manfred Obermann GmbH & Co KG v Land Berlin* ECLI:EU:C:2019:76.

[47] See Derrick Wyatt, 'Community Competence to Regulate the Internal Market' (2007) Oxford Legal Studies Research Paper 9/2007, 36 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=997863> accessed 7 June 2024.

[48] Weatherill (n 40) 843.

[49] *Tobacco Advertising* (n 38) para 88. It must be noted that this is appropriate only when there are no other provisions that could serve as legal bases, thus rendering the 'centre of gravity doctrine' not applicable. See de Witte, 'A Competence to Protect' (n 39) 35–36.

Advertising ruling, which accompanies its 'competence restrictive elements' examined before.[50]

The use of internal market legal competences to pursue other non-economic aims was deemed possible in *Tobacco Advertising* since health protection was considered a cross-cutting objective in what is now Article 168(1) TFEU and was also expressly referred to in the current formulation of Article 114(3) TFEU.[51]

While a deeper analysis on this point would go beyond the scope of this study, it suffices here to mention that the Court also accorded broad discretion to the EU legislator in deciding the intensity of the measures adopted, using a 'conspicuously light touch' in evaluating the proportionality of its intervention.[52] Indeed, as already mentioned in the previous section, the protection of these non-economic objectives can strongly limit the fundamental freedom at stake. This is evident from the content of the measures adopted, which might also include bans on the trade of certain products.

3.2 A new interpretation of EU internal market competences by the CJEU after the introduction of Article 9 TFEU

As the previous analysis has demonstrated, the functional character of Article 114 TFEU allows the EU to adopt measures hypothetically in any field, provided that there is a link with the establishment and functioning of the internal market.[53] In the field of the internal market, this legitimises an extensive interpretation of Article 114 TFEU. The possibility to use Article 114(1) TFEU to pursue non-economic interests was supported in the case law analysed by the explicit obligation to take into account certain goals. Indeed, Article 114(3) TFEU enshrines a duty to consider different objectives, including a high level of health protection, in the legislative process. The introduction of Article 9 TFEU imposes on the EU legislator the obligation to consider the social objectives listed therein, including when adopting legislative acts. In particular, one of the main innovations that this provision has brought to the EU legal order is that it has expanded the set of non-economic interests that EU

[50] Wyatt (n 47) 22–23.

[51] For a critique to this approach, see, for instance, Gareth Davies, 'The Competence to Create an Internal Market: Conceptual Poverty and Unbalanced Interests' in Garben and Govaere (n 7) 84–85, who argues that pursuing non-economic values 'within the trade-promoting project' disguises the real objectives of certain measures, thus risking to harm legitimacy in the EU.

[52] Weatherill (n 10) 17.

[53] Stephen Weatherill, *The Internal Market as a Legal Concept* (OUP 2017) 154.

institutions should take into account beyond those mentioned in Article 114(3) TFEU, adding a host of social objectives to this list.

In light of these considerations, this section examines how the Court has recognised the obligation stemming from Article 9 TFEU. This analysis aims to understand which consequences derive from such a duty. These implications affect especially the balance between different objectives, namely those of liberalising the internal market and the need to protect social interests, and the relation between the competences and powers of the EU. To do so, it is worth looking beyond Article 114 TFEU and considering other provisions related to the establishment and functioning of the internal market. These legal bases concern the free movement of workers (Articles 46 and 48 TFEU),[54] the freedom of establishment (Articles 50 and 53 TFEU), the freedom to provide services (Article 56 and 59 TFEU) and the free movement of capital (Articles 64 TFEU). Indeed, two connected decisions that the CJEU delivered in 2020, namely Cases C-620/18 *Hungary v Parliament and Council*[55] and C-626/18 *Poland v Parliament and Council*,[56] dealt with the possibility for the EU to rely on Articles 53(1) and 62 TFEU and are particularly enlightening on how the Court conceives the obligation deriving from Article 9 TFEU. These cases stem from two actions for annulment brought by Hungary and Poland against Directive (EU) 2018/957 which revised a previous Directive on the posting of workers. The two MSs contested the use of Articles 53(1) and 62 TFEU as legal bases for the adoption of the Directive. More specifically, they argued that these two articles confer on the EU the competence to adopt measures that facilitate the exercise of the freedom to provide services and not hamper it. Indeed, the two MSs maintained that the main objective of the Directive at stake was increasing social protection for posted workers and, by so doing, making the transborder provision of services more costly.

In the two judgments *Hungary v Parliament and Council* and *Poland v Parliament and Council*, the CJEU stated that the EU was allowed to update existing acts when circumstances had changed, especially taking into consideration the social objectives mentioned in Article 9 TFEU. In this regard, the introduction of the horizontal social clause should be considered a modification in EU primary law that the EU legislator must take into consideration.[57] The crucial point made by the CJEU was that,

[54] It must be recalled that Article 114(2) TFEU excludes the free movement of persons and the rights of employed persons from the scope of this legal basis.

[55] Case C-620/18 *Hungary v European Parliament and Council of the European Union* ECLI:EU:C:2020:1001.

[56] Case C-626/18 *Republic of Poland v European Parliament and Council of the European Union* ECLI:EU:C:2020:1000.

[57] *Hungary v Parliament and Council* (n 55) para 41.

even when the EU exercises its internal market competences, it should also safeguard other social interests.[58] Indeed, the introduction of Article 9 TFEU requires the partial modification – or 'updating'[59] – of how economic fundamental freedoms are conceptualised to account for the objectives stated in the horizontal social clause. In other words, the internal market should not only be construed as '"*free*" but also as "*fair*"'.[60] As a consequence, such an interpretation also binds EU institutions when adopting legislative measures.[61]

Similar reasoning was already adopted in the *Pillbox* judgment delivered in 2016. That case stemmed from a preliminary ruling questioning the validity of certain provisions of Directive 2014/40 on the approximation of national legislations on tobacco and related products. In that judgment, the Court clarified that when scientific evidence demonstrates that new products might cause risks to human health, the EU legislator is 'required to act', as envisaged also by Article 9 TFEU.[62] Mentioning that under certain circumstances the EU is required to act taking into account non-economic interests, this passage already suggested an obligation on the part of EU institutions to consider these objectives in their legislative functions.[63]

Hence, the Court recognises that Article 9 TFEU not only enables but also requires an interpretation of EU internal market powers in ways that allow for a series of horizontal social objectives to be taken into account and ultimately to be safeguarded. In this respect, the two judgments on the Posted Workers Directive explicitly acknowledge the existence of a duty to interpret EU internal market powers in a new and more 'social-friendly' way. As stated at the beginning, this reading of EU internal market competences presents some consequences that should be considered.

First, Article 9 TFEU could be construed as imposing an obligation to balance and to reconcile different interests. For the purposes of this work, this would mean balancing the need to foster the internal market and protect social objectives. In other words, Article 9 TFEU objectives should be considered in a way that preserves the essence of those

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[58] ibid, para 48.

[59] This term is used in Davide Diverio, 'Il distacco nella giurisprudenza della Corte di giustizia: quale equilibrio fra libera circolazione dei servizi e tutela dei lavoratori?' (2022) 3 Rivista del Diritto della Sicurezza Sociale 489, 499.

[60] Herwig Verschueren, 'The CJEU Endorses the Revision of the Posting of Workers Directive' (2021) ERA Forum 557, 565.

[61] Diverio (n 59) 498.

[62] *Pillbox* (n 31) para 116.

[63] Bartoloni (n 6) 87.

provisions conferring powers on the EU to undertake specific actions in particular fields.[64] This idea squares with the *Tobacco Advertising* legacy, which clarified that Article 114 TFEU can be used to pursue other interests only when the legislation at stake also has a connection with the internal market.

Second, EU political institutions must enjoy discretion when deciding the result of such a balancing test.[65] Indeed, recognising the obligation to consider the objectives listed in Article 9 TFEU does not impose on the EU a specific way to act to protect and promote these interests since the EU legislator should exercise its political discretion in choosing the measures to be taken. Moreover, a minimum standard of protection of Article 9 TFEU objectives is difficult to determine since this provision does not impose any obligation of result. However, it is reasonable to assume that the EU would fail in its duties if it adopted measures that completely disregarded Article 9 TFEU social objectives,[66] without adequately stating the reasons on which they are based, as required by Article 296 TFEU.[67] Hence, it could be argued that the EU is subject to at least two minimum requirements of a substantive and procedural nature, respectively. First, by analogy with the case law concerning health risks, at least the same level of protection existing at the time of the adoption of the legislation should be maintained.[68] Second, the EU legislator must take into account all the relevant circumstances that can inform its decision and it should be able to demonstrate which elements such a decision is based upon.[69]

Finally, Article 9 TFEU does not attribute new powers to the EU but requires it to exercise its competences differently. Thus, while this clause does not formally extend EU powers, it gives greater nuance to the relation between EU competences and objectives. This demonstrates that the issue of EU competences should be approached by moving away from the simple parallelism between competences and objectives.[70] The introduction of horizontal clauses in the EU legal order, such as Article

[64] Michel (n 18) 185–187.

[65] Aranguiz (n 8) 345.

[66] Psychogiopoulou (n 8) 1365.

[67] Maria Dolores Ferrara, 'Il futuro dell'Europa sociale e le dimensioni del social mainstreaming' (2023) 1 Lavoro e diritto 129, 141.

[68] Delphine Misonne, 'The Importance of Setting a Target: The EU Ambition of a High Level of Protection' (2015) 4 Transnational Environmental Law 22. Reference is made to Case C-601/11 P *French Republic v European Commission* ECLI:EU:C:2013:465, para 110.

[69] Case C-310/04 *Kingdom of Spain v Council of the European Union* ECLI:EU:C:2006:521, para 122.

[70] Eleftheria Neframi, 'Le rapport entre objectifs et compétences: de la structuration et de l'identité de l'union européenne' in Neframi (n 9) 11.

9 TFEU, confirms that a certain competence no longer corresponds unequivocally to a specific objective.[71] Such an interpretation questions some assumptions on the relation between EU competences and objectives. In particular, the claim that Article 114 TFEU attributes to the EU a 'purposive' competence requires further consideration. According to this view, EU internal market powers would be constrained by the need to pursue a specific objective, namely liberalising trade between MSs, which in turn creates problems of legitimacy for the EU.[72] However, the recent case law on the Posted Workers Directive offers a new understanding of Article 114 TFEU, which should be perceived as having different purposes, not only economic goals. While enhancing cross-border exchanges constitutes one of these purposes, social objectives also become relevant goals. Indeed, considering social interests when exercising its internal market competence is not merely a choice for the EU but has become an obligation due to the introduction of Article 9 TFEU.[73] In addition, as the case law examined demonstrates, the broad discretion of the EU legislator recognised by the CJEU allows it to adopt measures that restrict economic freedoms, when justified by the need to safeguard social objectives. It is undeniable that the EU can still rely on Article 114 TFEU only when there is some connection with cross-border exchanges. However, this is reduced to a condition allowing the EU to resort to its internal market legal basis, and the liberalisation of the internal market has become one of the multiple interests that could and indeed should guide the EU legislator in its decisions. As the final discussion will better illustrate, such a new understanding of Article 114 TFEU solves, at least partially, the EU legitimacy problems.

4 The impact of Article 9 TFEU on EU internal market competences

4.1 The expansion of the scope of EU action to fields in which MSs retain competences

In addition to questioning the parallelism between EU competences and objectives, Article 9 TFEU influences the scope of EU powers. This is no novelty in the internal market. Indeed, as legal scholarship has already shown, EU institutions may easily rely on Article 114 TFEU, thus using their powers to regulate the internal market, to intervene in areas

[71] Bartoloni (n 6) 89.

[72] This argument is proposed in Gareth Davies, 'Democracy and Legitimacy in the Shadow of Purposive Competence' (2015) 21 European Law Journal 2.

[73] This partially contradicts what is claimed in ibid 9–11.

where the EU would otherwise have limited competences.[74] Despite not equating to formally attributing new competences to the EU, the effect produced by interpreting Article 114 TFEU in light of Article 9 TFEU can nonetheless be considered *de facto* as a possibility for the EU to expand its powers beyond those conferred on it in the Treaties. The issues that arise are not in EU law, but they might occur more often after the Court has explicitly mentioned that the EU internal market powers should be used not only to remove obstacles to trade but also to ensure due consideration to social objectives in the creation of the internal market. The next sections elaborate further on how such expansion takes place when the EU considers Article 9 TFEU objectives in exercising its internal market competence. In particular, this final section has a twofold goal. First, it aims to identify three possible dynamics that can influence the scope and nature of EU powers due to this new reading of Article 114 TFEU. Its second objective is to understand how such an expansion of EU powers in areas where EU intervention is explicitly limited can be considered compatible with the principle of conferral. Indeed, in social policy areas that might be touched upon when the EU relies on Article 114 TFEU in light of Article 9 TFEU, the Treaties attribute some powers to the EU, but they also restrict its possibilities to intervene through different constraints.

As a preliminary remark, it should be recalled that when Article 9 TFEU interests are considered, certain fields might be particularly affected by EU actions.[75] In particular, those policy areas are employment, social security, education and training, and public health. In all these sectors, certain clauses present in the TFEU explicitly require respect for national competences. Such limitations are contained, for instance, in Article 147(1) TFEU concerning employment, in Article153(5) TFEU about social security, in Articles 165(1) and 166(1) TFEU dedicated respectively to education and training, and in Article 168(7) TFEU on public health. Some of these provisions exclude EU actions with regard to specific issues, such as rules on pay, the right of association and the right to strike and to impose lock-outs,[76] 'content of teaching and the organisation of

[74] See Garben (n 10) 207-208; Robert Schutze, 'Limits to the Unions' "Internal Market" Competence(s): Constitutional Comparisons' in Azoulai (n 7) 215–233. For a critique to this approach, see, for instance, Vincent Delhomme, 'Emancipating Health from the Internal Market: For a Stronger EU (Legislative) Competence in Public Health' (2020) 11 European Journal of Risk Regulation 747.

[75] Further reflections could be elaborated by analysing those fundamental rights corresponding to Article 9 TFEU interests contained in the Charter, considering that according to Article 6(1) TEU protection of fundamental rights does not extend the EU competences. On the interaction between fundamental rights and competences, see Edouard Dubout, 'The Protection of Fundamental Rights and the Allocation of Competences in the EU: A Clash of Constitutional Logic' in Azoulai (n 7) 193–212.

[76] Article 153(5) TFEU.

education systems and their cultural and linguistic diversity',[77] 'content and organization of vocational training',[78] and various aspects of health-care policy.[79] In these areas where the Treaties explicitly prevent the EU from interfering with national choices, the powers of the MSs have been defined as 'reserved competences'.[80]

When the EU exercises its legislative competences under Article 114 TFEU taking Article 9 TFEU into account, it can adopt measures that have an impact on how these goals are safeguarded in all the MSs. In turn, taking social interests into consideration narrows down MSs' room for manoeuvre in social areas by means of measures that regulate the internal market.

In light of the foregoing, the question arises of how the Court dealt with the relation between possibilities to adopt internal market legislation, on the one hand, and restrictions to EU action in areas of MSs' retained competences, on the other hand. On various occasions, the MSs have claimed that resorting to Article 114 TFEU to adopt certain acts influencing fields of reserved competences would constitute undue interference with their sovereign competences. More specific indications have been provided by the Court in cases concerning the revised Posted Workers Directive. The main bone of contention was that the new rules introduced would, among other things, ensure that posted workers receive remuneration that is in line with that of workers of the hosting MS. This was considered by Hungary and Poland as an unlawful intrusion in decisions regarding remuneration that should pertain to the national level. However, the Court did not share that view. First, it specified that the Directive at stake merely established a framework to coordinate different national legislations.[81] Second, it claimed that the limitation contained in Article 153(5) TFEU, which prohibits EU interventions in the matter of pay,[82] had not been violated. Indeed, this prohibition is applicable only when the legal bases enshrined in the rest of that provision

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[77] Article 165(1) TFEU.

[78] Article 166 TFEU.

[79] Article 168 TFEU reads: 'Union action shall respect the responsibilities of the Member States for the definition of their health policy and for the organisation and delivery of health services and medical care. The responsibilities of the Member States shall include the management of health services and medical care and the allocation of the resources assigned to them. The measures referred to in paragraph 4(a) shall not affect national provisions on the donation or medical use of organs and blood'.

[80] Bruno de Witte, 'Exclusive Member State Competences – Is There Such a Thing?' in Garben and Govaere (n 7) 59–61.

[81] *Hungary v Parliament and Council* (n 55) para 79.

[82] The paragraph establishes that '[t]he provision of [Article 153] shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs'.

are relied upon, whereas this clause does not restrict EU actions taking place through the use of other powers conferred on the EU, such as those in the field of the internal market.[83] Similar conclusions had already been reached by the Court in the *Tobacco Advertising* case with regard to Article 129(4) EEC Treaty.[84] The restrictive interpretation of these prohibitions confirms the possibility for the EU to intervene in areas that remain a national competence using its internal market legislative powers.

As a last point, the wording of the two above-mentioned provisions, ie Articles 153(5) TFEU and 129(4) EEC Treaty, might support the interpretation given by the Court in the two cases. Indeed, they require that EU actions in the areas of social policies and public health do not interfere with certain national choices. However, it could be questioned whether in assessing compliance with other provisions that exclude EU action in more general terms, such as the current formulation contained in Article 168(7) TFEU, the Court would have provided a different interpretation. While this issue has not been addressed yet, the outcomes of the varied case law mentioned above make it difficult to argue that this could be the case. This assumption is reinforced by those judgments in which the Court maintained that while MSs retain sovereign powers in the field of social protection, they can be nonetheless required to adapt their legal order to ensure respect for fundamental freedoms.[85]

4.2 The relation between EU action and the limits to EU harmonising powers

A second limitation usually present in the fields mentioned above – namely employment, social security, education and training, and public health – is the prohibition to harmonise national legislations in these areas. These limitations are contained in Article 149 TFEU on employment, in Article 153(2)(a) TFEU with regard to social policy, in Article 165(4) TFEU and in Articles 166(4) referring respectively to education and training, and 168(5) TFEU concerning public health. In essence, all these provisions confer on the EU certain competences in these policy fields, provided that EU action does not amount to harmonisation of MSs' legislation. However, the very goal of Article 114 TFEU is to approximate rules applicable at the national level. Thus, a conflict can arise if the EU legislator relies on this latter legal basis to adopt acts that end up

[83] *Hungary v Parliament and Council* (n 55) para 80.

[84] This provision read '[c]ommunity action in the field of public health shall fully respect the responsibilities of the Member States for the organisation and delivery of health services and medical care'.

[85] See, for instance, Case C-372/04 *The Queen, on the application of Yvonne Watts v Bedford Primary Care Trust and Secretary of State for Health* ECLI:EU:C:2006:325, para 147.

harmonising at the supranational level certain areas where EU primary law excludes such a possibility. In other words, the broad opportunities for harmonisation provided by Article 114 TFEU clash with the limitations envisaged in the Treaties as to the extent to which national legislations can be brought into line by interventions at the EU level. To make sense of this tension, one could argue that the two terms should be given a different meaning, and that harmonisation should be construed as a more limited process. In practice, distinguishing between the two concepts could be very complex, and thus it comes as little surprise that the Court has decided to take a different path.

Once again, it seems appropriate to move back to *Tobacco Advertising*. In that judgment, the Court recalled the limitation contained in the previous version of Article 168 TFEU, but it also specified that this clause should not prevent the EU from using other legal bases to adopt legislation influencing health protection.[86] Nevertheless, it recognised that the EU legislator cannot rely on other articles in the Treaties to circumvent the prohibition to harmonise MSs' legislation established in Article 168 TFEU.[87] This statement distinguishes two different situations, having two different legal consequences. When the EU institutions can legitimately resort to Article 114 TFEU because the conditions mentioned in section 3 are fulfilled, they are allowed to adopt legislation that pursues objectives other than the mere creation of the internal market.[88] However, when reliance on these provisions is not permitted, the EU is prevented from adopting measures that might have an impact on other non-economic interests. This appears as a consolidated rule of EU law since the Court has stopped explicitly mentioning this aspect in its more recent judgments.[89] It may seem that the Court is stating the obvious, namely that the EU can adopt internal market legislation only when the conditions authorising the adoption of internal market legislation are fulfilled. However, a deeper examination allows us to draw relevant considerations for the purposes of this study.

First, it appears that respecting the conditions mentioned above that allow the EU legislator to resort to Article 114 TFEU would be sufficient to respect the harmonisation prohibitions contained in the Treaties. Taking Article 168 TFEU as an example, it could be argued that the prohibition of harmonisation contained in that provision would preclude

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[86] *Tobacco Advertising* (n 38) paras 77–78.

[87] ibid, para 79.

[88] de Vries and de Jager (n 8) 1418.

[89] Anatole Abaquesne de Parfouru, '"Choking Smokers, Don't You Think the Joker Laughs at You": European Union Competence and Regulation of Tobacco Products Packaging under the New Tobacco Products Directive' (2018) 25 Maastricht Journal of European and Comparative Law 410, 418.

the use of EU powers attributed to it in the field of public health to adopt harmonising legislation in the health sector using the legal bases contained in Article 168 TFEU. Nevertheless, this would not prevent the adoption of similar measures if reliance on other legal bases, such as Article 114 TFEU, is allowed.[90] In this vein, the harmonisation prohibition would be set aside when recourse to this latter legal basis is admissible.[91] As already mentioned, the generous interpretation offered by the Court of Article 114 TFEU leads to the conclusion that this would be the case in many circumstances. This would also apply to other internal market legal bases due to the broad interpretation of fundamental freedoms.

Second, the Court grants broad discretion to EU institutions regarding the possibility and the manner in which they choose to consider and include social objectives in their internal market legislation. However, the CJEU also seems to warn that the promotion of Article 9 TFEU interests cannot be achieved when the Treaties do not envisage a legal basis that can be relied upon to adopt the relevant legislation. This confirms that these objectives do not allow for an extension of the powers of EU institutions when they have not been given the competences to enact certain measures.

Third, using internal market powers would not necessarily lead to harmonisation in any instance, since regulating the internal market would not always require standardising MSs' legislation. As the example of the revised Posted Workers Directive mentioned above illustrates, for the internal market to function properly, it can sometimes be sufficient to enact measures that coordinate different national rules. In the same vein, it should be remembered that Article 114(2) TFEU restricts to a certain extent the broad possibilities stemming from the EU internal market powers, since it excludes the possibility of relying on Article 114 TFEU to adopt measures concerning the free movement of people and the rights and interests of employed workers. Hence, analysing respect of the harmonisation prohibition should be conducted on a case-by-case basis, depending on the provisions contained in specific legislation.

4.3 The impact on the nature of EU competences

The third and last phenomenon that might occur when Article 9 TFEU is considered when relying on Article 114 TFEU concerns the nature of EU competences. The categorisation of various types of competences introduced with the Lisbon Treaty is closely connected to the

[90] Bartoloni (n 6) 103.

[91] Schütze (n 7) 82.

principle of conferral and is designed to 'qualitatively limit' EU powers.[92] In this regard, another tension could emerge, namely the possibility for the EU to intervene through the approximation of national laws influencing areas where the action of the EU should be of a coordinating and complementary nature.[93] This has important consequences not only for the type of actions that the EU could undertake, but also for the division of powers between the EU and the MSs. The following analysis sheds further light on how this tension could be approached.

Indeed, according to the Treaties, the nature of EU competence in the internal market differs from the one it enjoys in the various social policy areas that might be affected when the legislator considers the objectives of Article 9 TFEU. As is well known, the EU has shared competences with the MSs in the internal market according to Article 4(2)(a) TFEU. Instead, it can only coordinate MSs' social and employment policies pursuant to Article 5(2) and (3) TFEU and, according to Article 6 TFEU, the EU has complementary powers in the areas of public health, education and training.[94] More specifically, the EU should support and complete MSs' actions in various fields concerning workers' protection, as well as social exclusion and social security. The adoption of minimum standards for the protection of workers is allowed, but only regarding certain issues, including, for example, health and safety at work, protection in the case of unemployment, and gender equality in labour matters.[95] The EU can also sustain, complement or coordinate MSs' actions in the field of occupation.[96] Similar competences are attributed to the EU in the fields of education and training.[97] Finally, powers have been conferred on the EU to ensure health protection, but they remain limited to certain issues such as the standardisation of certain products, cross-border health threats, and tobacco and alcohol legislation.[98] The types of measures that the EU can adopt in these fields where it only has supporting or coordinating competences also vary, but they exclude harmonisation.[99]

When Article 114 TFEU is read in the light of Article 9 TFEU, two interrelated issues arise. First, the EU could approximate national laws to

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[92] ibid 84.

[93] Tridimas (n 7) 67.

[94] As the following overview better explains, shared competences in social policies and public health have been conferred on the EU, but only with regard to specific issues (see Article 4(2)(b) and (k) TFEU).

[95] See Article 153(1) and (2) TFEU.

[96] Articles 147 and 149 TFEU.

[97] Articles 165 and 166 TFEU.

[98] Article 168 TFEU.

[99] Article 2(5) TFEU.

contribute to the functioning of the internal market. In turn, this would require MSs not only to coordinate but also to harmonise certain aspects of their social policies. In other words, the EU would intervene in these areas not only using complementary measures but also by approximating national laws.

In addition, the relation between EU and MSs' competences could also be affected. Pursuant to Article 2(2) TFEU, once the EU has adopted internal market legislation influencing these social policy areas, MSs should be prevented from adopting measures on the same matter, despite the fact that MSs' actions in the fields mentioned in Articles 5 and 6 TFEU should not be prohibited after the EU has exercised its competences.

This situation could be exemplified by recalling the so-called Patients' Rights Directive, which was based on Article 114 TFEU and established common rules to facilitate the cross-border provision of healthcare services while ensuring a high level of health protection.[100] Among other things, the Directive sets out shared principles for reimbursing the costs incurred by patients insured in one MS that received healthcare services in another MS, as well as common rules that MSs should follow when subjecting to prior authorisation certain healthcare treatments to be received in other MSs.[101] Despite the fact that Article 6 TFEU considers public health as an area where the EU has only complementary competences, when adopting the said Directive the EU legislator has required the MSs to harmonise certain aspects of their healthcare policies to facilitate the functioning of the internal market and has prevented national authorities from enacting measures that would regulate the same subject matter.

So far, the CJEU has not dealt explicitly with such a possible modification of the nature of EU competences arising when the EU uses its internal market powers to intervene in social policy areas. However, based on the previous analysis, it is reasonable to assume that this possible modification of the nature of EU competences should not constitute a problem when its institutions can legitimately resort to Article 114 TFEU to adopt legislation. This, for instance, was the case of the Patients' Rights Directive since the Court had already affirmed that the cross-border provision of healthcare services fell within the scope of EU provisions on the free movement of goods.[102] This reading is also confirmed by

[100] Directive 2011/24/EU of 9 March 2011 on the application of patients' rights in cross-border healthcare [2011] OJ L88/45.

[101] Detailed provisions in these areas are set out in Articles 7 and 8 of the Directive.

[102] This was affirmed for the first time in Case C-286/82 *Luisi and Carbone* ECLI:EU:C:1984:35, para 16. It should be noted that the Directive also introduced provisions on cooperation among MSs that were, instead, based on Article 168 TFEU.

previous judgments affirming that when the MSs are required to 'make some adjustments to their national systems of social security' to ensure that their functioning is compatible with economic fundamental freedoms, this would not deprive the MSs of their competences in these social policy areas.[103] The extent of the expansion of EU action in social policy areas would clearly depend on the specific measures adopted, and the acceptance of the act by the MSs would be based on the degree and type of harmonisation requested. Nonetheless, these reflections further confirm the close correlations between social policy and internal market regulation, making it impossible to define 'watertight boundaries' among different areas of EU intervention.[104]

5 Conclusions

This article has shed light on the capacity of Article 9 TFEU to modify the relation between EU competences and objectives, questioning a straightforward overlap between the two. In addition, the horizontal social clause contributes to blurring the dividing line between EU and MSs' powers. In essence, this contribution has confirmed that the division of competences between the EU and the MSs as envisaged in the Treaty of Lisbon must be considered a dynamic process.[105] In particular, the obligation to consider Article 9 TFEU objectives when the EU legislates in the field of the internal market runs the risk of the EU regulating social policy areas reserved for the MSs, thus *de facto* expanding its competences. This tendency is set to continue since Article 114 TFEU is still used as a legal basis to adopt measures that might influence other policy areas. Many of these pieces of legislation would require the EU to reconcile different objectives, including those mentioned in Article 9 TFEU.[106]

This tendency has deep implications for the scope and nature of EU competences and their relation with powers that remain within the national sphere, since the EU will pursue Article 9 TFEU social objectives when using internal market legal bases, while respecting the principle of

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[103] See, among others, Case C-385/99 *Müller-Fauré and van Riet* ECLI:EU:C:2003:270, para 102.

[104] Tridimas (n 7) 72.

[105] ibid 73; Sacha Garben and Inge Govaere, 'The Division of Competences between the EU and the Member States: Reflections on the Past, the Present and the Future' in Garben and Govaere (n 7) 10.

[106] This is, for instance, the case of the Commission proposal for a European Health Data Space, which is also based on Article 114 TFEU and tackles issues related to health protection. In a similar vein, an example of legislation that requires consideration of interests other than those mentioned in Article 9 TFEU is the so-called European Media Freedom Act, which has been adopted using Article 114 TFEU as a legal basis and which raises important questions of freedom of expression or plurality of the media.

conferral. While possible incompatibility between these duties has been underlined by the MSs interested in the annulment of EU legislation, the CJEU has not been greatly inclined to acknowledge it. In fact, it has solved this conundrum, offering a restrictive interpretation of the various limitations to EU competences in social policy areas. Vice versa, it has extended the opportunities to rely on Article 114 TFEU. In essence, as its approach evolved after the *Tobacco Advertising* case, it seems that the Court would consider the principle of conferral respected when internal market powers can be legitimately used to adopt a certain piece of legislation, even if the link of the act with free trade and competition in the EU is a weak one. When this is the case, other limitations to EU competences present in the Treaties should not interfere with such a possibility. Indeed, these limitations must be interpreted restrictively and should only apply when the EU resorts to the specific legal bases in the various social policy areas. In other words, the discussion boils down to a matter of perspective: depending on the policy area into which the matter falls, the EU would be able to enact different types of measures. If the issue is considered to be somehow connected to the internal market, the EU can use its harmonising powers. Instead, if the question is deemed to belong to social policy, EU intervention could be more limited. This would also lead to a different redefinition of the boundaries dividing EU and MSs' powers. The fact that there may be spillovers in social fields when Article 114 TFEU is used as a legal basis appears to be an inevitable consequence. In turn, this approach allows the Court to impose on the EU legislator the obligation to consider social objectives while ensuring it is given the necessary leeway to do so. This interpretation of existing legal bases is understandable since if the EU were not given the power to pursue its aims, the very reasons for its existence would be questioned.[107] This includes, for instance, the possibility of enacting internal market legislation oriented towards social aims. Such an interpretation of Article 114 TFEU further contributes to the practical implementation of the obligation contained in Article 9 TFEU, thus strengthening the role this provision might have in EU law.

From the substantive point of view, this new reading of EU internal market powers appears as another example of Article 9 TFEU's capacity to reinforce the social dimension of the EU integration process. This could be perceived as a positive development towards a more balanced understanding of economic and social objectives of the EU legal order. Indeed, as the two cases on the Posted Workers' Directive demonstrate, the Court has recognised that, in addition to removing obstacles to trade, the protection of Article 9 TFEU interests also constitutes an objective to

[107] See Michel (n 18) 184.

be pursued when the EU legislator regulates the internal market. Hence, the horizontal social clause has the potential to be increasingly taken into account in ways that allow the EU to strive towards the establishment of the 'social market economy' envisaged in Article 3(3) TEU. The explicit recognition given by the Court to the obligation to consider social objectives stemming from Article 9 TFEU and the impetus given by the European Pillar of Social Rights reinforces this assumption.

Finally, this new understanding of Article 114 TFEU has important implications for the democratic and social legitimacy of the EU. As already underlined in the literature, various forms of competence creep can give rise to a democratic deficit, but the one deriving from the broad scope of Article 114 TFEU is the least problematic since the adoption of EU legislation requires the involvement of EU political institutions.[108] In addition, the fact that the Court has imposed on the EU legislator the obligation to consider Article 9 TFEU objectives when adopting internal market legislation could be deemed to further reinforce the social legitimacy of the EU. Therefore, this re-interpretation of Article 114 TFEU would question what has already been argued concerning the nature of EU action in the internal market, which has been considered 'value neutral' by some,[109] or having a neo-liberal orientation by others.[110] Indeed, as noted in the literature, it was precisely the functional nature of EU integration, which allows spillovers from one policy field to the other, that requires the inclusion of horizontal objectives in EU law.[111] Hence, the presence of objectives to be considered in a cross-cutting way legitimises understanding of the scope of a certain policy area and existing legal bases in broad terms.[112] For the purposes of the present discussion, considering Article 9 TFEU objectives would justify a broad interpretation of Article 114 TFEU since this would allow the EU legislator to take into account multiple interests that are not exclusively of an economic nature. In other words, reading Article 114 TFEU in light of Article 9 TFEU would provide the EU with more leeway to balance the need to ensure the liberalization of trade in the internal market and other interests, including those protected by the horizontal social clause.

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[108] Garben (n 10) 213. However, the democratic legitimacy of the EU is hampered to a larger extent, for instance in the process of negative integration taking place due to the so-called 'overconstitutionalisation' of the EU legal order. See, in this regard, Dieter Grimm, 'The Democratic Cost of Constitutionalisation: The European Case' (2015) 21 European Law Journal 460, 470.

[109] Tridimas (n 7) 73.

[110] Davies (n 51) 84.

[111] Michel (n 18) 182.

[112] ibid 191.

Despite the fact that this process would enhance discussions of a political nature in the EU institutions, the outcomes could disappoint some of the actors involved. In particular, some MSs might oppose certain measures adopted by the EU legislator since they might not agree with the balance between different interests embodied in the act. This appears as an inevitable consequence when political decisions are taken, but these MSs could bring further cases before the CJEU, claiming that the EU does not have the competence to adopt such measures. While the Court has already solved various issues concerning the attribution of powers to the EU and the division of competences between the EU and the MSs, further use of Article 114 TFEU to pursue social objectives might give rise to contestation by the MSs.

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REGULATING DeFi: SAFEGUARDING MARKET INTEGRITY WHILE MANAGING HIGH EXPECTATIONS*

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Abstract: Digital finance has contributed to the dematerialisation and disintermediation of financial transactions. Technological innovations, namely blockchain technology and smart contracts, have generated an additional ecosystem – decentralised finance (DeFi). Since its main characteristics are pseudonymity and a lack of intermediaries, which are currently challenging to systemically evaluate, it requires an equally innovative approach from policy makers, regulators, and legislators. The purpose of the paper is twofold. Firstly, it illuminates market trends and highlights the emerging risks associated with DeFi. Secondly, it examines policies, legislative proposals, and existing regulation, focusing on three main areas: consumer protection, anti-money laundering, and determining jurisdiction and applicable law. Drawing on a qualitative analysis of primary sources, namely EU and US legislation, and supported by relevant reports and case studies made by financial authorities, international standard-setting bodies, and business associations, this paper adopts a theoretical approach. It puts forward arguments in favour of the hypothesis that regulatory certainty fosters a favourable environment for the development of financial services in the realm of crypto innovations, a correlation that will hopefully hold significance within the context of DeFi.

Keywords: decentralised finance (DeFi), MiCA, crypto assets, financial regulation, consumer protection, AML, jurisdictional issues.

'Creative destruction is the essential fact about capitalism'.

Joseph A Schumpeter

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1 Introduction

Digital finance has creatively disrupted financial services and business models within the global financial ecosystem. Technological innovations, such as distributed ledger technology (DLT), often referred to as blockchain, have contributed to the dematerialisation and disintermediation of financial transactions. Combined with big data analytics, artificial intelligence (AI), and machine learning, there is the ongoing potential for operational upgrades, allowing speedier, more convenient, and often cheaper financial services.[1] New market entrants, namely start-ups (also known as FinTechs)[2] and large technology firms (or BigTechs), have fostered both competition and collaboration with incumbents, ie traditional financial intermediaries, such as banks and stock exchanges, compelling them to modernise their legacy systems.

The Bitcoin cryptocurrency was the first example of applying blockchain technology in a new way to financial markets, with the idea of creating 'a peer-to-peer electronic cash system', ie utilising new technology to cut off financial intermediaries from their role in processing, authorising, and clearing financial transactions, in order to generate more direct, faster, and more cost-effective financial services.[3] So far, Bitcoin has proven to be captivating. It had an essential role in moulding the crypto ecosystem, an industry that is valued at close to USD 3 trillion.[4] However, it is highly volatile and speculative,[5] with dramatic booms and

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[1] Financial Stability Board, 'Artificial Intelligence and Machine Learning in Financial Services: Market Developments and Financial Stability Implications' (2017) <www.fsb.org/wp-content/uploads/P011117.pdf> accessed 22 May 2024.

[2] Although the FinTech expression covers a broader area and represents: 'technology-enabled innovation in financial services that could result in new business models, applications, processes or products with an associated material effect on the provision of financial services'. Financial Stability Board, 'Fintech and Market Structure in Financial Services: Market Development and Potential Financial Stability Implications' (2019) Financial Stability Board 2, fn 1 <//www.fsb.org/wp-content/uploads/P140219.pdf> accessed 22 May 2024. The term FinTechs is also often used to describe new challengers/start-ups in financial markets.

[3] S Nakamoto, 'Bitcoin: A Peer-to-peer Electronic Cash System' (2008) White Paper <https://satoshinakamoto.me/bitcoin.pdf> accessed 22 May 2024.

[4] At its peak in November 2021, the value of the global cryptocurrency market was around USD 2.9 trillion. On 22 May 2024, the value stood at USD 2.70 trillion, according to Forbes Digital Assets, global cryptocurrency market capitalization daily estimates. See Forbes, 'Cryptocurrency Prices Today by Market Capitalisation' (2024) <www.forbes.com/digital-assets/crypto-prices/?sh=5d21d05f2478> accessed 22 May 2024.

[5] ESMA, 'Crypto Assets: Market Structures and EU Relevance' (2024) ESMA Report on Trends, Risks and Vulnerabilities Risk Analysis, ESMA50-524821-3153, 10 April 2024 <www.esma.europa.eu/sites/default/files/2024-04/ESMA50-524821-3153_risk_article_crypto_assets_market_structures_and_eu_relevance.pdf> accessed 22 May 2024; F Panetta, 'Paradise Lost? How Crypto Failed to Deliver on Its Promises and What to Do about It' (Speech at a panel on the future of crypto at the 22nd BIS Annual Conference, Basel, 23 June

busts, while cyberattacks and fraud are also issues.[6] Bitcoin and other cryptocurrencies are therefore justifiably disapproved of by financial experts and regulatory authorities,[7] but they are also recognised as 'remarkably resilient under adverse circumstances and shocks'.[8]

Subsequently, since the cryptocurrency market has primarily evolved into a speculative financial playground – missing the chance to contribute to financing the real economy while also being highly volatile[9] – the private and public sectors have both commenced the pursuit for 'cryptostability', ie more stable forms of crypto assets, eg stablecoins[10] and central bank digital currencies (CBDCs).[11]

Although all the abovementioned crypto assets contain innovative technologies which, as mentioned, purport to decentralise finance – by

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2023) <www.ecb.europa.eu/press/key/date/2023/html/ecb.sp230623_1~80751450e6.en.html> accessed 22 May 2024.

[6] A Briola, D Vidal-Tomás, Y Wang and T Aste, 'Anatomy of a Stablecoin's Failure: The Terra-Luna Case' (2023) 51 Finance Research Letters <www.sciencedirect.com/science/article/abs/pii/S1544612322005359?via%3Dihub> accessed 22 May 2024; M Lewis, Going Infinite: *The Rise and Fall of a New Tycoon* (WW Norton & Company 2024).

[7] F Panetta, 'For a Few Cryptos More: The Wild West of Crypto Finance' (Speech at Columbia University, New York, 25 April 2022) <www.ecb.europa.eu/press/key/date/2022/html/ecb.sp220425%7E6436006db0.en.html> accessed 22 May 2024; P Krugman, 'Bitcoin Is Evil' *The New York Times* (New York, 28 December 2013) <https://archive.nytimes.com/krugman.blogs.nytimes.com/2013/12/28/bitcoin-is-evil/?mcubz=1> accessed 22 May 2024; ESMA, EBA and EIOPA, 'EU Financial Regulators Warn Consumers on the Risks of Crypto-assets' ESA 2022 15, Press Release, 17 March 2022 <www.esma.europa.eu/sites/default/files/library/esa_2022_15_joint_esas_warning_on_crypto-assets.pdf> accessed 22 May 2024; ESMA, 'Crypto-assets and Their Risks for Financial Stability' (2022) ESMA TRV Risk Analysis <www.esma.europa.eu/sites/default/files/library/esma50-165-2251_crypto_assets_and_financial_stability.pdf> accessed 22 May 2024.

[8] I Angeloni, 'Digital Finance in the Global Context: Challenges and Perspectives' in T Beck, L Giani and G Sciascia (eds), *Digital Finance in the EU: Drivers, Risks, Opportunities* (The EU Supervisory Digital Finance Academy's First Year e-book, European University Institute 2023) 31 <https://cadmus.eui.eu/handle/1814/76429> accessed 22 May 2024.

[9] S Aramonte, W Huang and A Schrimpf, 'DeFi Risks and the Decentralisation Illusion' (2021) BIS Quarterly Review, December 2021 <www.bis.org/publ/qtrpdf/r_qt2112b.pdf> accessed 22 May 2024.

[10] Despite Facebook's 'epic fail' of the proposed stablecoin Diem (formerly known as Libra), stablecoins have thrived over the past years, currently accounting for approximately 7% of the crypto market. See CoinMarketCap, 'Top Stablecoin Tokens by Market Capitalization' <https://coinmarketcap.com/view/stablecoin/> accessed 22 May 2024). However, due to many risks and uncertainties surrounding stablecoins, they have, in policymaking circles, been wisecracked as 'neither stable nor coins'. See D Arner, R Auer and J Frost, 'Stablecoins: Risks, Potential and Regulation' (2020) BIS Working Papers No 905, Bank for International Settlements, 7 <www.bis.org/publ/work905.pdf> accessed 22 May 2024.

[11] CBDCs have so far been launched in emerging economies, eg Bahamas, Zimbabwe and Nigeria, while developed economies follow a more cautious and gradual approach. For an interactive geographical map of CBDCs (inaugurations, pilot projects, conducted research by countries, etc) since January 2014, see CBDC Tracker Database <https://cbdctracker.org/> accessed 22 May 2024.

cutting off intermediaries – there is still a certain degree of centralised finance (CeFi) involved in the crypto ecosystem, ie intermediaries providing services around crypto assets, eg crypto exchanges. A number of intermediary services are currently provided, such as the conversion of fiat currency to cryptocurrency, the exchange of crypto assets for other crypto assets (cross-chain bridge operations), the operation of trading platforms for crypto assets, the provision of custody of crypto assets, advisory services, etc.

Accordingly, another step toward disintermediation in digital finance is decentralised finance, also known as DeFi. DeFi is defined as a 'competitive, contestable, composable and non-custodial financial ecosystem built on technology that does not require a central organisation to operate and that has no safety net', and which 'consists of financial protocols – implemented as "smart contracts" – running on a network of computers to automatically manage financial transactions'.[12] Aramonte, Huang and Schrimpf contend that this is yet another instance of the 'decentralisation illusion', as all DeFi platforms exhibit certain centralised characteristics, eg central governance structures, decision-making power that is concentrated among major coin-holders, and the influence of key validators.[13]

DeFi was first introduced in 2014 in the form of an innovative open-source blockchain platform called Ethereum, which was invented by its co-founder Vitalik Buterin.[14] The technology of DeFi relies on blockchain and smart contracts,[15] ie computer programmes stored on the blockchain that are self-executed in an automated manner when predetermined conditions are met. As a system, DeFi cannot support fiat currencies, so stablecoins have an important function in the DeFi ecosystem by enabling financial transactions between users and facilitating fund transfers across platforms, while bypassing fiat currency swaps and the

[12] R Auer, B Haslhofer, S Kitzler, P Saggese and F Victor, 'The Technology of Decentralized Finance (DeFi)' (2023) BIS Working Papers No 1066, Bank for International Settlements, 3 <https://www.bis.org/publ/work1066.pdf> accessed 22 May 2024.

[13] Aramonte and others (n 9) 27–29; also in ESMA, 'Decentralised Finance in the EU: Developments and Risks' (2023) ESMA TRV Risk Analysis, Financial Innovation, ESMA50-2085271018-3349, 11 October 2023, 5 <www.esma.europa.eu/sites/default/files/2023-10/ESMA50-2085271018-3349_TRV_Article_Decentralised_Finance_in_the_EU_Developments_and_Risks.pdf> accessed 22 May 2024.

[14] V Buterin, 'Ethereum: A Next-Generation Smart Contract and Decentralized Application Platform' (2014) <https://ethereum.org/content/whitepaper/whitepaper-pdf/Ethereum_Whitepaper_-_Buterin_2014.pdf> accessed 22 May 2024.

[15] Smart contracts were first presented by Nick Szabo in 1990s as a computer program which eliminates the need for trust between the parties involved since its execution would be self-enforced. See P De Filippi, C Wray and G Sileno, 'Smart Contracts' 10(2) Internet Policy Review <https://doi.org/10.14763/2021.2.1549> accessed 22 May 2024; also acknowledged by Buterin (n 14) 10.

high volatility of cryptocurrencies. DeFi aims to perform the same functions as traditional finance (TradFi), like trading, asset management, lending, and payments, but in a more automated way.[16]

Similar to cryptocurrency market trends, DeFi is also a very concentrated market, with Ethereum having a 60% market share measured as total value locked (TVL), but new entrants have emerged since 2021, eg Binance, Tron, Solana, etc.[17] DeFi counts for around 7% of the total crypto market and is also highly volatile. During a two-year period known as 'DeFi summer', the market experienced growth of 524%; starting with a TVL estimated at around USD 600 million at the beginning of 2020, it peaked at USD 315 billion by the end of December 2021.[18] However, following the collapse of the Terra DeFi platform, the market saw a nearly 40% drop in TVL within just a few days. By the end of 2023, the number of DeFi users was estimated at around 7.4 million, reflecting an annual growth rate of 35%.[19] In May 2024, TVL in DeFi services was estimated at around USD 107 billion,[20] while DeFi's major assets were estimated at approximately USD 93 billion based on market capitalisation.[21]

According to Chainalysis's 2023 report on regional trends in crypto asset adoption, Central and Southern Asia (CSA) lead the way in terms of DeFi platform usage, followed by the US, the UK, Russia, and Ukraine. In 2023, DeFi usage in the US declined due to the 'crypto winter' and regulatory uncertainty, but it is expected to rise again, with regulation playing a crucial role in its recovery. In Europe, the largest cryptocurrency adopters are the UK, Spain, France, Germany, Italy, and the Netherlands, with DeFi accounting for more than 50% of the cryptocurrency value gained. France has emerged as a leader in DeFi transaction volume growth, with Paris becoming the European headquarters for major

[16] ESMA, 'Decentralised Finance: A Categorisation of Smart Contracts' (2023) ESMA TRV Risk Analysis, Financial Innovation, ESMA50-2085271018-3351, 11 October 2023 <www.esma.europa.eu/sites/default/files/2023-10/ESMA50-2085271018-3351_TRV_Article_Decentralised_Finance_A_Categorisation_of_Smart_Contracts.pdf> accessed 22 May 2024; Auer and others (n 12).

[17] Total value locked (TVL) is a measure in the cryptocurrency industry that calculates the fiat currency worth of digital assets that are locked or staked on a particular DeFi blockchain platform or decentralised applications (dApps). See in ESMA (n 13) 5.

[18] See T Roukny, 'Decentralized Finance: Information Frictions and Public Policies – Approaching the Regulation and Supervision of Decentralized Finance' (2022) European Commission, Directorate-General for Financial Stability, Financial Services and Capital Markets, June 2022, 8 <https://finance.ec.europa.eu/system/files/2022-10/finance-events-221021-report_en.pdf> accessed 22 May 2024.

[19] ESMA (n 13) 6.

[20] DeFi Llama, 'Overview: Total Value Locked' (May 2024) <https://defillama.com/?tvl=true> accessed 22 May 2024.

[21] DeFi Market Cap, 'Top 100 DeFi Tokens by Market Capitalization' (May 2024) <https://defimarketcap.io/> accessed 22 May 2024.

players like Binance, Crypto.com, and Circle. Notably, Eastern and Western Europe and CSA are the only regions to see an increase in DeFi activity over the past year.[22]

Despite this information, monitoring DeFi remains a highly challenging task, mainly due to the scarcity of reliable data, which is principally a result of its decentralised and anonymous nature. DeFi operates across multiple platforms, which are frequently located in tax havens, and currently lacks requirements for reporting and auditing. Its complexity is continuously evolving, and the market is often vulnerable to manipulation.[23] The European Securities and Markets Authority (ESMA) has reported that 'Crypto markets are global in nature, and the activities of market participants and service providers remain impossible to trace back to individual jurisdictions in systematic ways'.[24]

The aforementioned analyses indicate that regulatory certainty is vital for promoting positive market development and improving risk monitoring. By establishing clear rules and standards, regulation can provide a framework that fosters trust, stability, and confidence in emerging technologies and markets such as DeFi. In line with this, the purpose of the paper is twofold. Firstly, it illuminates market trends and highlights the emerging risks associated with DeFi. Secondly, it analyses policies, legislative proposals, and existing regulations, with a distinctive emphasis on three critical areas: consumer protection, anti-money laundering measures, and the determination of jurisdiction and applicable law. This analysis is enriched by drawing insightful examples from two prominent legal frameworks – the EU and the US – offering a unique comparative perspective on the approaches and challenges within these jurisdictions. By contrasting the regulatory approaches and practical implementation between the EU and the US, this examination provides a deeper understanding of how different legal systems address common issues. Such a comparative approach not only highlights best practices but also identifies potential gaps and opportunities for harmonisation or adaptation in the policy-making realm. It puts forward arguments in support of the hypothesis that regulatory certainty plays a significant role in fostering a favourable environment for the development of financial services

[22] Chainalysis, 'The 2023 Geography of Cryptocurrency Report: Everything You Need to Know about Regional Trends in Crypto Adoption' October 2023 <https://go.chainalysis.com/geography-of-cryptocurrency-2023.html> accessed 22 May 2024.

[23] ESMA (n 5); Chainalysis, 'The 2024 Crypto Crime Report: The Latest Trends in Ransomware, Scams, Hacking, and More' (February 2024) 35–42 <https://go.chainalysis.com/rs/503-FAP-074/images/The%202024%20Crypto%20Crime%20Report.pdf?version=0> accessed 22 May 2024.

[24] ESMA (n 5) 4.

within the realm of crypto innovations.[25] By establishing clear guidelines and frameworks, regulatory certainty not only encourages investment and innovation but also installs confidence among stakeholders. This is particularly significant with regard to the evolving landscape of decentralised finance, where the need for robust regulatory structures is becoming increasingly apparent.

The research for this paper was based on a qualitative analysis of primary sources, namely EU and US legislation, supplemented by relevant reports and case studies made by financial authorities, international standard-setting bodies, and business associations. A comparative analysis was chosen in order to balance conflicting interests and emphasise the need for legal certainty, which can be a significant catalyst for ensuring these technologies are used for the benefit of the financial sector as a whole; by ensuring a stable and predictable legal framework, legal certainty may prove to be crucial in resolving conflicting interests and fostering trust in emerging technologies. To ensure clarity while reading the paper, the authors have included a list of abbreviations at the end of the paper.

The paper is structured as follows: the introduction presents an overview of digital finance developments, in particular cryptocurrency and DeFi markets, combined with market trends. Section two provides a literature review of the regulatory policy activities directed towards the DeFi ecosystem. Sections three to five delve deeper into regulatory approaches with regard to consumer protection, anti-money laundering, and determining jurisdiction and applicable law, analysing potential regulatory gaps and exploring regulatory strategies and best practices for policy making in these areas. Section six concludes.

2 Navigating technological and financial complexities through policy and regulatory mechanisms: a literature review

DeFi has introduced innovative financial products to the market, eg perpetual futures, flash loans, and autonomous liquidity pools. It has the potential to enhance financial inclusion, and its underlying technology could offer additional advantages in terms of speed, security, and cost efficiency. At the same time, the DeFi market is also vulnerable to operational, technological, and security risks, including cyberattacks, fraud, and other illicit activities, posing considerable risks for investors.[26]

[25] R La Porta, F Lopez-de-Silanes and A Schleifer, 'The Economic Consequences of Legal Origins' (2008) 46(2) Journal of Economic Literature 285.

[26] ESMA (n 13) 7–9.

Within the realm of FinTech advancements, DeFi has highlighted the entanglement of two highly sophisticated complexities: technological and financial. Attention is therefore focused on regulators and their efforts in managing high expectations. The prevailing challenge is to strike a balance between fostering financial innovation and maintaining financial stability, ensuring sustainable growth in FinTech through adequate regulatory and supervisory measures and safeguards.[27] This balancing act may appear to be an endless pursuit or even an oxymoron, especially when considering the historical lessons from centuries of financial crises, which often seem unpredictable in their recurrence.[28]

Addressing arising complexities, ESMA's risk analysis reports signal that the usage of smart contracts on the Ethereum blockchain platform has changed significantly over the past few years. During the first embryonic period from 2017 to 2018, smart contracts were utilised for simple transactions such as lending. However, in the period from 2020 to 2023, observed operations included derivatives management, prediction markets, insurance, yield farming, stablecoins, decentralised asset management, etc.[29] These operations lead to new densities and complexities, which Angeloni describes as 'increasing the speed at which transactions can be executed; facilitating automation and round-the-clock activity; augmenting the possibility of diversifying and hedging risks; enhancing geographical transmission; and, more generally, requiring faster and more complex decision-making'.[30]

Stability risk reports conducted to date by ESMA, the ESRB, the BIS, and the FSB indicate that, at present, DeFi does not pose a systemic risk to financial stability. This is primarily due to its relatively small scale and the limited channels of contagion between the crypto

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[27] ST Omarova, 'Technology v Technocracy: Fintech as a Regulatory Challenge' (2020) 6(1) Journal of Financial Regulation 75 <https://doi.org/10.1093/jfr/fjaa004> accessed 22 May 2024; M Amstad, 'Regulating Fintech: Objectives, Principles, and Practices' (2019) ADBI Working Paper Series No 1016, Asian Development Bank Institute, October 2019 <https://ssrn.com/abstract=3491982> accessed 22 May 2024.

[28] CM Reinhart and KS Rogoff, *This Time Is Different: Eight Centuries of Financial Folly* (Princeton University Press 2009); CP Kindleberger and R Aliber, *Manias, Panics, and Crashes, A History of Financial Crises* (5th Edition, John Wiley 2005).

[29] ESMA (n 16) 7–12. For a historical overview of DeFi's services by categories (assets, auxiliary, credit, insurance, payments, staking, trading) between 2018 and 2023, see the chart 'Total value locked in DeFi protocols by category' in European Systemic Risk Board, European System of Financial Supervision, 'Crypto-assets and Decentralised Finance: Systemic Implications and Policy Options' (2023) ESRB Task Force on Crypto-Assets and Decentralised Finance, May 2023, 18 <www.esrb.europa.eu/pub/pdf/reports/esrb.cryptoassetsandecentralisedfinance202305~9792140acd.en.pdf?853d899dcdf41541010cd3543aa42d37> accessed 22 May 2024.

[30] Angeloni (n 8) 28.

sector and TradFi markets.[31] For example, turbulence in the crypto asset market and DeFi sector during 2022 revealed significant operational vulnerabilities within the DeFi ecosystem. The collapse of the DeFi Terra blockchain platform in May 2022, triggered by a liquidity pool attack on its stablecoin TerraUSD, which lost its peg to the USD and subsequently collapsed,[32] led to substantial investor losses of approximately USD 100 billion in TVL, while overall loss in value across the crypto market was estimated at USD 400 billion.[33] At the same time, attackers profited by an estimated USD 800 million.[34]

On a positive note, this collapse of the crypto asset market in May 2022, along with the downfall of one of the largest crypto exchanges, FTX, in November 2022, demonstrated that, for now, the crypto asset market is neither a systemic risk in terms of size nor interconnected with the traditional financial market.[35] Additionally, the collapse of Silicon Valley Bank (SVB) in March 2023, which also caused the second largest stablecoin USD Coin (USDC) to temporary depeg, did not directly impact the TradFi sector.[36]

Cybersecurity remains a critical concern relating to DeFi, with 84% of all crypto assets stolen in 2022, amounting to USD 3.1 billion, and 64% in 2023, equating to USD 1.1 billion; this can be directly linked to vulnerabilities in smart contract design and implementation. The surge in hacking incidents correlates with the growing popularity and market share of DeFi, as well as deficiencies in the operational security of leading DeFi platforms, which have prioritised growth over the implementation and maintenance of robust security systems. On a positive note, the value lost in DeFi hacks declined significantly by 63.7% in 2023, which can be attributed to improved security practices but also a decrease in overall DeFi activity.[37]

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[31] ESMA (n 13) 7–16; ESRB (n 29) 17–19; FSB – Financial Stability Board, 'The Financial Stability Risks of Decentralised Finance' (16 February 2023) 24–28 <www.fsb.org/wp-content/uploads/P160223.pdf> accessed 22 May 2024; BIS – Bank for International Settlements, 'The Financial Stability Risks of Decentralised Finance: Executive Summary' (2023) Financial Stability Institute 31 August 2023 <www.bis.org/fsi/fsisummaries/defi.pdf > accessed 22 May 2024; Aramonte and others (n 9) 29; Bank for International Settlements, 'The Crypto Ecosystem: Key Elements and Risks – Report Submitted to the G20 Finance Ministers and Central Bank Governors' (July 2023) 13–16 <www.bis.org/publ/othp72.pdf> accessed 22 May 2024.

[32] Briola and others (n 6).

[33] ESMA (n 13) 8.

[34] Briola and others (n 6) 2.

[35] ESRB (n 29) 4, 10–13.

[36] The exceptions were Silvergate Bank and Signature Bank in the US, which primarily served the crypto asset sector. ESRB (n 29) 6.

[37] Chainalysis (n 23) 35–42.

Although DeFi and TradFi currently operate as separate realms, financial authorities' reports indicate emerging signs of connectivity between the two. The primary vulnerabilities of DeFi related to financial stability have been identified as: operational fragilities; leverage; liquidity and maturity mismatches; a lack of shock-absorbing capacity; interconnectedness within the financial ecosystem; spillover effects due to the automatic liquidation of collateral based on smart contracts or a reliance on underlying blockchain technologies; and non-compliance with existing regulatory requirements or the absence of regulation.[38]

Based on the identified risks, international standard-setting bodies have also agreed that traditional regulatory mechanisms might not be suitable for DeFi, due to its decentralised and pseudonymous business model. Interestingly, financial authorities have also embraced an innovative tactic, developing new financial governance models, eg regulatory sandboxes and innovation hubs, which allow for a more flexible approach in crafting rules that are adaptable to the digital age.

At the EU level, the European Forum for Innovation Facilitators gathers European supervisory authorities for knowledge sharing activities, eg in the areas of private sector engagement and technological expertise. They also coordinate on the regulatory treatment of innovative products, services, and business models. More specifically, the European Blockchain Regulatory Sandbox, an initiative of the European Commission, aims to facilitate dialogue between regulators and innovators to increase legal certainty for blockchains and other DLT, including smart contracts.[39]

The BIS provides a comprehensive overview of regulatory activities related to crypto and DeFi undertaken by 25 financial authorities in 11 jurisdictions around the world.[40] In line with its main purpose, the

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[38] ESMA (n 13) 7–16; ESRB (n 29) 27–29; FSB (n 31) 16–29; BIS (n 31) 'The financial stability risks …'; BIS (n 31) 'The crypto ecosystem …' 13–14; Aramonte and others (n 9) 29–33.

[39] ESA – EBA, EIOPA and ESMA, 'Report – Update on the Functioning of Innovation Facilitators – Innovation Hubs and Regulatory Sandboxes' (2023) ESAs Joint Report, ESA 2023-27, 11 December 2023 <www.eba.europa.eu/sites/default/files/2023-12/e6b1d9b3-9fec-49ef-9bd7-8dcdf56d8efb/Joint%20ESAs%20Report%20on%20Innovation%20Facilitators%202023.pd> accessed 22 May 2024. For European Blockchain Regulatory Sandbox activities, see <https://ec.europa.eu/digital-building-blocks/sites/display/EBSI/Sandbox+Project>.

[40] Including: EU, France, Germany, Italy, Netherlands, United Kingdom, United States, Canada, Japan, Singapore and United Arab Emirates. For a concise overview of regulatory approaches associated with DeFi protocols, see Box 1, in D Garcia Ocampo, N Branzoli and L Cusmano, 'Crypto, Tokens and DeFi: Navigating the Regulatory Landscape', Bank for International Settlements, Financial Stability Institute, FSI Insights on Policy Implementation No 49, May 2023, 36 <www.bis.org/fsi/publ/insights49.pdf> accessed 22 May 2024. Additionally, online Annex B provides a complete list of the regulatory and policy documents

ESRB primarily focuses on enhancing monitoring capabilities so as to oversee market developments, identify potential risks, and propose policy options for mitigating these risks. More specifically, it advocates for introducing reporting requirements to map exposures connecting the DeFi and TradFi ecosystems.[41] The OECD encourages reporting measures for technology-mediated structures (like decentralised autonomous organisations (DAOs)), smart-contract auditing, and the greater disclosure of DeFi applications.[42] Auer proposes 'embedded supervision' within DeFi protocols through the automated compliance monitoring of decentralised market ledgers.[43] Roukny and Halaburda advise that public observatories investigate and issue warnings about DeFi protocols, practices, and voluntary compliance through an open policy framework that benefits DeFi services.[44] As part of a global cooperation mechanism, the International Organization of Securities Commissions (IOSCO)[45] has published a policy toolkit to support the construction of a regulatory architecture for DeFi, focusing on investor protection and market integrity.[46]

All things considered, regulatory aspirations are aimed at establishing a legal framework with defined liabilities for key actors in DeFi protocols, such as miners and validators, to generate a more controlled and transparent business environment that is conducive to the sustainable growth of the DeFi ecosystem. This also involves building capacities within national supervisory authorities and fostering global cooperation

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by the aforementioned regulatory authorities with online references: Annex B: References of regulatory and policy responses covered in Table 6.

[41] ESRB (n 29) 35–36.

[42] OECD, 'Why Decentralised Finance (DeFi) Matters and the Policy Implications' (2022) OECD, Paris 58–62 <hwww.oecd.org/daf/fin/financial-markets/Why-Decentralised-Finance-DeFi-Matters-and-the-Policy-Implications.pdf> accessed 22 May 2024.

[43] eg The Bank of Lithuania's 'LBchain' regulatory sandbox to embed a regulatory infrastructure in a DLT-based market and Federal Reserve Bank of Boston's supervisory node case study. See R Auer, 'Embedded Supervision: How to Build Regulation into Decentralised Finance' (2019) BIS Working Papers No 811, Monetary and Economic Department, September 2019 (revised May 2022) 20 <www.bis.org/publ/work811.pdf> accessed 22 May 2024. For an overview of innovation facilitators' arrangements with regard to FinTech, see P Bains and C Wu, 'Institutional Arrangements for Fintech Regulation: Supervisory Monitoring' (2023) <www.imf.org/en/Publications/fintech-notes/Issues/2023/06/23/Institutional-Arrangements-for-Fintech-Regulation-Supervisory-Monitoring-534291> accessed 22 May 2024.

[44] Report under the auspices of the European Commission – DG FISMA, while voluntary compliance is attributed to Hanna Halaburda. See Roukny (n 18) 39–42.

[45] IOSCO, 'Final Report with Policy Recommendations for Decentralized Finance (DeFi)' (2023) The Board of International Organization of Securities Commissions, FR/14/2023, December 2023, <www.iosco.org/library/pubdocs/pdf/IOSCOPD754.pdf> accessed 22 May 2024.

[46] For additional policy recommendation and guidance reports, eg the World Economic Forum, the Financial Action Task Force, etc, see Roukny (n 18) 8–9.

and knowledge exchange regarding DeFi market developments and key stakeholders.

A comprehensive examination of policy documents from relevant financial authorities demonstrates that regulatory activities are underway globally in many jurisdictions. With this context in mind, the following sections will delve deeper into consumer protection, anti-money laundering protocols, and jurisdictional issues.

3 Consumer protection

Consumer protection has two sides – one concerned with cybersecurity, and the other connected with investment scams. Due to the decentralised and virtual nature of DeFi, it is significantly more difficult to ensure a high degree of security and control over potential cyber-attacks. Although there are protocols which try to ensure that breaches do not happen, their effectiveness is questionable, with some DeFi systems severely lacking in this area. A failure in any part of this complex structure can have an adverse effect on the whole system. These systems are highly automated, and the lack of human control can mean that any vulnerabilities can go unnoticed for a significant period of time. In addition, due to the high popularity of such systems, some developers rush the development process, circumventing the necessary testing which could identify and prevent these issues in the first place. Even when these protocols are thoroughly tested and without technical flaws, hackers have been known to target other vulnerabilities.[47] A study by Chainalysis determined that in Q1 of 2022, hackers stole USD 1.3 billion from exchanges, platforms, and private entities, with almost 97% of all stolen cryptocurrency being taken from DeFi protocols.[48] Even the Federal Bureau of Investigation published a public service announcement warning of the dangers of DeFi.[49] Victims, therefore, suffer not only as a

[47] For example, in April 2021, hackers successfully attacked the DeFi protocol EasyFi by stealing access to the code from the founder's computer, which resulted in losses of around USD 75 million. See J Crawley, 'DeFi Protocol EasyFi Reports Hack, Loss of Over $80M in Funds' (*Coindesk*, 14 September 2021) <www.coindesk.com/markets/2021/04/20/defi-protocol-easyfi-reports-hack-loss-of-over-80m-in-funds/> accessed 29 July 2023.

[48] Chainalysis Team, 'Hackers Are Stealing More Cryptocurrency from DeFi Platforms Than Ever Before' (*Chainalysis*, 14 April 2022) <www.chainalysis.com/blog/2022-defi-hacks/> accessed 30 July 2023. In the newest report, Chainalysis once again emphasises DeFi's importance to hackers in stealing cryptocurrency. Once again, DeFi protocols were the most likely target, with most cryptocurrency thefts connected with DeFi protocols. Somewhat paradoxically, Chainalysis also states that due to DeFi's transparency, DeFi is a poor choice for obfuscating the movement of funds being stolen. See Chainalysis (n 23) 24.

[49] Federal Bureau of Investigation, 'Cyber Criminals Increasingly Exploit Vulnerabilities in Decentralized Finance Platforms to Obtain Cryptocurrency, Causing Investors to Lose Money' (*FBI*, public service announcement, 29 August 2022) <www.ic3.gov/Media/Y2022/

consequence of the theft itself, but also due to the inability of authorities to hold anyone accountable for errors in the operation of the DeFi protocols which were at fault for the cyberattack, as a result of the high degree of protocol decentralisation.[50]

Regarding investment scams, DeFi scams consist of cases where a scammer programs a crypto token's underlying smart contract to perform a 'rug pull'; this is the malicious abandonment of the crypto project by the development team in which they cash out or remove all of the project's liquidity, therefore running away with investors' funds.[51] There are many different types of rug pulls, with some of the most commonly used being: honeypots, which prevent buyers from re-selling their tokens; hidden mints, which enable developers to create unlimited new tokens, thereby depreciating the value of investors' investments; hidden balance modifiers, giving developers the ability to directly edit users' balances; fake ownership renunciations, which let developers hide the fact that they can call sensitive functions; and hidden transfers, which give developers the power to transfer tokens from users to themselves. Of these, honeypots account for almost 50% of all DeFi rug pulls.[52]

Dangers exist far outside the scope of influence of the developers themselves. Other market participants can exert an influence on the price of crypto assets without anyone being able to determine if someone is engaging in malevolent practices. If there is no effective way to ascertain the true identities of the traders or owners of smart contracts, it becomes highly challenging to differentiate whether asset prices and trading volumes are being driven by genuine market interest; manipulative practices, such as a single individual utilising bots to control multiple wallets; or a coordinated group engaging in collusive trading. DeFi eliminates the intermediaries holding crucial gatekeeping roles and operates independently of the established investor and market protection framework. As a result, retail investors may lack access to professional financial advisors or other intermediaries who traditionally aid in evaluating the quality and legitimacy of investments. In TradFi, these

PSA220829> accessed 13 August 2023. C Ferguson, 'Banking Is a Criminal Industry Because Its Crimes Go Unpunished' (*HuffPost*, 15 September 2012) <www.huffpost.com/entry/bank-crimes_b_1675714> accessed 25 July 2023.

[50] I Salami, 'Challenges and Approaches to Regulating Decentralized Finance' (2021) 115 AJIL Unbound (e-journal) 425.

[51] 'Rug pull' (*Binance Academy Glossary*) <https://academy.binance.com/en/glossary/rug-pull> accessed 29 July 2023; 'Rug pull' (*Alexandria Glossary*) <https://coinmarketcap.com/alexandria/glossary/rug-pull> accessed 27 August 2023.

[52] 'What Is a Rug Pull? DeFi and Exit Scams Explained' (*Solidus Labs*, 27 October 2022) <www.soliduslabs.com/post/rug-pull-crypto-scams#:~:text=DeFi%20scammers%20may%20modify%20their,rug%20out%20from%20under%20investors> accessed 27 July 2023.

intermediaries play a significant role in reducing fraud and assessing risks, but in the realm of DeFi, there are limited alternatives who can provide similar levels of assistance.[53]

3.1 The consumer protection regulatory landscape

3.1.1 The EU: stretching the boundaries of MiCA and MiFID II

On 20 April 2023, the European Parliament adopted MiCA,[54] a long-awaited framework for the functioning of markets in crypto assets. It has been described as 'the first and only legislation of its kind in the world', 'position[ing] Europe as an attractive region in the crypto market'.[55] Two remarks about MiCA must be made at this point: firstly, MiCA is a legal act with a broad reach, covering all three identified legal areas, with the relevant parts being elaborated at appropriate places in this paper; secondly, MiCA's application to DeFi is arguable, due to it explicitly not applying[56] to services which are performed in a fully decentralised manner without any intermediary.[57,58] However, for the purposes of this

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[53] CA Crenshaw, 'Statement on DeFi Risks, Regulations, and Opportunities' (*SEC*, 9 November 2021) <www.sec.gov/news/statement/crenshaw-defi-20211109> accessed 20 August 2023.

[54] Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 on markets in crypto-assets, and amending Regulations (EU) No 1093/2010 and (EU) No 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937 [2023] OJ L150/40 (hereinafter MiCA).

[55] 'EU Markets in Crypto-Assets (MiCA) Regulation: What Is It and Why Does It Matter?' (*BBVA,* 20 April 2023) <www.bbva.com/en/innovation/eu-markets-in-cryptoassets-mica-regulation-what-is-it-and-why-does-it-matter/> accessed 16 August 2023.

[56] MiCA (n 54) Preamble, para 22.

[57] In the Preamble, MiCA defines its scope of application, stating that it applies to natural and legal persons, certain other undertakings and to the crypto-asset services and activities performed, provided or controlled, directly or indirectly by them, but only when part of such activities or services is performed in a decentralised manner. When these services are performed in a fully decentralised manner without any intermediary, they do not fall within the scope of this Regulation (MiCA, Preamble, para 22). This regulatory decision has already been criticised, since determining whether a service is only partially or fully decentralised is, in essence, impossible. Some view the concept of decentralisation at the infrastructure level (with the possibility of also including decentralisation at the front end and custody), while others find that it is not just a question of how many nodes or physical computers support the service, but rather the 'political' aspect of who controls it and how they exercise that control. For more, see C Veas, 'DeFi and MiCA: How Much Decentralisation Is Enough?' (*CMS*, 24 May 2023) <https://cms.law/en/int/publication/legal-experts-on-markets-in-crypto-assets-mica-regulation/defi-and-mica-how-much-decentralisation-is-enough> accessed 3 August 2023.

[58] Even the regulators are not certain when it comes to answering the question whether or not MiCA applies to DeFi. For example, the ESRB has concluded the following: 'Despite their name, DeFi protocols can never be fully decentralised. They need mechanisms for making strategic decisions, adapting to changes and correcting errors. Governance, operation and maintenance always have a significant degree of centralisation'. See ESRB (n 29) 8. MiCA

paper, and since there are reasonable arguments to be made for its application to DeFi, the rest of this paper will be based on the assumption that regulators could apply MiCA to DeFi, while at the same time acknowledging its shortcomings.

Entities covered by MiCA, or crypto-asset service providers (CASPs), include custodial wallets, exchanges for crypto-to-crypto transactions or crypto-to-fiat transactions, crypto-trading platforms, crypto-asset advising firms, and crypto-portfolio managers. MiCA's focus on consumer protection is visible through the imposition of an obligation on the CASP to issue white papers containing information about the issuer, the crypto asset, the rights and obligations attached to the crypto asset, the underlying technology, risks, etc.[59] More importantly, however, MiCA also expressly imposes the liability of the issuers of e-money tokens for the information given in a crypto-asset white paper.[60] Specifically, if the issuer provides information that is not complete, fair, or clear, or that is misleading, that issuer and the members of its administrative, management, or supervisory body will be liable to a holder of such an e-money token for any loss incurred due to that infringement. In order to prevent any contractual mechanisms aimed at avoiding this liability, MiCA states that any contractual exclusion or limitation of civil liability will be deprived of legal effect. It can be concluded that such provisions could also be applicable to DeFi platforms (or, more precisely, their operators) as well.[61] In order to prevent investment scams, MiCA also stipulates

explicitly states that it does not apply to crypto-asset services and activities performed in a fully decentralised manner without any intermediary. This would mean that every DeFi protocol is in fact covered by MiCA. However, the ESRB's report stated that DeFi is on the perimeter of MiCA, essentially meaning that certain protocols do not fall within its scope. That said, the expert public is also unsure of MiCA's scope. While the general understanding is that DeFi was to be omitted from MiCA's scope, some have put forward their opinions that DeFi is not to be excluded and that it is actually to a significant extent covered by MiCA. As Galea points out, 'the interpretation of the law is typically at the hands of the regulatory & supervisory authorities and the courts of the land, not the legislator'. The ESRB's opinion that no DeFi is ever really fully decentralised might be seen as an indication of the regulators' practice in the future, which could compensate for an insufficient explicit legal framework. It would, in fact, be very difficult to apply MiCA's provisions to extremely decentralised protocols, but extensive interpretation is most certainly not foreign to EU institutions. For more, see J Galea, 'Is DeFi Really Excluded from MiCA's Scope?' (*BCAS*, 28 March 2023) <https://blog.bcas.io/is-defi-really-excluded-from-micas-scope> accessed 6 August 2023; Shyft Network, 'Navigating Regulatory Challenges: MiCA and the DeFi Landscape' (*Medium*, 6 June 2023) <https://medium.com/shyft-network/navigating-regulatory-challenges-mica-and-the-defi-landscape-5fd0fe86045d#:~:text=MiCA%20aims%20to%20regulate%20crypto,of%20decentralization%20in%20DeFi%20services> accessed 1 August 2023.

[59] MiCA (n 54) Articles 19 and 51.

[60] ibid, Article 52.

[61] Entities establishing DeFi platforms could be obliged to issue white papers providing information on the functioning of DeFi protocols, the services they provide, risks, underlying technology, etc.

that all members of the management body of the CASP, as well as all shareholders of the CASP, must provide evidence for the absence of a criminal record with respect to convictions or the absence of penalties imposed under applicable commercial law, insolvency law, and financial services law, or in relation to anti-money laundering and counter-terrorist financing, fraud, or professional liability.[62] This translates to more transparent CASP management and ownership structures through background checks, which ensures that CASPs are not owned and run by those who have already carried out misuses in the past.

Still, enforcing the abovementioned will prove difficult. Even if MiCA applies to DeFi, how will the regulators be able to determine the management and ownership structures of DeFi CASPs? Who will in the end be liable for misleading white papers? Without the effective enforcement of a legal framework designed to ensure the security of end users, which can be achieved only when fraudulent behaviour is sanctioned, DeFi could become unattractive not only to new users but also to existing ones. If there is no regulation, tech-savvy users will still be willing to experiment with new technologies and use their benefits, even with the risks involved. However, when a regulatory framework is adopted, the users' perception changes; they expect a certain level of security, even if the adopted acts fall short of an optimal level of protection. If they then become victims of a rug pull, even when there is a legal framework in place, there is a high possibility that they will completely stop utilising DeFi as a whole, due to the loss of trust in any authorities which should be able to provide at least some protection. The consequences of such legal solutions could therefore be far reaching, undermining trust in the safeguards in place, thereby having a negative effect on DeFi's market perception.

MiCA's rules could be supplemented by the provisions of the MiFID II directive.[63,64] In essence, MiFID II regulates various financial instruments, including derivatives, transferable securities, and various types of contracts relating to commodities. Some DeFi protocols offer tokens or assets that could potentially be categorised as financial instruments, especially if they exhibit characteristics of traditional securities or

[62] MiCA (n 54) Article 18 para 5.

[63] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (recast) [2014] OJ L173/349 (hereinafter MiFID II or MiFID).

[64] Bron, for example, argues that DeFi platforms that operate within the European Union may come under the purview of existing regulations, such as MiFID and the Prospectus Regulation, contingent on the specific services they offer. See D Bron, 'The Legal Aspects of Decentralized Finance (DeFi): Regulation, Compliance, and Consumer Protection' (*LinkedIn*, 19 April 2023) <https://www.linkedin.com/pulse/legal-aspects-decentralized-finance-defi-regulation-daniel-bron-> accessed 20 July 2023.

derivatives.[65] MiFID, for example, introduced new powers to supervisors at both national and European level – these include the right to access any document or other data in any form which the competent authority considers could be relevant for the performance of its duties; to receive or take a copy of this document or data; to demand the provision of information from any person and, if necessary, to summon and question a person with a view to obtaining information; to carry out on-site inspections or investigations; to require the freezing and/or sequestration of assets; to require the temporary prohibition of professional activity; to require the auditors of authorised investment firms, regulated markets, and data-reporting-service providers to provide information; etc.[66] These rules, giving wide supervisory authority to regulators, mean that the framework established by MiFID is already tried and tested, and regulators have extensive experience in its interpretation. Due to the width of its application and the goals which it aims to achieve – consumer protection, as well as preventing market abuse and manipulation – regulators may very well try to argue that certain DeFi protocols do fall within MiFID's scope, in order to monitor and mitigate these risks. MiCA does contain special rules concerning the supervisory powers of regulators,[67] but these rules bear great resemblance to those introduced by MiFID. This is exactly why regulators could interpret them just as they have over the past ten years during the implementation of MiFID and national legislation transposing MiFID. This could result in an increased level of consumer protection without any additional legislative activity.

3.1.2 The US – the SEC, the CFTC, and regulation-by-enforcement

Although lacking a specific legal framework regulating DeFi, US regulators have decided to crack down on DeFi platforms through a very strict approach, which some have named 'regulation-by-enforcement', as opposed to the alternative of developing a tailor-made regulatory

[65] Smart contracts and blockchain technology, the basis of DeFi, is used to provide financial services such as trading and yield farming, which does not necessarily fall under the same regulatory framework as traditional financial products and services. However, in 2021 the European Central Bank (ECB) published its Opinion on a proposal for a regulation on Markets in Crypto-assets, and amending Directive (EU) 2019/1937. In it, while discussing the proposal of MiCA, the ECB emphasised that 'more clarity is needed with respect to the distinction between crypto-assets that may be characterized as financial instruments (falling under the scope of the MiFID II) and those which would fall under the scope of the proposed regulation'. For more, see Opinion of the European Central Bank of 19 February 2021 on a proposal for a regulation on Markets in Crypto-assets, and amending Directive (EU) 2019/1937 (CON/2021/4) 2021/C 152/01 [2021] OJ C152/1, para 1.4 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021AB0004> accessed 3 August 2023. Bron (n 64) has also asserted that DeFi could fall within the scope of MiCA.

[66] MiFID II (n 63) Article 69.

[67] MiFID II (n 63) Article 94 para 2.

framework for the crypto sector.[68] For example, in April 2023, the Securities and Exchange Commission (SEC) declared that rules governing trading exchanges in the US also apply to DeFi, by altering proposed amendments to the definition of an exchange under Exchange Act Rule 3b-16.[69,70] Such a statement was not a change of stance by the SEC, since it already proposed the amendments in January 2022; the new proposal simply clarified the view the SEC had already taken – existing exchange rules must apply to DeFi.[71] Such an approach considers consumer protection to be the most important goal, and it is to be achieved via a regulatory framework. However, consequently, this could also lead to the exact opposite, driving DeFi platforms offshore where regulation isn't necessarily as strict, and could result in less protection for domestic

[68] C Mesidor, 'SEC Regulation of DeFi Could Box out Diverse Entrepreneurs and Impact Projects' (*Forbes,* 9 July 2023) <https://www.forbes.com/sites/digital-assets/2023/07/09/sec-regulation-of-defi-could-box-out-diverse-entrepreneurs-and-impact-projects/> accessed 27 August 2023.

[69] US Securities and Exchange Commission, 'SEC Reopens Comment Period for Proposed Amendments to Exchange Act Rule 3b-16 and Provides Supplemental Information' (*SEC*, press release, 14 April 2023) <www.sec.gov/news/press-release/2023-77> accessed 15 August 2023.

[70] The declaration had a significant impact, with all relevant media outlets conveying the news. For more, see J Hamilton, 'SEC Lays Its Cards on the Table With Assertion That DeFi Falls Under Securities Rules' (*Coindesk*, 17 April 2023) <www.coindesk.com/policy/2023/04/17/sec-lays-its-cards-on-the-table-with-assertion-that-defi-falls-under-securities-rules/> accessed 21 August 2023; L Beyoud, 'SEC's Gensler Takes on Crypto DeFi Exchanges With Refreshed Rule Plan' (*Bloomberg*, 14 April 2023) <www.bloomberg.com/news/articles/2023-04-14/gensler-takes-on-crypto-defi-exchanges-with-refreshed-rule-plan#xj4y7vzkg> accessed 23 August 2023; C Prentice and H Lang, 'U.S. SEC Sees Decentralized Crypto Platforms as Exchanges, Seeks Public Input (*Reuters*, 14 April 2023) <www.reuters.com/markets/us/us-sec-weigh-taking-more-feedback-plan-expand-exchange-definition-2023-04-14/> accessed 27 August 2023.

[71] The industry instantly criticised this decision, seeing it as an unlawful attack on their freedom to develop new technologies. More surprisingly, however, the SEC has faced criticism from within as well. Commissioner Hester Pierce published a dissenting opinion 'Rendering Innovation Kaput: Statement on Amending the Definition of Exchange' in which she stated the following: 'Rather than embracing the promise of new technology as we have done in the past, here we propose to embrace stagnation, force centralization, urge expatriation, and welcome extinction of new technology'. She stated in a different interview: 'We see this new technology, and we're not willing to make any adjustments to accommodate it. If you don't look exactly like incumbent firms, then we're just going to be fine with killing you off or driving you offshore or forcing you to turn yourself into a centralized entity'. On the other hand, Gary Gensler, the chair of the SEC, explicitly stated that crypto firms can and must operate within the bounds of the law (Gensler, 2023). For more, see HM Peirce, 'Rendering Innovation Kaput: Statement on Amending the Definition of Exchange' (*SEC*, 14 April 2023) <www.sec.gov/news/statement/peirce-rendering-inovation-2023-04-12> accessed 17 August 2023; C Lancaster, 'SEC in the Spotlight as It Moves to Regulate DeFi' (*Payments Journal*, 18 April 2023) <www.paymentsjournal.com/sec-in-the-spotlight-as-it-moves-to-regulate-defi/> accessed 25 May 2024; G Gensler, 'Getting Crypto Firms to Do Their Work within the Bounds of the Law' (*The Hill*, 9 March 2023) <https://thehill.com/opinion/congress-blog/3891970-getting-crypto-firms-to-do-their-work-within-the-bounds-of-the-law/> accessed 20 August 2023.

investors. A more moderate approach could therefore prove to be a wiser one. In Japan, such an approach proved successful – the Japanese subsidiary of FTX was the first to restart withdrawals, making it a rare case of customers being able to recover the frozen funds.[72] While the Japanese regulatory framework obliges crypto exchanges to register with the Financial Services Agency, and requires that any foreign entity wishing to register with the Financial Services Agency establishes either a subsidiary (in the form of a *kabushiki kaisha*, or joint-stock company) or a branch in Japan, at the same time it gives the crypto industry self-regulatory status, permitting the Japan Virtual Currency Exchange Association to police and sanction exchanges for any violations.[73] This kind of approach may foster cooperation between the industry and regulators, while still ensuring a satisfactory level of customer protection. It remains to be seen whether the SEC will change its stance in the aftermath of the US presidential elections, due to its change in leadership.[74]

The US Commodity Futures Trading Commission (CFTC) has made the biggest steps in enforcing existing rules on DeFi platforms in the US.[75] The CFTC has recently directed its focus towards DeFi – in June 2023, the CFTC secured a default judgment against Ooki DAO, a DAO facilitating trading based on the price differentials of digital assets. Determining these transactions to be retail commodity activities within its jurisdiction, the CFTC mandated Ooki DAO to register under the Commodity Exchange Act (CEA). Amidst widespread industry and academic speculation, the US District Court for the Northern District of California

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[72] Z Tayeb, 'FTX's Crypto Customers in Japan Can Now Get Their Frozen Money Back as It Starts Allowing Withdrawals' (*Business Insider*, 21 February 2023) <https://markets.businessinsider.com/news/currencies/crypto-ftx-collapse-japan-customers-start-withdraw-money-frozen-funds-2023-2> accessed 14 November 2024.

[73] T Nagese and others, 'Blockchain & Cryptocurrency Laws and Regulations 2025: Japan' (*Mondaq*, 14 November 2024) <www.mondaq.com/fin-tech/1544186/blockchain-cryptocurrency-laws-and-regulations-2025-japan> accessed 14 November 2024; and T Uranaka, 'Japan Grants Cryptocurrency Industry Self-regulatory Status' (*Reuters*, 24 October 2018) <www.reuters.com/article/technology/japan-grants-cryptocurrency-industry-self-regulatory-status-idUSKCN1MY10W/> accessed 14 November 2024.

[74] Gary Gensler, SEC's chairman, stepped down from the SEC following the presidential elections effective on 20 January 2025. As opposed to Gary Gensler's stance on cryptocurrency, the new SEC chairman, Paul Atkins, is known as a backer of cryptocurrencies. For more, see 'Trump Picks Crypto Backer Paul Atkins as New Securities and Exchange Commission Chair' (*NPR*, 4 December 2024) <https://www.npr.org/2024/12/04/g-s1-36803/trump-crypto-paul-atkins-sec-chair> accessed 19 January 2025.

[75] Other regulators, such as the SEC, have not been so successful. For example, in *SEC v Ripple Labs*, the court found that the XRP token does not qualify as a security when sold to the public on an exchange, but it is when sold to institutional investors. Such a decision may have far-reaching effects on the future of crypto asset regulation. See US District Court, Southern District of New York, *Securities and Exchange Commission vs Ripple Labs, Inc, et al*, <https://storage.courtlistener.com/recap/gov.uscourts.nysd.551082/gov.uscourts.nysd.551082.874.0_2.pdf> accessed 26 May 2024.

ruled in favour of the CFTC, establishing Ooki DAO as a legal entity under the CEA, marking a precedent-setting decision regarding the legal status of DAOs under federal jurisdiction.[76] The CFTC's focus on consumer protection can be seen in a statement given by Ian McGinley, then Director of the CFTC's Division of Enforcement, who stated that Ooki DAO's founders created the platform with an evasive purpose, with the explicit goal of operating an illegal trading platform without legal accountability.[77] Following a favourable judgment, the CTFC issued orders simultaneously filing and settling charges against Opyn, Inc; ZeroEx, Inc; and Deridex, Inc. The orders required that Opyn, ZeroEx, and Deridex pay civil monetary penalties of USD 250,000, USD 200,000, and USD 100,000, respectively, and cease and desist from violating CEA and CFTC regulations.[78]

As things currently stand, the CFTC has so far done the most to support consumer protection against misuses common in the DeFi universe.[79] In light of this, it remains to be seen in what way other regulators will adapt their approaches and regulations to address the evolving landscape of DeFi and its associated challenges.[80]

4 Anti-money laundering

The second main issue connected with DeFi, but still related to consumer protection, is covered by another area of law – anti-money

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[76] 'Forum: CFTC Announces Its DeFi Presence with Authority' (*Thomson Reuters*, 26 January 2024) <www.thomsonreuters.com/en-us/posts/government/forum-cftc-defi/> accessed 26 May 2024.

[77] 'Statement of CFTC Division of Enforcement Director Ian McGinley on the Ooki DAO Litigation Victory' (*CFTC*, press release, 9 June 2023) <www.cftc.gov/PressRoom/PressReleases/8715-23> accessed 26 May 2024.

[78] 'CFTC Issues Orders Against Operators of Three DeFi Protocols for Offering Illegal Digital Asset Derivatives Trading' (*CFTC*, press release, 7 September 2023) <www.cftc.gov/PressRoom/PressReleases/8774-23> accessed 26 May 2024.

[79] These results back up the view of some that the CFTC may be a favourite to helm a proposed US crypto regulatory framework. For example, the CFTC would be given the broadest scope of supervisory powers in regulating crypto (and DeFi) by many current crypto-centred regulatory proposals, such as the Digital Commodity Exchange Act of 2022, the Responsible Financial Innovation Act (RFIA), the Digital Commodities Consumer Protection Act of 2022 (DCCPA) and the Financial Innovation and Technology for the 21st Century (FITC) Act. For more, see 'Forum: CFTC Announces Its DeFi Presence with Authority' (*Thomson Reuters*, 26 January 2024) <www.thomsonreuters.com/en-us/posts/government/forum-cftc-defi/> accessed 26 May 2024.

[80] It seems as if the SEC has taken a hard stance and will not give up on the regulation-by-enforcement approach. In July 2023, a relatively small DeFi project in comparison with others, BarnBridge DAO, announced that it was under investigation by the SEC, with its legal counsel immediately advising on closing any existing liquidity pools, not opening new ones, and all work on BarnBridge products stopped until further notice. For more, see A Shirinyan, 'SEC Attacking Smaller DeFi Projects, What's Happening?' (*U.today*, 7 July 2023) <https://u.today/sec-attacking-smaller-defi-projects-whats-happening> accessed 22 August 2023.

laundering, or AML. DeFi can be, and often is, used for the purpose of bypassing laws and regulations. The decentralised and frequently anonymous nature of transactions within these platforms creates challenges in tracing and supervising illicit activities. Furthermore, DeFi services commonly operate without intermediaries, presenting obstacles in applying both AML and combating the financing of terrorism (CFT) measures.[81] The main issues are: certain DeFi services not being covered by existing AML/CFT obligations; weak or non-existent AML/CFT controls in some jurisdictions; pseudonymity; and disintermediation, which is the self-custody and transfer of virtual assets without the involvement of an intermediary financial institution.[82] Perhaps the most troublesome of these is the weak or non-existent AML/CFT controls in some jurisdictions – international cooperation in any area is difficult to achieve, especially in those with direct financial consequences. States want to attract capital, and one of the easiest ways to do so is to enact lenient legislation, which creates a protective environment for potential money laundering, tax evasion, and any other forms of financial crimes.

In connection with AML and CFT measures, there are also know your client (KYC) obligations, which are important for a wide range of professionals, including financial and legal experts. These obligations, in essence, consist of verifying information about a client and trying to spot potentially suspicious activity so it can be flagged as soon as possible. Due to the nature of the services these experts provide – providing consultation services when clients are in trouble, usually in marginal situations – their AML/CFT and KYC obligations can come into direct conflict with their obligation to keep their clients' information confidential, as well as to protect their clients' best interests, eg when defending a client from money laundering accusations.

4.1 The anti-money laundering regulatory landscape

4.1.1 The EU – the Fifth Anti-Money Laundering Directive

The Fifth Anti-Money Laundering Directive (5AMLD)[83] is an EU directive designed to strengthen AML, CFT, and KYC obligations at the

[81] Bron (n 64).

[82] 'Illicit Finance Risk Assessment of Decentralized Finance' (US Department of the Treasury, April 2023) <https://home.treasury.gov/system/files/136/DeFi-Risk-Full-Review.pdf> accessed 27 August 2023.

[83] Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU [2018] OJ L156/43 (hereinafter 5AMLD). On 31 May 2024, the Sixth Money Laundering Directive was adopted, with Member States having the

EU level, by providing a more detailed framework which Member States needed to transpose into their national legislations by 10 January 2020.[84] The main improvements include changes to improve the transparency of registers of beneficial owners, enhanced customer due diligence measures, and also an extension of the scope of persons subject to AML and CFT measures, in particular due to technological advancements.[85] Cryptocurrency and DeFi are attractive to those with malicious intent because of the anonymity they provide. Obviously, a quick reaction was needed, and the proposal was quickly adopted. However, a legal vacuum still exists concerning DeFi.

Generally speaking, 5AMLD demands that centralised cryptocurrency exchanges and wallet providers which operate within the territory of the EU verify the identities of those who are participating in transactions, as well as fulfil certain data-sharing obligations. The problem is that DeFi is, as the name suggests, decentralised. There are DeFi protocols with different levels of decentralisation, but if DeFi protocols are sufficiently decentralised, they will not be covered by 5AMLD. In addition, even if they fall within the scope of 5AMLD, incorporating KYC requirements into DeFi protocols poses significant challenges due to their nature – consent would have to be obtained from a diffuse network of governance-token holders worldwide, some, if not most, of whom would not like for this to happen.[86]

As a result, the current legal framework concerning AML, CFT and KYC obligations is lacking in the context of DeFi. While certain steps have been taken with regards to centralised cryptocurrency exchanges, crypto assets are in general still underregulated. However, certain attempts are being made to change this. As part of an EU AML package,[87] a regulation of the European Parliament and of the Council on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing could include some rules which would explicitly regulate DeFi. Although still in the early stages, some amendments to

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obligation to transpose it into their national legal systems by 10 July 2027. For more see Directive (EU) 2024/1640 of the European Parliament and of the Council of 31 May 2024 on the mechanisms to be put in place by Member States for the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Directive (EU) 2019/1937, and amending and repealing Directive (EU) 2015/849.

[84] 5AMLD (n 83) Preamble, para 53.

[85] '5th AML Directive. Key Aspects' (*Arendt*, 2018) <www.arendt.com/jcms/p_15555/en/5th-aml-directive-key-aspects> accessed 10 August 2023.

[86] Salami (n 50).

[87] 'The EU AML Package: Where Is It in the Legislative Process?' (*EY*, 12 June 2023) <www.ey.com/en_mt/articles/the-eu-aml-package---where-is-it-in-the-legislative-process-> accessed 27 August 2023.

the proposal for the abovementioned regulation do seem to be heading in the right direction. The proposed amendments state that:

> Decentralised Autonomous Organisations (DAO) and other Decentralised Finance (DeFi) arrangements should also be subject to Union AML/CFT rules to the extent they perform or provide, for or on behalf of another person, crypto-asset services which are controlled directly or indirectly, including through smart contracts or voting protocols, by identifiable natural and legal persons. Developers, owners or operators which fall within the scope of this Regulation should assess the risks of money laundering and terrorist financing before launching or using a software or platform and should take appropriate measures in order to mitigate the risks of money laundering and terrorist financing on an ongoing and forward-looking manner.[88]

Whether these amendments will be implemented remains to be seen, since they also state that DAO or DeFi arrangements should be considered to be crypto-asset service providers falling within the scope of MiCA. As was previously discussed, the applicability of MiCA to DeFi is arguable. Still, this is currently the closest thing to explicit DeFi obligations in EU law.

4.1.2 The US – IIJA, the Bill, and regulatory competition

The Infrastructure Investment and Jobs Act (IIJA)[89] was signed into law on 15 November 2021. Although unusual for an act of its name, it does in fact include two provisions affecting the reporting of transactions involving digital assets, including cryptocurrency. The first imposes the obligation to report transfers of digital assets via Form 1099-B filing, while the second requires transaction participants to report transactions of digital assets amounting to over USD 10,000. These provisions apply to returns that are required to be filed after 31 December 2023.[90] In essence, IIJA's provisions impose certain KYC obligations on cryptocurrency brokers regarding their clients and customers for tax purposes.

On 18 July 2023, the US Senate proposed a new bill – a bill to clarify the applicability of sanctions and anti-money laundering compliance

[88] European Parliament, 'Report on the proposal for a regulation of the European Parliament and of the Council on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing' (2023) <www.europarl.europa.eu/doceo/document/A-9-2023-0151_EN.html> accessed 14 August 2023.

[89] Infrastructure Investment and Jobs Act, *117th Congress*, HR3684 (2023) <www.congress.gov/bill/117th-congress/house-bill/3684/text> accessed 15 August 2023.

[90] 'Infrastructure Investment and Jobs Act Contains New Cryptocurrency Reporting Requirements' (*BDO*, 5 January 2022) <www.bdo.com/insights/tax/infrastructure-investment-and-jobs-act-contains-new-cryptocurrency-reporting-requirements> accessed 27 August 2023.

obligations to United States persons in the decentralized finance technology sector and virtual currency kiosk operators, and for other purposes, or for short, the Crypto-Asset National Security Enhancement Act of 2023.[91] Unlike other regulations analysed so far, this bill focuses on DeFi specifically, and expresses the Senate's intent to regulate DeFi more strictly, mostly by imposing certain AML obligations.[92]

The Senate identifies the main issue of regulating DeFi – determining who has control over the whole system, which could potentially even be fully decentralised, at least in the future. Consequently, in Sec 2(a)(1), it defines the term control over a digital asset protocol as:

> the power, directly or indirectly, to direct a change in the computer code or other terms governing the operation of the protocol, as determined by the Secretary of the Treasury. Such power may be exercised through ownership of governance tokens, administrator privileges, ability to alter or upgrade computer code, or otherwise.

Usually, control over a DeFi protocol is exercised by the developer, who has access to the code of the protocol. In order to prevent abuses in more specific cases, the Bill introduces two safeguards. Sec 2(a)(4) introduces the term 'digital asset protocol backer', meaning a person who holds governance tokens of a digital asset protocol valued at more than USD 25 million or who makes an investment in the development of a digital asset protocol of the same value, as well as a combination of investments totalling at least USD 25 million, with each of the investments being at least USD 2.5 million. This ensures that liability is determined even in cases where 'control' cannot be – as a backstop, anyone who invests more than USD 25 million in developing a project will be responsible for AML obligations, such as conducting due diligence on the customers and reporting suspicious transactions to the Financial Crimes Enforcement Network.[93] Sec 2(a)(5) introduces a 'digital asset transaction facilitator' – a person who controls a digital asset protocol, but also a person who provides access to an application designed to facilitate transactions using a digital asset protocol. This can be interpreted as a reference to groups who build

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[91] 'A Bill to clarify the applicability of sanctions and anti-money laundering compliance obligations to United States persons in the decentralized finance technology sector and virtual currency kiosk operators, and for other purposes' [2023] *US Senate, 118th Congress*, S.2355 <www.congress.gov/bill/118th-congress/senate-bill/2355/text?s=3&r=1> accessed 25 May 2024.

[92] D Nelson, 'New US Senate Bill Wants to Regulate DeFi Like a Bank' (*Coindesk*, 19 July 2023) <www.coindesk.com/policy/2023/07/19/new-us-senate-bill-wants-to-regulate-defi-like-banks/> accessed 17 August 2023.

[93] MR Warner, 'US Senators Unveil Crypto Anti-Money Laundering Bill to Stop Illicit Transfers' (*US Senate*, press release, 19 July 2023) <www.warner.senate.gov/public/index.cfm/2023/7/bipartisan-u-s-senators-unveil-crypto-anti-money-laundering-bill-to-stop-illicit-transfers> accessed 21 August 2023.

user-friendly frontends for protocol smart contracts that would otherwise be hard to understand and implement. For example, Uniswap Labs does this for Ethereum's top decentralised exchange.[94] These groups will also have to comply with the Bill's requirements.

Although very short, the Bill manages to pinpoint the main issues relating to DeFi regulation. Despite its brevity, the Bill goes beyond every other legal act in regulating DeFi. Its rules seem to be very precise, applicable to a clearly defined scope of subjects. The Bill does not contain provisions of general character; instead, it tries to impose concrete obligations on three specific groups – those who exercise control over digital asset protocols, digital asset transaction facilitators, and digital asset protocol backers – adopting a 'regulate-DeFi-like-a-bank' approach. Although still only a proposal, which could change significantly up until its adoption and entry into force, it can be used as an example of a framework which takes into consideration the specifics of DeFi and does not prevaricate by adopting a soft approach which excludes some DeFi protocols.

5 Jurisdiction and applicable law

5.1 The multi-jurisdictional aspect

As opposed to traditional financial institutions, which must adhere to strict regulations concerning capital requirements, risk management, and consumer protection, DeFi platforms often operate without a central authority or clear lines of responsibility. This makes it difficult to apply existing regulations – since their application relies on the existence of strong connections to a particular place or jurisdiction – resulting in jurisdictional challenges and making it almost impossible to determine applicable law.[95] DeFi protocols with a high degree of decentralisation and DAOs can easily escape regulation. DAOs can be run strictly through the codes and protocols which form the basis of DeFi's operation. Salami[96] also provides an analysis of fully decentralised DAOs, which could

[94] Nelson (n 92).

[95] Bron (n 64). For many of these concepts, even uniform definitions do not exist. For example, smart contracts are usually determined by their inherent characteristics, and not by a single definition. This only presents more of a problem when jurisdictional problems are considered. As explained by Dell'Erba, in the absence of a relevant jurisdiction, smart contracts carry no inherent legal meaning. See 'Decentralised Finance: A Categorization of Smart Contracts' (*ESMA*, 11 October 2023) <www.esma.europa.eu/sites/default/files/2023-10/ESMA50-2085271018-3351_TRV_Article_Decentralised_Finance_A_Categorisation_of_Smart_Contracts.pdf> accessed on 26 May 2024. Cf M Dell'Erba, 'Do Smart Contracts Require a New Legal Framework? Regulatory Fragmentation, Self-regulation, Public Regulation' (2018) University of Pennsylvania Journal of Law & Public Affairs <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3228445> accessed 26 May 2024.

[96] Salami (n 50).

operate and be governed entirely by a code or a protocol without any influence from a central body such as a software developer. In such cases, the question of who would be regulated for the activities occurring within such DAOs remains open. Although it is arguable whether full decentralisation is even plausible, as was previously discussed, the provided example still illustrates potential problems. In addition, although full decentralisation arguably does not currently exist, it is only a matter of time before technological advances will make it a reality. In instances without a physical presence or, even more problematic, with a digital presence in multiple locations, the current regulatory framework does not provide sufficient criteria for determining jurisdiction and applicable law. This is also the first step when resolving disputes, if and when they arise. Attempts at creating efficient decentralised dispute-resolution platforms, as an answer to the decentralised nature of DeFi, have so far shown to be potentially even more problematic, since they raise questions about the enforceability of decisions, their quality, as well as their compatibility with existing legal frameworks.[97]

This problem can be emphasised even more in the presence of strict regulation. By implementing a static approach to regulating a dynamic technological development such as DeFi, the result may not be the protection of investors or a well-functioning financial market. It may not even prevent certain users from accessing DeFi protocols. DeFi platforms would exit or never enter such jurisdictions, but any user with an internet connection would be able to access the services they offer.[98] In other words, it would not ensure any protection but rather would only create more problems as, thus far, there is little to no coordination between different jurisdictions, nor are there clear criteria for establishing applicable law. Even if such criteria existed, enforceability remains questionable.

Still, initial attempts at ensuring multi-jurisdictional cooperation have been made at the EU level. Based on the provisions contained in Article 107 paragraphs 1 and 3 of MiCA, ESMA has (in cooperation with the EBA) adopted a template document for cooperation arrangements which competent national authorities can conclude with supervisory authorities of third countries concerning the exchange of information with those supervisory authorities and the enforcement of obligations under MiCA in

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[97] Bron (n 64).

[98] Blockchain Association and DeFi Education Fund, 'Reply to the Notice of Proposed Amendments to Exchange Act Rule 3b-16 Regarding the Definition of "Exchange"; Regulation ATS for ATSs That Trade US Government Securities, NMS Stocks, and Other Securities; Regulation SCI for ATSs That Trade US Treasury Securities and Agency Securities' (*SEC*, Release No 34-94868; File No S7-02-22, 13 June 2022) <https://www.sec.gov/comments/s7-02-22/s70222-202979-407862.pdf> accessed 20 August 2023.

those third countries.[99] It remains to be seen whether competent national authorities will actually conclude such agreements – this will depend on a multitude of factors, especially the political willingness of both sides (the EU and third countries). Japan has also recently decided to draft new legislation to prevent domestic assets from being transferred out of the country in cases of foreign crypto-exchange bankruptcies. Under the new regulatory framework, cryptocurrency exchanges would be prohibited from transferring assets belonging to Japanese residents to foreign entities during a domestic financial crisis. This measure aims to protect local investors from potential losses resulting from the bankruptcy of exchanges based abroad, which is often the case (eg with Bahamas-based FTX).[100] Through such interventions, Japan is starting to place more emphasis on the multi-jurisdictional aspect of crypto regulation, making significant strides in the area of consumer protection as well.

5.2 The intra-jurisdictional aspect

In addition to certain jurisdictional issues at the international level, cooperation may become an issue even within a single jurisdiction. For example, different regulatory bodies may want to expand their regulatory authorities to a new, unregulated area. Digital assets, unlike traditional assets, are not governed by a single agency, nor are they overseen by a centralised regulated exchange. This consequently results in regulatory arbitrage, as competition between regulators leads to less effective enforcement of still rather modest rules, as well as a lesser degree of clarity for all market participants.

This issue has so far proved to be most complex in the US. For example, the aforementioned IIJA reflects the intention of the Internal Revenue Service (IRS) to increase its regulatory power over cryptocurrencies and digital assets in general,[101] influencing DeFi as well. Different regulators are treating cryptocurrency differently – the SEC applies the Howey principle, a test conducted by US regulators to determine wheth-

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[99] ESMA, EBA and EIOPA (n 7).

[100] C Hope, 'Japan Tightens Crypto Laws on Domestic Assets to Prevent FTX Repeat' (*Yahoo Finance*, 6 November 2024) <https://finance.yahoo.com/news/japan-tightens-crypto-laws-domestic-084457702.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&gugu_referrer_sig=AQAAAJgdej9jnRwOu-XXozA0HaPLv2wPUBz0nab_dewRwu5OkI60AsMS-Nk4IsWdxVR-aU509INNIYR8XXypMiFuVe-FX20p6O7MsfgY_ZRxg0ONU8QvFp8SdaC8W3YYjvZf8X8KQGbpDJi4WGqzqx8DAaID4w9HhHhoTmh8hEhKX6tR> accessed 14 November 2024.

[101] SH DeAgostino, JM Martins and RB Hofherr, 'The Infrastructure Investment and Jobs Act: Building A Road to Liability for Cryptocurrency Industry?' (*Harris Beach*, 15 December 2021) <www.harrisbeach.com/insights/the-infrastructure-investment-and-jobs-act-building-a-road-to-liability-for-cryptocurrency-industry/#:~:text=Under%20the%20IIJA%2C%20the%20IRS,IRS%20on%20a%201099%20form.> accessed 21 August 2023.

er something qualifies as an investment contract or, when applied to cryptocurrency, to determine whether it should qualify as a regulated security;[102] the CFTC argues that crypto assets should be treated as a commodity; while the IRS taxes crypto similarly to property.[103] Just as the IRS has gained some new powers through IIJA, this is also the intention of the SEC via the amendments to the Exchange Act analysed above.

This regulatory competition will not simply vanish upon adopting new acts or amending old ones – crypto and DeFi are too complex for this to happen. An area that is at the intersection of different fields necessarily must be regulated by a combined effort from all authorities. The way forward should be regulatory cooperation, not regulatory competition.

Contrary to the US, the EU has thus far curbed this regulatory competition. Although the EU has many regulatory bodies and agencies playing a significant role in DeFi regulation,[104] they have so far taken a more cooperative approach. MiCA even formalises such cooperation – the abovementioned Article 107 paragraphs 1 and 3 state that ESMA shall, in close cooperation with the EBA, develop draft regulatory technical standards. Additionally, other agencies have also formally cooperated, or at least shown that they closely follow the opinions of other EU agencies. ESMA, the EBA, and the European Insurance and Occupational Pensions Authority (EIOPA) have published a joint press release warning consumers about the risks of crypto assets.[105] In addition, the ESRB's Task Force on Crypto-Assets and Decentralised Finance published a report on crypto and DeFi in May 2023[106] – while referring to ESMA's functions, it emphasised that ESMA's first report regarding MiCA will focus on the latest market developments at the perimeter of MiCA, non-fungible tokens (NFTs) and DeFi.[107] Once again, further action must be taken in the form of elaborated, planned, and coordinated steps forward.

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[102] P Kim, 'The Howey Test: A Set of Rules that Determine if an Investment Is a Security' (*Business Insider*, 31 May 2022) <www.businessinsider.com/personal-finance/howey-test> accessed 19 November 2023.

[103] DeAgostino and others (n 101).

[104] The European Securities and Markets Authority (ESMA), for example, holds responsibility for overseeing securities markets and coordinating activities among national securities regulators. In doing so, it plays a role in influencing the EU's stance on DeFi by providing analysis and recommendations related to crypto-assets and distributed ledger technologies (DLT). The European Banking Authority (EBA) has also already cautioned against the risks linked to virtual currencies and emphasised the necessity for a comprehensive regulatory framework for both crypto-assets and DeFi platforms. For more, see Bron (n 64).

[105] ESMA, EBA and EIOPA (n 7).

[106] ESRB (n 29).

[107] ibid 8.

6 Concluding remarks

The paper argued from a theoretical standpoint that legal certainty plays a significant role in the sustainable embracing of DeFi, which in turn influences the development of financial services. The paper identifies three areas of law which are challenging in the context of DeFi: jurisdiction and applicable law (on the international level, but also within a jurisdiction through regulatory competition); consumer protection; and AML/CFT. Through an analysis of the legislative frameworks of two major legal systems – the EU and the US – it can be concluded that most regulatory work is focused on consumer protection and AML/CFT, while little focus has been placed on adopting uniform criteria for determining jurisdiction and applicable law at the international level, with problems even arising due to conflicts between regulators. Legal uncertainty in some jurisdictions and overly lenient regulation in others could create an imbalance on the global scale. Legal clarity, on the other hand, enhances and promotes DeFi's potential benefits, eg financial inclusion.

Comparing the two major legal systems – the EU and the US – two different approaches to DeFi regulation can be observed, each of them having a similar effect on the financial services industry. The EU has decided to utilise its usual gradual approach, with a specialised regulation in the form of MiCA having many exemptions, most importantly the exclusion of at least some DeFi protocols.[108] With other legal acts not adapted to regulate DeFi specifically, the necessity for broad interpretation to fill the existing legal vacuum until new acts are adopted creates legal uncertainty. For example, there is a possibility that MiFID can be applied to DeFi, but doing so would require very broad interpretation by the authorities. Such legal uncertainty disproportionately hurts consumers, who fall victim to DeFi rug pulls with few if any effective remedies. Would this broad interpretation hurt or benefit DeFi? On one hand, certain precedents would be established, making it easier for end users to know the rules of the game and act accordingly. However, 'creating' law through, fundamentally, its application can be problematic from both a competence and a legal certainty aspect. The acceptance of such 'lawmaking' depends on the quality of the proposed solutions, with those widely accepted by the crypto community welcomed with open arms and others being subject to heavy criticism. Because of this, there is a strong

[108] However, as is presumed in the paper, it seems that the regulators will interpret MiCA in a way which would ensure MiCA's application to DeFi as much as possible. This interpretation was suggested in ESRB's Crypto-assets and decentralized finance report of May 2023: 'MiCA in its recitals sets a seemingly high hurdle for DeFi activities to be included within its scope ("services provided in a fully decentralised manner without any intermediary"). This boundary (e.g. the meaning of "fully") will be further clarified by practical application'. For more, see ESRB (n 29) 46.

possibility that the more direct involvement of regulators in such practices would be a welcome occurrence, especially if this means greater protection for consumers or, in general, market participants. Paradoxically, although first created to restore faith in traditional financial institutions after the 2008 financial crisis, regulators are now aiming to regulate a system disconnected from any intermediaries, especially financial institutions. Such changes, although minor at first glance, could mean that a significant shift is beginning to happen – controlling new developments in the financial sector – thereby blurring the lines between centralised and decentralised finance.

As is the case in the EU, the US legal system has started a period of intensive regulatory activity aimed at setting out a framework for DeFi and crypto assets. US regulators have significant experience in monitoring new developments, which is reflected in the rapid response by regulators to try and establish competence for regulating this area. In comparison with the EU, the US has decided to go for a much more direct approach – one which regulates DeFi as a whole, whether through amending and enforcing existing (not tailor-made) regulation, or by proposing new bills which do not contain exemptions for fully decentralised DeFi protocols. This type of approach places much more emphasis on the consumer protection aspect, but affects the financial services industry in a major way, with some arguing that such regulation will drive DeFi out of the US. For example, the SEC's push to amend the Exchange Act so that decentralised exchanges are considered as exchanges under this act also resulted in a major pushback by stakeholders, with many of them finding such attempts detrimental both to DeFi's further development and to the development of the US financial services industry in general. Generally speaking, there has been progress – in the US, the Senate has proposed the Crypto-Asset National Security Enhancement Act of 2023, which seems to tackle some of the most prevalent issues relating to DeFi; in the EU, attempts at ensuring the effective enforcement of MiCA in third countries via multi-jurisdictional cooperation are currently ongoing.

DeFi protocols, although rapidly on the rise, still do not provide the basis for the provision of the majority of financial services. In these early stages, DeFi can contribute to the development of the financial services sector only if the wider population is willing to adopt it. Indeed, DeFi is currently used mainly by a narrow circle of tech-savvy users and institutional investors, but with the right regulatory framework – ie one which ensures the smooth performance of services, with strong safeguards in place – this number could rise exponentially. Existing DeFi platforms and services may very well quickly gain market share if compliance with the legal framework that is in place reduces the scale of

externalised CASP activities.[109] These are the steps which are necessary for creating a thorough legal framework – the involvement of all market participants and the concretising of generic obligations. Including stakeholders in the regulatory process, especially for a risky environment such as DeFi, is a prerequisite for contributing to the wider adoption of DeFi and, therefore, the development of the financial services sector as a whole through the use of DeFi's potential benefits.

While it remains relatively still not as prevalent, DeFi's shortcomings, which stem from a lack of proper legal regulation, cannot be perceived as a threat to the development of financial services. The same can be said if bad regulation is adopted – this will prevent the adoption of DeFi by the wider population, whether due to the low level of legal protection and lack of efficient remedies, or because certain jurisdictions will be made unattractive for DeFi developers, thereby preventing end users from ever easily accessing DeFi in the first place. Although it would be unfavourable for the development of financial services if DeFi does not catch on, it would still not result in major damage to the existing financial services industry. On the other hand, by adopting clear and precise rules, many disadvantages of DeFi could be diminished. The undisputed benefits of DeFi – its speed, cost-effectiveness, and accessibility – could then be fully taken advantage of. This could shift the financial services industry from being an elitist, traditional, and often incomprehensible system to a readily approachable one, in which all stakeholders could cooperate much more easily. To put it simply, a good regulatory framework may catalyse the development of financial services, but a bad one would not significantly hurt it either – it would simply be a case of missed opportunity.

In conclusion, regulating DeFi is a complex task, which involves the balancing of many different conflicting interests and values: the protection of privacy on one hand and AML/CFT obligations on the other, and effective and speedy financial transactions versus the traditional safeguards for identifying and preventing scams. Cooperation and coordination between regulatory bodies and market participants on the global level is necessary to achieve the goal of creating a balanced set of rules, providing both legal certainty and a stimulating environment for further technological developments. In addition, it is to be expected that stakeholders from different sectors will try to use their influence to secure the adoption of regulation which is beneficial to them. It is up to lawmakers and regulators to strike a balance which is beneficial for all.

[109] Furthermore, CASPs may also decide not to offer their services in the EU, which could result in DeFi platforms taking over their role, at least to some extent. For more, see ESRB (n 29) 45.

List of abbreviations

AML – anti-money laundering
Bill – Crypto-Asset National Security Enhancement Act of 2023
BIS – Bank for International Settlements
CFT – combating the financing of terrorism
DAO – decentralised autonomous organisation
DeFi – decentralised finance
EBA – European Banking Authority
ECB – European Central Bank
EIOPA – European Insurance and Occupational Pensions Authority
ESMA – European Securities Market Agency
ESRB – European Systemic Risk Board
FSB – Financial Stability Board
IIJA – Infrastructure Investment and Jobs Act
IOSCO – International Organization of Securities Commissions
KYC – know your client
MiCA – Markets in Crypto-Assets Regulation
MiFID – Markets in Financial Instruments Directive
NFT – non-fungible token
5AMLD – Fifth Anti-Money Laundering Directive
6AMLD – Sixth Anti-Money Laundering Directive

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RETHINKING THE EUROPEAN UNION WITHDRAWAL CLAUSE

Aldijana Ahmetović*

Abstract: The Lisbon Treaty introduced an EU withdrawal procedure in Article 50 of the Treaty on European Union (TEU). However, the withdrawal procedure outlined in Article 50 TEU revealed a lack of clarity in withdrawal rules, highlighting the need for future amendments. This is particularly evident in aspects such as the setting of the two-year withdrawal period, the regulation of possible extensions of the withdrawal period, the role of the Court of Justice of the European Union (CJEU) in the withdrawal procedure, and the required majority for the conclusion of a withdrawal agreement.

Keywords: withdrawal clause, Article 50 TEU, withdrawal agreement, Court of Justice of the EU.

1 Introduction

Before the Treaty establishing the Constitution for Europe, European legislation did not specify a right regarding withdrawal from the European Union. The existence of this right was based on the classification of the nature of the European Union. However, the *sui generis* nature of the European Union did not seem to fit into the traditional dichotomy between federal states and international organisations, resulting in an unclear answer to this question. During the preparation phase of the Treaty establishing the Constitution for Europe, the presidency assessed that including a withdrawal clause in the constitutional text was necessary to dispel doubts about such a right and to define the procedure for its implementation.[1] By creating the withdrawal clause, the Treaty establishing a Constitution for Europe subordinated the provisions regarding withdrawal from the EU to EU law and prevented the use of international law on the withdrawal of Member States.[2]

Article 50 TEU followed the solutions laid down in the Treaty establishing a Constitution for Europe and legally regulated the right of withdrawal from the EU. The compatibility of Article 50 TEU with national constitutional orders has been reviewed by several national courts. The

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[1] The European Convention, Cover Note of 28/5/2003 from the Praesidium to the Convention, CONV 724/1/03 REV 1.

[2] C Hillion, 'Accession and Withdrawal in the Law of the European Union' in Anthony Arnull and Damian Chalmers (eds), *The Oxford Handbook of European Union Law* (OUP 2015).

Czech Constitutional Court emphasised that determining the procedure for withdrawal from the EU based on Article 50 TEU is consistent with the principle that the Member States are 'masters of the treaties'.[3] It also clarified that the withdrawal procedure is more akin to a withdrawal from an international organisation than that of a federal unit from a federation, thereby reinforcing the aforementioned right of Member States and their sovereignty.[4] In considering the compatibility of the two-year withdrawal period, the Latvian Constitutional Court stressed that this period is not only beneficial for both the withdrawing Member State and the EU but is also necessary to guarantee the rights of the citizens of the outgoing Member State and ensure an orderly withdrawal.[5]

The article aims to critically analyse the challenges that the withdrawal clause raises. Through an examination of the Brexit experience and scholarly contributions, the author seeks to identify necessary amendments to Article 50 TEU that would better address possible future withdrawals of Member States from the EU.

2 Deciding to withdraw from the EU by the State's constitutional requirements

Article 50 of the TEU stipulates that Member States shall decide to withdraw from the EU by their constitutional requirements, thereby referring to the use of national law in the initial stage of the withdrawal process. Since almost no Member State has established a specific procedure for withdrawal from the EU in national legislation, most would face a lacuna when deciding on withdrawal. From the perspective of national law, the author believes it is necessary to determine whether national law requires a constitutional revision procedure before withdrawal, whether it provides for a referendum on the matter, and what the relationship is between the legislative and executive branches during the withdrawal process. A constitutional revision procedure seems to be necessary, at least in cases where EU membership is explicitly stipulated in the constitution, and a referendum decision regarding withdrawal from the EU is likely to be used, especially when a referendum was used to accede to the EU. The author agrees with Garner[6] on the need for clarifying the constitutional requirements for withdrawal from the EU, as it would provide

[3] US 19/08 (Czech Constitutional Court) para 106.

[4] ibid, para 146.

[5] No 2008-35-01 (Latvian Constitutional Court).

[6] O Garner, 'Why All Member States Should Clarify Their Constitutional Requirements for Withdrawing from the EU' (*Verfassungsblog*, 2 November 2016) <https://verfassungsblog.de/why-all-member-states-should-clarify-their-constitutional-requirements-for-withdrawing-from-the-eu/> accessed 11 April 2024.

much-needed procedural clarity and avoid constitutional uncertainty. However, in contrast to Garner,[7] the author does not suggest the Quebec experience but points to the Polish withdrawal legislation as a model to constitutionally clarify the withdrawal requirements. While the case of Quebec represents secession from a federal state, and the application of the Vienna Convention on the Law of Treaties (VCLT) represents the withdrawal from an international organisation, it seems that the Polish withdrawal legislation represents a withdrawal solution based on the theory of the EU as a union.[8]

Several authors oppose the current wording of Article 50 TEU, as it lacks any conditions for withdrawal, except the requirement of respecting the State's constitutional requirements. Some argue that the withdrawal clause itself undermines the *telos* of the supranational constitutional order[9] and suggest that it would only be triggered after the prior use of sanctioning measures under Article 7 TEU. Based on the *travaux préparatoires*, Article 50 TEU represents an unconditional withdrawal clause and does not provide a sanctioning mechanism or an expulsion clause. The Brexit experience refuted suggestions about the linkage of the withdrawal proceedings and the sanctioning procedure as stipulated in Article 7 TEU, showing that Article 50 TEU could be triggered without any prior proceedings. Garner, however, believed that a Member State could withdraw only in the event of a fundamental constitutional conflict, which could be proven if the Member State demonstrated an incompatibility posed by its EU membership to its national identity inherent in its fundamental structures, political, and constitutional, as stated in Article 4(2) TEU.[10] Although this solution seems to address the undermining of the 'ever closer union' and respects the self-determination of individuals as EU citizens, it does not fully consider the derivative nature of EU citizenship and significantly interferes with the sovereignty of Member States by implying additional conditions for withdrawal.

In the context of the decision to withdraw from the EU by Member States' constitutional requirements, Garner advocates for a new double decision structure.[11] This structure would involve a decision on the intention to withdraw and a second confirmatory decision once the

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[7] ibid.

[8] M Avbelj, 'Evropska Unija Kot Nedržavna Federacija' in Matej Avbelj and Tine Hribar (eds), *Prenova Evrope: Posvetovanje: Prispevki za slovenski nacionalni program II* (Slovenska akademija znanosti in umetnosti 2017).

[9] O Garner, 'Reforming Withdrawal and Opt-Outs from the European Union: A Dual-Constituent Perspective' (SSRN, 4 January 2019) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3303938> accessed 11 April 2024.

[10] ibid.

[11] O Garner, 'Seven Reforms to Article 50 TEU' (2021) 46(6) European Law Review 784.

outcome of the negotiation is clear. Garner believes that this double decision structure would provide a more coherent basis for the continued application of EU law to a withdrawing Member State during negotiations and ensure greater symmetry with the accession process.[12] The author disagrees with Garner on the need for a double decision structure in Article 50 TEU, asserting that the decision to withdraw from the EU represents a sovereign state right, which should be determined in domestic constitutional orders and not integrated into the supranational withdrawal process solely due to Member States' lack of clarity regarding their constitutional requirements for withdrawal. Additionally, Garner's solution appears not to address the main issue – the absence of withdrawal rules in national legislation – and overlooks the existing possibility for all Member States to introduce a double decision structure in their own constitutional orders as a prerequisite before the conclusion of the withdrawal agreement. Considering the reversibility of the decision to withdraw, it seems that the current wording of Article 50 TEU already provides a legal basis for such a procedure.

2.1 Review of the decision to withdraw from the EU

It is crucial to highlight that the question of the constitutionality of the decision to withdraw primarily falls within the review of national courts. National courts play a vital role in the initial stages of this process by assessing whether the withdrawal decision has been made in compliance with constitutional standards. During Brexit, the UK Higher Court emphasised that intervening in a democratically adopted decision requires proving and establishing a violation of the electoral procedure. Additionally, the complainant must reasonably demonstrate that the referendum outcome would likely have been different had the mentioned violation not occurred.[13] With the decision in *Wilson v Prime Minister*, the UK Higher Court set a constitutional standard regarding possible interferences in the adoption of the withdrawal decision in the UK, recognising that such standards could vary in other Member States.

3 Withdrawal notification

The second paragraph of Article 50 TEU provides scant regulation for the withdrawal notification, as it does not establish any specific procedural prerequisites. After a Member State decides to exit the EU, the timing of the official notification to the European Council becomes crucial, as all deadlines are calculated from that date, and the formal act

[12] ibid.

[13] *Wilson v Prime Minister* [2019] EWCA Civ 304.

of notification serves as the foundation for all consequences outlined in Article 50 TEU. While Article 50 TEU does not specify any deadline for submitting the official withdrawal notification, the author agrees with Kreilinger, Becker, and Wolfstadter that compliance with the principle of loyal cooperation from Article 4(3) TEU requires Member States to provide the notification within a reasonable period, avoiding an increase in legal uncertainty in the EU and other Member States.[14] To prevent threats from Member States regarding exit from the EU, the notification of the exit is handled in an extremely formalistic manner. However, this does not imply that the notification has no legal effects on the participation of the exiting Member State in the decision-making process of the EU. These effects are primarily regulated by the fourth paragraph of Article 50 TEU.[15]

3.1 Revocability of the withdrawal notification

The question regarding the revocability of the withdrawal notification was one of the most contested issues following Brexit, as Article 50 TEU does not address this matter. The third paragraph of Article 50 TEU stipulates that EU treaties shall cease to apply to the exiting Member State after the entry into force of the withdrawal agreement or, in the absence of such an agreement, two years after the notification of the Member State's intention to withdraw unless the European Council and the exiting Member State unanimously agree to extend the withdrawal period. Through linguistic interpretation, we can infer that, in any case, the consent of the exiting Member State to leave the EU is required. This is because after a change in the decision of the exiting Member State regarding withdrawal from the EU, the fulfilment of the conditions from the first paragraph of Article 50 TEU – deciding to withdraw by the constitutional rules of the exiting Member State – becomes questionable. Furthermore, the Member State that changes its decision would be forced to withdraw against its will or even be expelled.

In the *Wightman* case,[16] the CJEU ruled that Article 50 TEU should be interpreted to allow Member States to unilaterally revoke the withdrawal notification unequivocally and unconditionally until the withdrawal agreement between the Member State and the EU is ratified. In

[14] V Kreilinger, S Becker and M Wolfstadter, 'Brexit: Negotiation Phases and Scenarios of a Drama in Three Acts', Jacques Delors Institute <https://institutdelors.eu/en/publications/brexit-negotiation-phases-and-scenarios-of-a-drama-in-three-acts/> accessed 7 March 2020.

[15] Consolidated version of the Treaty on European Union [2012] OJ C326/13.

[16] Case C-621/18 *Andy Wightman and Others v Secretary of State for Exiting the European Union* ECLI:EU:C:2018:999.

the case of no agreement being reached, Member States can revoke until the two-year negotiation period specified in Article 50(3) of the TEU expires or any extended period by that provision. This can be done through a written communication addressed to the European Council after the Member State has made the revocation decision according to its constitutional requirements.[17] By revoking the withdrawal notification, the Member State confirms its membership in the EU under the unchanged conditions of its previous membership, thus concluding the withdrawal process.[18] The Advocate General pointed out that the rules of the Vienna Convention on the Law of Treaties (VCLT) provided interpretative guidelines to assist in dispelling doubts about the issue of the revocability of the withdrawal decision, which was not expressly dealt with in Article 50 TEU.[19] On the other hand, the CJEU pointed out that the EU is a new legal order, autonomous from the Member States and international law. It has its institutions and independent sources of law, which have primacy over the laws of the Member States and may confer rights with direct effect.[20] The CJEU insisted on the autonomy of EU laws from international law, as previously confirmed in the *Kadi* judgment.[21] The Court reaffirmed that EU law was no longer part of international law, even though it may have been considered as such at its origin. Martinico and Simoncini also highlight that while the Advocate General aimed to strike a balance between national sovereignty and the European project, the CJEU focused on the goals of the EU legal order and the persistent willingness of the State to be part of that project.[22]

Barata disagreed with the CJEU findings regarding the revocability of the withdrawal notification during the extension period, as he argued that a State cannot claim absolute sovereignty in this extended period.[23] He contended that to guarantee the smooth functioning of the EU, the CJEU overlooked the sovereignty of Member States in their EU membership, which he considers a cornerstone of the EU integration process. Despite the potential for abuses in revoking the withdrawal statement,

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[17] Case C-621/18 *Andy Wightman and Others v Secretary of State for Exiting the European Union* ECLI:EU:C:2018:978, Opinion of AG Campos Sánchez-Bordona, paras 94–95.

[18] *Wightman* (n 16) para 75.

[19] Opinion of AG Campos Sánchez-Bordona (n 17) para 82.

[20] *Wightman* (n 16) paras 44–45.

[21] Case C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* ECLI:EU:C:2008:461, paras 282, 316.

[22] G Martinico and M Simoncini M, 'Wightman and the Perils of Britain's Withdrawal' (2020) 21(5) German Law Journal 799.

[23] M Barata, 'Brexit and the Limits of Article 50 Treaty of the European Union' (2020) 3 Open Political Science 165.

it must be emphasised that this initial phase of the withdrawal procedure falls within the sovereignty of Member States. This sovereignty must be respected, even when considering revocation in the extended period; otherwise, a Member State could be *de facto* expelled from the EU. Papageorgiou also warns that the revocation of the withdrawal notification can lead to various incidental effects, especially in the functioning of the EU institutions. Therefore, the CJEU can review the lawfulness of the given revocation.[24] However, the author believes that the CJEU's review of the lawfulness of the revocation is limited, as it is with the notification of withdrawal.

3.2 Review of the withdrawal statement

Despite the national court's decision regarding the constitutionality of the withdrawal decision, the European Council, which receives the official notification of withdrawal, must verify whether the decision has been made in line with the legal standards of the EU, thereby influencing the validity of the notification.[25] In light of the sovereignty of Member States, the verification should be made merely regarding possible breaches of the values referred to in Article 2 TEU. As the CJEU stipulated in *Hungary v Parliament and Council*,[26] the values in Article 2 TEU are an integral part of the very identity of the EU as a common legal order. Although acceding States need to comply with these values in the accession phase, the author believes that the expression of these principles in legally binding obligations for Member States could result in breaches after accession. Although the debate regarding the stand-alone (direct) use of Article 2 TEU before the CJEU is severely criticised as changing Article 2 TEU into a 'federal homogeneity clause',[27] the author believes that a serious breach of EU values that would result in the withdrawal decision should be contested before the CJEU.

4 Negotiation of a withdrawal agreement

The second paragraph of Article 50 TEU provides the legal basis for negotiations on the withdrawal from the EU, stating that the EU and the withdrawing Member State shall negotiate by the third paragraph of Article 218 TFEU, which governs the procedure for negotiations on

[24] I Papageorgiou, 'The (Ir-)Revocability of the Withdrawal Notification under Article 50 TEU' (European Parliament 2018) <https://www.europarl.europa.eu/RegData/etudes/IDAN/2018/596820/IPOL_IDA(2018)596820_EN.pdf> accessed 5 June 2020.

[25] Hillion (n 2).

[26] Case C-156/21 *Hungary v Parliament and Council* ECLI:EU:C:2022:97, para 232.

[27] M Nettesheim 'Die "Werte Der Union": Legitimitätsstiftung, Einheitsbildung, Föderalisierung' (2022) 57 Europarecht 525

international agreements. Lukić Radović points out that Article 50 TEU bestows upon the Union a best-efforts obligation to achieve an agreement with the withdrawing country, and not a duty to achieve the agreement at any cost.[28] It is worth noting that even in the case of withdrawal negotiations, we do not speak of negotiations *stricto sensu*, as the positions of the parties, despite their common desire to reach an agreement, are significantly different. The negotiating guidelines of the EU are formulated based on the guidelines set by the European Council[29] and consider the diverse interests of the remaining Member States and the EU, as they are adopted by consensus. This also means that the European negotiator is constrained in negotiations by the adopted guidelines, which must be broad enough to provide a reasonable ground for negotiations. The goal of the negotiations between the withdrawing Member State and the EU differs significantly. The primary goal of the EU is to preserve the rights and obligations derived from EU law in various areas, while the main goal of the withdrawing Member State is often to replace the EU legal framework with its national legal framework. On the other hand, the negotiating positions and capabilities of individual Member States that decide to withdraw are limited by their own constitutional rules, especially the competencies of their respective authorities in negotiations for the conclusion of international agreements.

The Council adopts negotiating directives and nominates the EU negotiator by a qualified majority vote, which means that Member States no longer have a veto. The European Parliament is actively involved in the exit negotiations through resolutions, primarily because of its right to veto the withdrawal agreement.[30]

5 Two-year withdrawal period

Article 50 TEU establishes that the fundamental treaties will cease to apply to the relevant Member State on the date when the withdrawal agreement comes into effect, or if no agreement is reached, two years after the official notification under Article 50(2) TEU. This is unless the European Council, in agreement with the concerned Member State, unanimously decides to extend this period. The drafters of Article 50 TEU set a relatively short period for a Member State's withdrawal from the EU, which is understandable from the perspective of resolving open issues between the exiting Member State and the EU more swiftly. However, considering the case of Greenland (which was not a case of withdrawal

[28] Maja Radović, 'Withdrawal from the European Union: Consequences under EU Law and International Law' (2020) 59(89) Zbornik radova Pravnog fakulteta Nis 227.

[29] Consolidated version of the Treaty on European Union [2012] OJ C326/13.

[30] ibid.

of an EU Member State based on international law as Greenland is an autonomous territory within the Kingdom of Denmark but still lasted two years),[31] and considering the deepening of the EU, the two-year withdrawal period could be considered too short. The author suggests that a longer withdrawal period should be set – such as three years or a flexible period (between three or four years), depending on the level of integration of the Member State in the EU (Schengen, Eurozone, number of opt-outs, etc).

The author disagrees with Garner's proposal for the removal of the two-year limit, as she believes that eliminating the time limit for negotiating a withdrawal agreement could stall negotiations and potentially delay the withdrawal indefinitely. Consequently, this might hinder the smooth functioning of the EU, as EU institutions would have to deal with prolonged negotiations. On the other hand, a longer time limit could benefit both negotiating parties, providing some predictability in the functioning of the EU institutions and Member States. The establishment of a longer withdrawal period, particularly if it considers the integration level of the withdrawing State in the EU, combined with restrictions on the extension of the withdrawal period, could contribute to an orderly withdrawal from the EU and enhance predictability.

5.1 Extension of the two-year withdrawal period

Article 50 TEU explicitly provides the legal basis for the extension of the withdrawal period, but it does not stipulate how many times the withdrawal period could be extended or for how much time. Bernard and Weatherill believe that due to the silence of the legislator and the lack of an explicit prohibition, the two-year exit period could be extended multiple times, and the European Council could condition the extension on the fulfilment of certain commitments by the exiting Member State.[32] With the adoption of European Council Decision (EU) 2019/584 on 11 April 2019, in agreement with the UK regarding the extension of the period provided for in Article 50(3) of the Treaty on European Union, all doubts regarding the possibility of multiple extensions of the two-year withdrawal period were removed.

Craig emphasises that the act of triggering the withdrawal clause, or its revocation, significantly differs from requesting an extension of the two-year withdrawal period. A shorter extension of the withdrawal period does not result in any direct legal consequences, allowing a government

[31] Derrick Wyatt QC, 'Supplementary Written Evidence (PLE0001)' <https://committees.parliament.uk/writtenevidence/66826/html/> accessed 16 May 2024.

[32] Catherine Bernard and Steve Weatherill, 'Extension and Elections: We Need to Talk about Article 50' (*EU Law Analysis*, 14 March 2019) <https://eulawanalysis.blogspot.com/2019/03/extension-and-elections-we-need-to-talk.html> accessed 22 June 2024.

to request such an extension within its competence.[33] However, Garner points out that the executive-driven extension mechanism lacks input legitimacy and, as such, should be avoided.[34]

Based on the author's proposal for setting a longer withdrawal period, the reasoning for restricting the extension of the withdrawal period also emerges. Although Brexit showed that the European Council conditioned the extension of the withdrawal period, the author believes that, from the aspect of legal security, the conditions for the extension of the withdrawal period should be set in advance. The withdrawal negotiations should, therefore, reach a final phase so that the extension would represent just a 'technical extension', for which the question of legitimacy would not arise.

6 Ratification of the withdrawal agreement

Article 50(2) TEU stipulates that the Council, with the consent of the European Parliament, concludes the withdrawal agreement on behalf of the EU. This provision governs the ratification process concerning the withdrawal agreement on behalf of the EU. However, the ratification process of the Member States is left to their national constitutional systems, and any potential withdrawing State will likely apply analogies with the accession procedure to the EU due to the lack of specific provisions in national legislation regarding this matter.

It should be noted that Article 50 TEU does not address the issue of the European Parliament's rejection of the withdrawal agreement or the political declaration.[35] Given the wording of this article, which requires prior consent from the European Parliament before the conclusion of the withdrawal agreement, one could infer that such rejection could lead to withdrawal from the EU without an agreement (if the withdrawal period expires) or to the reopening of negotiations with the withdrawing State.

It is important to highlight that in its history, the European Parliament has already exercised its right of veto within the framework of the ratification process of international treaties. Furthermore, during the negotiation process regarding the withdrawal agreement, the European Parliament has sought to transcend its formal role within the ratification process by utilising informal powers to influence the shaping of the

[33] Robert Craig, 'Can the Government Use the Royal Prerogative to Extend Article 50?' (*UK Constitutional Law Association Blog*, 9 January 2019) <https://ukconstitutionallaw.org/2019/01/09/robert-craig-can-the-government-use-the-royal-prerogative-to-extend-article-50/> accessed 22 July 2024.

[34] Garner (n 11).

[35] For example, in the case of the Anti-Counterfeiting Trade Agreement (ACTA).

withdrawal agreement ex-ante. Brusenbauch Meislova emphasises that after the adoption of the Lisbon Treaty, the European Parliament significantly strengthened its role in concluding international agreements, which is particularly evident in the case of the UK's withdrawal from the EU. By innovatively using the existing procedural provisions, the European Parliament expanded its powers beyond constitutionally provided ones and indirectly contributed to increasing the legitimacy of the decisions taken.[36]

7 The conclusion of the withdrawal agreement

Undoubtedly, one of the most important elements of a Member State's withdrawal from the EU is the conclusion of a withdrawal agreement, which, when ratified, serves as the basis for terminating the founding treaties of the EU for the withdrawing Member State.[37] According to the second paragraph of Article 50 TEU, the agreement on behalf of the EU is concluded by the European Council with a qualified majority vote.

This provision differs significantly from the entry of a Member State into the EU, as in the case of accession the European Council decides unanimously,[38] and the agreement is also subject to ratification in all Member States.[39] Although the legislative distinction in regulating the process of accession and withdrawal of a Member State to or from the EU may seem reasonable, it is important to note that some of the legal consequences of a Member State's withdrawal from the EU are far-reaching, requiring at least consideration of the inclusion of unanimous decision-making by the European Council in Article 50 TEU. The withdrawal of a Member State from the EU results in significant not only legal but also economic and political consequences that cannot be ignored; hence, decision-making by the European Council with a qualified majority vote seems inappropriate.

Although the author supports the EU institutions' campaign for qualified majority voting, which is seen by federalists as a major step in the EU integration process, she argues that the conclusion of the withdrawal agreement should be made by unanimity, similarly to the extension of the withdrawal period or the conclusion of the accession treaty. Although withdrawal will be effective with or without a negotiated

[36] Monika Brusenbauch Meislova, 'The European Parliament in the Brexit Process: Leading Role, Supporting Role or Just a Small Cameo?' in T Christiansen and D Fromage (eds), *Brexit and Democracy* (Palgrave Macmillan 2019).

[37] Consolidated version of the Treaty on European Union [2012] OJ C326/13.

[38] ibid.

[39] ibid.

agreement, the terms of such an agreement seem to be crucial for the EU and its Member States, resulting in the need for unanimous decision-making in this matter. The author believes that the question of withdrawal, along with EU membership, represents one of the most sensitive matters, where unanimity voting should be used to enable each Member State to veto the withdrawal agreement. In the case of EU enlargement, even the Committee on Constitutional Affairs recognised that the consensus requirement is a useful one since it offers reassurance to current members that they will not be obliged to accept new members without their explicit consent, and it offers recognition to the successful candidate country because all existing members will have accepted it into the 'club'.[40] Similarly, the conclusion of the withdrawal agreement by unanimity could guarantee that the remaining Member States could specify the terms under which an orderly withdrawal could take place and safeguard their most important rights about the withdrawal State. Brexit was illustrative on this question as it highlighted the question of Ireland and Northern Ireland, where Ireland could not formally stall the conclusion of the withdrawal agreement even if the issue of Northern Ireland was not addressed properly. Even if this case showed great unanimity amongst Member States, it is questionable if this would be the case in possible future withdrawals.

8 Conclusion

The regulation of the withdrawal of a Member State from the EU in Article 50 TEU has certainly eliminated doubts about the existence of the right to withdraw and enabled some clarity regarding the procedural requirements for the withdrawal of a Member State from the EU. It also passed the test of its first implementation, but at the same time, due to its legal ambiguity, it brought new challenges in understanding the individual stages of the withdrawal process. The questions that arose from Brexit showed that the traditional dichotomy between the EU as a federal State and international organisation persists and strongly influences the withdrawal procedure. The author believes that the question of a Member State's withdrawal from the EU under Article 50 is still under-regulated, and therefore proposes changes to Article 50 TEU to appropriately address the mentioned under-regulation.

[40] Sandro Gozi, 'Working Document on Overcoming the Deadlock of Unanimity Voting' (2021) Committee on Constitutional Affairs, European Parliament 2019-2024, DT\1229579EN.docx, PE691.407v01-00, <https://www.europarl.europa.eu/cmsdata/233740/AFCO%20Working%20Document%20on%20Overcoming%20the%20Deadlock%20of%20Unanimity%20Voting.pdf> accessed 16 May 2024.

Firstly, the author proposes to amend Article 50 TEU to ensure judicial review of the compatibility of the official notification of a Member State's withdrawal from the EU (which implies the decision to withdraw) with the fundamental values of the EU, as contained in Article 2 TEU. Since the decision to withdraw from the EU is made based on the constitutional rules of the Member State, the jurisdiction of the CJEU should be limited to assessing the conformity of the withdrawal notification with Article 2 TEU, thus preventing any disproportionate interference of the CJEU in the national legal systems of the Member States. In this regard, it is essential to emphasise that the decision to leave the EU is primarily a political issue, which, due to its sensitivity and legal effects, requires careful balancing by the CJEU between respecting the fundamental values of the EU and the specificities of individual national legal systems. Considering the CJEU case law, the decision regarding the direct applicability of Article 2 TEU could represent a major development towards more judicial federalism in the EU.

The author suggests explicitly allowing the revocation of the withdrawal decision. The purpose of the proposed change is to include the decision of the CJEU in the *Wightman* case regarding the revocability of the exit declaration in the text of Article 50 TEU. Despite the mentioned decision, in the interest of respecting the principle of separation of powers, the legislator should specifically regulate this issue and dispel all doubts regarding possible revocation.

The author further recommends a longer withdrawal period while at the same time restricting the possibility of extending the withdrawal period. Brexit has provided an answer to the question regarding the possibility of multiple extensions of the withdrawal agreement, simultaneously outlining numerous challenges that such extension may cause not only in the withdrawing Member State but also in the institutions of the EU. Although from the perspective of ensuring an orderly exit of a Member State from the EU (withdrawal with the conclusion of a withdrawal agreement), there is an understandable desire of the Member States to allow for the extension of the withdrawal period, the author must emphasise that the specific case of Brexit has indicated at least partial impairment of the regular functioning of the EU due to multiple extensions of the withdrawal agreement. Additionally, it should be noted that the determination of new commitments by the exiting Member States in the European Council's decisions on extending the withdrawal period is extremely problematic from the perspective of respecting the principle of equality of Member States. A solution to this issue could be provided by defining a longer withdrawal period.

Finally, the author proposes changing the required majority for the conclusion of a withdrawal agreement to an absolute majority. This

change is suggested based on a comparison of the accession and withdrawal processes, highlighting that the smaller required majority for the conclusion of a withdrawal agreement does not reflect the real weight of all legal, economic, and political consequences of a Member State's withdrawal from the EU. Similarly, drawing an analogy with the right to extend the exit period, which requires the consent of the European Council, decision-making by a qualified majority vote in the European Council regarding the conclusion of a withdrawal agreement is considered unjustifiable. The author argues that decision-making on the withdrawal agreement with unanimity would increase the democratic legitimacy of the agreement reached.

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ON THE VERGE OF THE NEXT EU ENLARGEMENT. ACCESSION LEGAL FRAMEWORK: CONCEPTUAL OVERVIEW

Sylwia Katarzyna Mazur*

Abstract: Since the founding days of the European Coal and Steel Community, the European integration model has been designed as an open one. Therefore, the enlargement of the European Union from its six founding members to its current twenty-seven is considered not only a success story for the EU but for Europe as a whole. Enlargement, as a twofold process, requires adequate preparation by the acceding State and the EU's capacity to integrate the new member. Despite the transformative power of European integration (where even the prospect of membership can trigger significant reforms), the process is governed by the relatively concise Article 49 of the Treaty on European Union (TEU), which has evolved significantly in practice. The purpose of this paper is threefold. Firstly, it will elucidate the evolving character of the accession procedure. Secondly, it will analyse the balancing act between the increasing complexity of the process and the mechanisms of pre-accession assistance combined with flexibility measures. Thirdly, it will explore the role and significance of political will throughout the entire accession process.

Keywords: European Union, enlargement, Copenhagen criteria, Member State, acceding State.

1 Introduction

The enlargement of the European Union (EU) is considered not only a success story for the EU itself but also for Europe as a whole. It has been described as 'one of the most successful and impressive political transformations of the twentieth century',[1] significantly impacting both the EU and international relations within Europe.[2] According to the

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[1] Romano Prodi, 'A Wider Europe: A Proximity Policy as the Key to Stability' (Peace, Security and Stability International Dialogue and the Role of the EU, Sixth ECSA-World Conference, Brussels, 5–6 December 2002) <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_02_619> accessed 19 January 2024.

[2] Frank Schimmelfennig and Ulrich Sedelmeier, 'The Politics of EU Enlargement. Theoretical and Comparative Perspectives' in Frank Schimmelfennig and Ulrich Sedelmeier (eds), *The Politics of European Union Enlargement. Theoretical approaches* (Routledge 2005) 3.

Council, the commitment to enlargement is a 'key policy of the European Union'.[3] In a similar vein, the European Commission has stated that 'a credible enlargement policy is a geostrategic investment in peace, stability, security and economic growth in the whole of Europe'.[4] Despite suggestions to create alternative forms of association, such as staged accession,[5] the European Political Community,[6] or to implement a fast-track procedure, the accession process enshrined in Article 49 TEU remains the sole pathway for a State aspiring to EU membership. Until the moment of accession, the aspiring State is considered a third country.[7]

After Croatia's accession on 1 July 2013, the enlargement process stalled.[8] Neither the 2018 Enlargement Strategy for the Western Balkans[9] nor the revised methodology[10] presented by the then newly appointed European Commission could reinvigorate it.[11] Despite the declaration that 'the future of the Balkans is within the European Union', the process for

[3] Council of the European Union, 'Council conclusions on enlargement and stabilisation and association process', 18 June 2019 <https://www.consilium.europa.eu/en/press/press-releases/2019/06/18/council-conclusions-on-enlargement-and-stabilisation-and-association-process/> accessed 19 February 2024.

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

[5] Michael Emerson, Milena Lazarević, Steven Blockmans and Strahinja Subotić, 'A Template for Staged Accession to the EU' (2021) European Policy Centre, Centre for European Policy Studies <https://www.ceps.eu/ceps-publications/a-template-for-staged-accession-to-the-eu/> accessed 26 January 2024.

[6] The European Political Community is a cooperation platform created by the EU Member States to reaffirm support for Ukraine under attack and to structure relationship within the EU neighbourhood. This new form was not conceived according to any blueprint, and therefore Kyiv explicitly rejected the idea of the EPC as an alternative to European integration. Despite a lack of any institutional structure or even a released *communiqué*, the new formula can serve as a facilitation endeavour for candidate countries. See Sylwia K Mazur, 'Evolution of the European Political Community in Times of the EU's "Geopolitical Awakening"' (2023) 19 CYELP 79.

[7] The enlargement policy is a part of the EU's external relations.

[8] The prospect of EU membership for Western Balkan countries opened in June 2003 in Thessaloniki during the EU-Western Balkans Summit.

[9] Commission, 'A credible enlargement perspective for and enhanced EU engagement with the Western Balkans' (Communication) COM(2018) 65 final.

[10] The presentation of the revised methodology in February 2020 was followed by the adoption of the Zagreb Declaration in May 2020 which did not even mention the possibility of membership for four Western Balkan States that were in the process at that time. See Uroš Ćemalović, 'One Step Forward, Two Steps Back: The EU and the Western Balkans After the Adoption of the New Enlargement Methodology and the Conclusions of the Zagreb Summit' (2020) 16 CYELP 179.

[11] Despite the above, the 'geopolitical Commission' tried to create new enlargement momentum in reaction to influences from third countries. See European Parliamentary Research Service, 'Serbia: Pulled in Two Directions' (2019) At a Glance, <https://www.europarl.europa.eu/RegData/etudes/ATAG/2019/642247/EPRS_ATA(2019)642247_EN.pdf> accessed 18 January 2024.

countries in the region has been sluggish,[12] and the prospect of membership has weakened. Critiques frequently advanced arguments that the EU had already 'bitten off more than it can chew', that 'deepening' should happen before 'widening',[13] that enlargement had killed the federal Europe,[14] or that the EU has to 'settle down' to 'sort out the constitutional imbroglio'.[15] Scepticism regarding further accessions was expressed not only by Member States[16] but also by EU institutions. Additionally, the sense of 'enlargement fatigue' dominated EU public opinion.[17]

The situation changed dramatically when, a few days after Russia's unprovoked attack, the President of Ukraine, Volodymyr Zelenskyy, signed an application for Ukraine's membership in the European Union.[18] In June 2022, less than four months later, the European Council decided to grant candidate country status to both Ukraine[19] and the Republic of Moldova.[20] In December 2023, the European Council decided

[12] Accession negotiations were opened with Montenegro in 2012, and Serbia in 2014, but made limited progress. According to the enlargement strategy presented by the European Commission in 2018, Montenegro and Serbia should join the EU by 2025. A Commission communication issued in April 2018 recommended the opening of negotiations with Albania and North Macedonia, but the accession negotiation framework was adopted only on 18 July 2022.

[13] In an explicit manner, Jan Klabbers stated that expansion eastward cannot be explained by the need to create an 'ever closer union'. In fact, the opposite is true since every enlargement dilutes the European Union. See Jan Klabbers, 'Formal Intergovernmental Organizations' in Jacob Katz Cogan, Ian Hurd and Ian Johnstone (eds), *The Oxford Handbook of International Organizations* (OUP 2016) 135.

[14] Michel Rocard, 'Elargissement: quel scénario? Terra Nova. Sortir l'Europe du blocage' (Liberation 2009) <https://www.liberation.fr/france/2009/06/02/elargissement-quel-scenario_561446/> accessed 26 January 2024.

[15] Michael Emerson, Senem Aydin, Julia De Clerck-Sachsse and Gergana Noutcheva, 'Just What Is This 'Absorption Capacity' of the European Union?' (2006) Policy Brief No 113, 1 <https://cdn.ceps.eu/wp-content/uploads/2013/02/1381.pdf> accessed 3 February 2024.

[16] The French government issued a 'non-paper' suggesting gradual association, stringent conditions and the reversibility of the process. See 'Non-Paper: Reforming the European Union Accession Process' (2019) <https://www.politico.eu/wp-content/uploads/2019/11/Enlargement-nonpaper.pdf> accessed 27 January 2024.

[17] Deniz Devrim and Evelina Schulz, 'Enlargement Fatigue in the European Union: From Enlargement to Many Unions' (2009) Real Instituto Elcano Working Paper 13/2009 <https://media.realinstitutoelcano.org/wp-content/uploads/2021/11/wp13-2009-devrim-schulz-enlargement-european-union.pdf> accessed 16 January 2024.

[18] President of Ukraine, 'Volodymyr Zelenskyy Signed an Application for Ukraine's Membership in the European Union' (28 February 2022) <https://www.president.gov.ua/en/news/volodimir-zelenskij-pidpisav-zayavku-na-chlenstvo-ukrayini-u-73249> accessed 2 February 2024.

[19] For more on Ukraine's application and its legal consequences, see Tetyana Komarova and Adam Łazowski, 'Switching Gear: Law Approximation in Ukraine After the Application for EU Membership' (2023) 19 CYELP 105.

[20] European Council, 'European Council meeting (23 and 24 June 2022) Conclusions' <https://www.consilium.europa.eu/media/57442/2022-06-2324-euco-conclusions-en.pdf> accessed 7 January 2024.

to open accession negotiations with both countries,[21] granted candidate country status to Georgia,[22] and reiterated that accession negotiations would open with Bosnia and Herzegovina, contingent upon it achieving the necessary degree of compliance with membership criteria. The European Council also reaffirmed its commitment to the EU membership perspective for the six Western Balkan partners. In short, as stated by the European Commission, Russia's war on Ukraine put EU enlargement 'to the fore of the European agenda',[23] making it a 'strategic necessity'.[24]

The purpose of this paper is to present a) the evolving character of the accession procedure, which adjusts to both internal and external factors, with special attention given to the stronger focus on fundamentals, particularly the rule of law. The centrality of the rule of law in accession negotiations is not only an extension of the political criteria set by the Copenhagen Summit in 1993 but also a compensatory measure for ineffective political conditionality in the post-accession period; b) the increasing complexity of the process, which is balanced by pre-accession assistance[25] and flexibility measures included in the accession treaties; and c) the role and significance of political will throughout the entire process. To contextualise the enlargement regulatory framework, the first part of this paper is dedicated to the notion of membership in international organisations in light of international law. This is followed by a discussion on the eligibility criteria, which has historically included only a geographical criterion. According to Article 237 of the Rome Treaty and Article O of the Maastricht Treaty, 'any European state' could apply to become a member of the Community/Union. The third part is dedicated to the accession procedure, which can vary in length. Historically, EU institutions have employed a two-step process consisting of a 'Community stage' and an 'inter-State stage'. The former involves the Commission's opinion, Parliament's assent, and the Council's decision, while the latter involves negotiating the text of the agreement and its ratification.[26] However, the author will divide the process into the following sections: (i) submitting an

[21] European Council, 'European Council meeting (14 and 15 December 2023) Conclusions' <https://www.consilium.europa.eu/media/68967/europeancouncilconclusions-14-15-12-2023-en.pdf> accessed 7 January 2024.

[22] The status was granted conditionally.

[23] Commission, '2022 Communication on EU Enlargement Policy' COM(2022) 528 final.

[24] Carl Bildt, 'The Return of EU Enlargement' (2023) Project Syndicate <https://www.project-syndicate.org/commentary/european-enlargement-returns-to-top-of-eu-agenda-by-carl-bildt-2023-07> accessed 17 January 2024.

[25] The pre-accession strategy is based on the 'comprehensive and active projection of EU norms, with a view to their effective adoption prior to admission to the Union. It is a 'post-Copenhagen product' endorsed by the 1997 Luxembourg European Council.

[26] European Parliament, 'Legal Questions of Enlargement' (Briefing No 23) <https://www.europarl.europa.eu/enlargement/briefings/23a2_en.htm> accessed 12 February 2024.

application; (ii) negotiations; and (iii) the Accession Treaty. Additionally, the paper will outline a few unwritten practices developed during the past rounds of enlargement, such as the selection of the next members from the neighbouring countries and the preference for group negotiations.[27]

2 EU membership in the light of international law

Although there is no universally accepted legal definition of an international organisation,[28] the European Union possesses features that set it apart from other subjects of international law. These include being an association of subjects of international law (exclusively States); being established by a treaty; pursuing common objectives (as outlined in Article 3 of the Treaty on European Union); and having organs capable of generating a distinct *volonté distincte*.[29] The Treaty of Lisbon conferred full legal personality on the EU,[30] thereby establishing it as an independent entity in its own right.

The EU is a legal community created by law, which employs law as a means of governance and is governed by the rule of law.[31] It is often classified as a supranational organisation.[32] Due to a degree of autonomous regulatory power, it is also considered a 'new legal order of international law'[33] and an autonomous 'constitutional' order.[34] Despite being also described as a *sui generis* international organisation, it does not yet constitute a distinct category of its own.[35]

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[27] Péter Balázs, 'Enlargement Conditionality of the European Union and Future Prospects' in Inge Govaere, Erwan Lannon, Peter van Elsuwege and Stanislas Adam (eds), *The European Union in the World: Essays in Honour of Professor Marc Maresceau* (Brill 2014) 532–533.

[28] The International Law Commission, in its Articles on the Responsibility of International Organisations, defines the term as an 'organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members in addition to States, other entities'. Article 2(a) of Articles on the Responsibility of International Organisations (2011) *Yearbook of the International Law Commission*, 2011, vol II, Part Two.

[29] Jan Wouters, Cedric Ryngaert, Tom Ruys and Geert de Baere, *International Law: A European Perspective* (Hart 2020) 256.

[30] Article 47 of the Treaty on European Union.

[31] Anne Peters, 'International Organizations and International Law' in Jacob Katz Cogan, Ian Hurd and Ian Johnstone (eds), *The Oxford Handbook of International Organizations* (OUP 2016) 33.

[32] The term has not acquired a distinct legal meaning and was even rejected by some scholars; therefore, it will not be mentioned further in the presented research.

[33] Case 26/62 *Van Gend & Loos v Netherlands Inland Revenue Administration* ECLI:EU:C:1963:1.

[34] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (OUP 2000).

[35] Fernando Lusa Bordin, 'Is the European Union a Sui Generis International Organization?' in Fernando Lusa Bordin, Andreas Th Müller and Francisco Pascual-Vives (eds), *The European Union and Customary International Law* (CUP 2022).

As an international organisation, the European Union is governed by the principle of specialty,[36] meaning it exercises powers conferred upon it by the Treaties. Under the fundamental principle of conferral outlined in Article 5 TEU, the EU acts within the limits of the competences assigned to it by its Member States to achieve the objectives set out in the Treaties. Compared to other international organisations, the EU can be classified as closed, regional,[37] and universal due to the gradual expansion of its scope of activities.[38]

The question of EU membership falls within the realm of international law[39] and is also considered to be 'inspired by the cannons of international institutional law'.[40] Membership is a common element among international organisations,[41] and yet the criteria for membership diverge considerably. On the one hand, certain organisations permit accession through the unilateral declaration of intent by a prospective member state; on the other hand, some prescribe a stringent and procedurally complex accession process grounded in technocratic assessments. The EU can be classified as an organisation adhering to the latter approach. Its objectives allow for the expansion of its membership.[42] The current legal basis for enlargement is enshrined in Article 49 TEU, which establishes the criteria for States seeking EU membership, and Article 2 TEU, which encapsulates the EU's founding values. The EU is a union of States, established by States, and only States can become its members.[43]

EU Member States play a double role in their relationship with the organisation: an internal and external role. Regarding the former, membership attributes include the right to participate in the activities of organs, the right to participate in decision-making processes, and, for Member States' representatives, the right to stand for elections, and the right to be elected to those organs.[44] Regarding the latter, States are the

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[36] Malcolm M Shaw, *International Law* (CUP 2017) 998.

[37] Some authors qualify regional organisations as types of closed organisations. See Henry G Schermers and Niels M Blokker, *International Institutional Law* (Brill/Nijhoff 2018) 57.

[38] Wouters and others (n 29) 258.

[39] James Crawford and Alan Boyle, 'Annex A. Opinion: Referendum on the Independence of Scotland – International Law Aspects' (2013) UK Government, 98.

[40] Christophe Hillion, 'Accession and Withdrawal in the European Union Law' in Damian Chalmers and Anthony Arnull (eds), *The Oxford Handbook of European Union Law* (OUP 2015) 129.

[41] Schermers and Blokker (n 37) 65.

[42] ibid 59.

[43] Nowadays, international organisations are also (establishing) members of other international organisations. See Wouters and others (n 29) 263; Schermers and Blokker (n 37) 65.

[44] Stephen Mathias and Stadler Trengove, 'Membership and Representation' in Jacob Katz Cogan, Ian Hurd and Ian Johnstone (eds), *The Oxford Handbook of International Organizations* (OUP 2016) 972–973.

counterparts of the organisation on the international stage. The law of international organisations also addresses 'duties of good membership' or 'duties of loyal cooperation'.[45] In the case of the European Union, the duty of sincere cooperation is enshrined in Article 4(3) TEU. This duty imposes a mutual legal obligation on the EU and its Member States to 'assist each other in carrying out the tasks arising from the Treaties'. This is considered a key constitutional principle of the European Union.

The EU does not provide for modalities of membership, such as associated membership, observer status, or consultative status,[46] nor does it differentiate between 'original' and 'additional' members or employ any other two-tiered membership system. From a legal standpoint, the rights and obligations of 'old' and 'new' Member States are the same.

Membership in the European Union can be terminated.[47] To date, only one Member State,[48] the United Kingdom, has decided to withdraw from the European Union.[49] The Treaties do not explicitly mention the possibility of suspending membership. However, under Article 7(3) TEU, the Council, acting by a qualified majority, may decide to suspend certain rights derived from the application of the Treaties, including crucial voting rights of the Member State in the Council. This option, often referred to as 'nuclear', has not yet been applied in practice.

3 Eligibility criteria

According to Article 49 TEU, an applicant country must be a European State,[50] thereby imposing a geographical limitation. This requirement reflects the EU's objective from the Preamble to create an 'ever closer union' among Europeans. Additionally, the applicant must respect and commit to the values outlined in Article 2 TEU. These values include

[45] Tleuzhan Zhunussova, 'What Does It Take to Be a Loyal Member? Revisiting the "Good Membership" Obligations in the Law of International Organizations' (2022) 14 Eur J Legal Stud 65.

[46] With the exception of 'acceding country' status, which will be described below.

[47] Under Article 50 TEU, 'any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements'. For more on the withdrawal process, see Christophe Hillion, 'Withdrawal under Article 50 TEU: An Integration-friendly Process' (2018) Common Market Law Review 55 (Special issue) 29; Hannes Hofmeister, '"Should I Stay or Should I Go?" A Critical Analysis of the Right to Withdraw from the EU' (2010) 16 European Law Journal 589.

[48] In 1985, after securing home rule from Denmark, Greenland withdrew from the European Community.

[49] The withdrawal agreement entered into force on 31 January 2020 at midnight.

[50] In 1987, the Council rejected Morocco's application on the grounds that it was not a European State. In the case of Turkey, the Parliament, the Council, and the Commission confirmed Turkey's eligibility.

human dignity, freedom, democracy, equality, the rule of law, respect for human rights (including those of minorities), a pluralistic society, non-discrimination, tolerance, justice, solidarity, and equality between women and men. The requirement that the applicant be a 'European State' was originally stipulated in Article O of the Treaty of Maastricht. While this was the sole material condition specified, its interpretation has never been unequivocally defined. According to the European Parliament, this criterion could be understood in 'geographical, cultural or political terms'.[51] It is noteworthy that some authors explicitly mention statehood as a condition.[52]

The European Union assesses the readiness of applicant States based on three accession criteria known as the 'Copenhagen criteria', which were defined by the European Council in 1993 originally for aspiring Central and Eastern European States. Despite their general nature, these criteria have become central to accession debates.[53] The criteria are divided into three groups. The political criteria require the candidate country to achieve stability of institutions guaranteeing democracy, the rule of law, human rights, and respect for the protection of minorities. Compliance with these criteria is a prerequisite for the opening of negotiations.[54] Interestingly, even before the introduction of the Copenhagen criteria, non-democratic Portugal and Spain were excluded from the integration process. Greece had been an Associate Member of the Community since 1961; however, its membership negotiations were suspended after the military coup in April 1967. Therefore, it seems 'reasonable' that political factors are assessed in the political organisation.[55]

The economic criteria demand a functioning market economy and the ability to withstand competition and market forces. Finally, membership in the European Union presupposes the candidate's capacity to fulfil the obligations of membership. In 1995, the European Council emphasised that for 'sound preparation', the enlargement strategy must be enhanced to create conditions for 'gradual, harmonious integration'. This includes developing a market economy, adjusting the applicant's administrative structure, and establishing a stable economic and monetary

[51] European Parliament (n 26).

[52] Eg Hillion (n 40) 126.

[53] Alan Mayhew, 'Enlargement of the European Union: An Analysis of the Negotiations with the Central and Eastern European Candidate Countries' (2000) Sussex European Institute Working Papers 39 <https://www.sussex.ac.uk/webteam/gateway/file.php?name=sei-working-paper-no-39.pdf&site=266> accessed 19 March 2024.

[54] Luxembourg European Council, 'Presidency Conclusions (12 and 13 December 1997)' <https://www.europarl.europa.eu/summits/lux1_en.htm> accessed 23 March 2024.

[55] Henry G Schermers and Niels M Blokker, *International Institutional Law* (Nijhoff 2011) 81.

environment.[56] Despite criticisms that the criteria are too vague to be operational and that they go beyond the *acquis communautaire*,[57] Article 49 TEU underscores that the eligibility conditions agreed upon by the European Council must be considered, thus allowing for these conditions to diverge. Strong interference with the domestic legal system of potential members does not allow the general terms made on the applicant to be pre-determined, and so the organisation should be able to set specific conditions in each specific case.[58]

Importantly, the Copenhagen Conclusions also emphasised that the EU's capacity to absorb new members must be taken into consideration[59] to ensure that the enlargement process is balanced with the momentum of integration. However, absorption capacity[60] has never been formally added as a criterion. Moreover, there are also voices advocating against using the notion in official EU texts, which aim for precise and unambiguous meaning.[61] Yet, in June 2022 the European Council confirmed that the progress of each applicant 'will depend on its own merit in meeting the Copenhagen criteria, taking onto consideration the EU's capacity to absorb new members'.[62] It is thus a clearly functional concept.[63]

4 Accession process

Accession to the European Union is highly asymmetrical in character. Since the Treaty establishing the European Coal and Steel Community stated that 'any European State may request to accede to the present Treaty', the initiative has been on the third State aspiring for

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[56] European Council, 'Madrid European Council, 15–16 June 1995. Presidency Conclusions' <https://www.europarl.europa.eu/summits/mad1_en.htm#enlarge> accessed 22 April 2024.

[57] Commission, 'Agenda 2000 – Volume I – Communication: For a stronger and wider Union' DOC/97/6 1997.

[58] Schmers and Blokker (n 55) 86.

[59] The Union's capacity to absorb new members, while maintaining the momentum of European integration. It is an important consideration in the general interest of both the Union and the candidate countries.

[60] From its 2006–2007 enlargement strategy, the Commission uses the term 'integration capacity'. See Commission, 'Communication from the Commission to the European Parliament and the Council. Enlargement Strategy and Main Challenges 2006–2007 Including annexed special report on the EU's capacity to integrate new members' (2006) <http://ec.europa.eu/enlargement/pdf/key_documents/2006/Nov/com_649_strategy_paper_en.pdf> accessed 1 April 2024.

[61] Emerson and others (n 15).

[62] European Council (n 20).

[63] Tanja A Börzel, Antoaneta Dimitrova and Frank Schimmelfennig, 'European Union Enlargement and Integration Capacity: Concepts, Findings, and Policy Implications' (2017) 24 Journal of European Public Policy 160.

membership. This aspiring State typically has more interest in acceding than the EU has in enlarging[64] and must accept the existing set of rules before having the possibility to shape them.[65] Accession is not granted automatically, as it depends on the adequate preparation of the applicant State. The mechanism itself is intricate and formalistic, yet it also serves as a trust-building exercise between the acceding State and the EU.[66]

According to the European Commission, accession conditions must be 'objective, precise, detailed, strict and verifiable'.[67] Although negotiations, a crucial part of the process, are now perceived as a technical process, with the European Commission playing a dominant role, the procedure has become more demanding than in the past, with increased involvement and scrutiny from the Council and Member States. Not only have instances of unanimous decision-making throughout the process multiplied, but Member States are instrumentalising the membership possibility to leverage their domestic interests. Furthermore, it is predominantly a political process initiated by the aspiring State and concluded with the primarily political decision of the international organisation to admit the applicant State.[68] As early as 1977, the European Parliament described the reception of official applications from Greece and Portugal as favourable primarily for political reasons.[69]

4.1 Submitting an application

An aspiring State that wishes to join the European Union addresses its application to the rotating EU Council Presidency. Crucially, the right to lodge an application for accession does not equate to the right to accede to the European Union. The European Parliament and national parliaments are notified of this application as a new procedural element added by the Lisbon Treaty. The European Commission is then formally invited to assess the application based on established criteria and conditions. It is worth noting that the Council does not pass the application directly to

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[64] Wojciech Sadurski, 'EU Enlargement and Democracy in New Member States' in Wojciech Sadurski, Adam Czarnota and Martin Krygier (eds), *Spreading Democracy and the Rule of Law? The Impact of EU Enlargement on the Rule of Law, Democracy and Constitutionalism in Post-communist Legal Orders* (Springer 2006) 27.

[65] Kristi Raik, 'The EU as a Regional Power: Extended Governance and Historical Responsibility' in Hartmut Meyer and Henri Vogt (eds), *A Responsible Europe? Ethical Foundations of EU External Affairs* (Palgrave Macmillan 2006) 85.

[66] Jan Truszczyński, *Do czego zobowiązała się Polska, wstępując do Unii Europejskiej* (My Obywatele Unii Europejskiej 2020).

[67] Commission (n 4).

[68] Schermers and Blokker (n 37).

[69] European Parliament, 'EC-Accession of Four Mediterranean Countries and Regional Policy' (October 1977) <https://www.europarl.europa.eu/RegData/etudes/etudes/join/1977/049154/IPOL-REGI_ET(1977)049154_EN.pdf> accessed 21 March 2024.

the Commission; instead, it first assesses the admissibility of the application before the other two institutions can produce their assessments.[70]

In its *Avis*, the European Commission thoroughly analyses the applicant country's legal and constitutional framework and the implementation of its legislation against the entire *acquis*.[71] This analysis is prepared based on a detailed questionnaire.[72] The Commission then presents its recommendations for further steps. If the country does not sufficiently meet the membership criteria, the Commission outlines specific reforms (key priorities) that the applicant country needs to implement.[73] If the Commission's Opinion is favourable, the Council may decide to grant the country candidate status. Following a recommendation by the Commission, the Council also decides whether to open negotiations. Both decisions by the Council are taken unanimously. Given the Council's requirement for unanimous agreement among all EU Member States, it can safely be assumed that throughout the process, the Council operates as an agent of the Member States.[74]

Once a candidate country sufficiently fulfils the political criteria, the European Commission recommends opening the negotiations. The Council is neither bound by the recommendation from the European Commission nor by the agreement of the European Parliament. In fact, the Council can agree to open accession negotiations even in cases where the political criteria are only met 'sufficiently'.[75]

4.2 Negotiations

Following the issuance of a negotiating mandate to the European Commission by the Council, the first step involves the European Commission proposing a negotiation framework. This framework consists of

[70] Hillion (n 40) 132.

[71] The term is used to describe the collection of common rights and obligations that constitute the body of EU law. The EU *acquis* evolves over time and includes, among other things, the content, principles and political objectives of the EU Treaties; any legislation adopted to apply those treaties and the case law developed by the Court of Justice of the European Union; and declarations and resolutions that are adopted by the EU.

[72] The questionnaire consists of questions aimed at providing information in regard to political and economic criteria, compliance with EU legislation and information on the institutional and administrative capacity necessary for the acceptance and implementation of the EU's legislation in each of the policy areas of the EU *acquis*.

[73] For example, in the case of Ukraine's application, the Commission's Opinion outlined seven steps which needed to be addressed in order to progress on the path to the EU. See Commission, 'Commission Opinion on Ukraine's application for membership of the European Union' (Communication) Brussels COM(2022) 407 final 2022.

[74] Hillion (n 40) 126.

[75] For example, the Commission was hesitant to start negotiations with Greece. However, the Council decided to open negotiations anyway.

principles governing the accession negotiations, the substance of negotiations, and the negotiation procedure. The framework needs to be unanimously adopted by the Council. The Commission delivers a 'screening' report for each chapter, examining the candidate's ability to meet the requirements of the *acquis*. The negotiations then take place in an intergovernmental conference involving ministers and ambassadors of the Member States and the candidate country. This conference marks the formal start of the accession negotiations. At this stage, the accession negotiation framework is made public.

The *acquis communautaire* is divided into policy chapters to facilitate thematic negotiations. Based on the Commission's recommendation, the Council decides unanimously whether or not to open additional negotiating chapters or clusters. Whenever the candidate country makes satisfactory progress, the Commission may recommend provisionally closing a chapter or cluster. The European Commission has established criteria for the provisional closure of negotiating chapters. These criteria include full acceptance of the EU *acquis*, the absence of requests for transitional periods, satisfactory answers to EU questions, the global character of negotiations, and satisfactory progress in preparations for accession.[76] As the European Commission has pointed out, candidate countries 'attach increasing importance to the provisional closure of negotiations', driven by the political need to demonstrate progress.[77]

Under the revised methodology[78] from February 2020, the thirty-three negotiating chapters were divided into six clusters.[79] The European Commission decided to put rule-of-law issues at the centre of this methodology. The negotiating chapters on Judiciary and Fundamental Rights (Chapter 23) and on Justice, Freedom and Security (Chapter 24) are to be opened at an early stage and closed last. Additionally, interim benchmarks for both of these chapters were introduced. Under the revised methodology, no chapter can be closed if the interim benchmarks for the rule-of-law chapters have not been met.

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[76] Commission, 'Composite Paper. Reports on progress towards accession by each of the candidate countries' COM (99) 500 final.

[77] ibid.

[78] Originally, the revised methodology was to be formalised into negotiating frameworks for North Macedonia and Albania, but after acceptance by Montenegro and Serbia, the Council agreed on its application to the accession negotiations with those two countries. See Council of the European Union, 'Application of the revised enlargement methodology to the accession negotiations with Montenegro and Serbia', Brussels, 6 May 2021 <https://data.consilium.europa.eu/doc/document/ST-8536-2021-INIT/en/pdf> accessed 10 March 2024.

[79] Fundamentals; Internal market; Competitiveness and inclusive growth; Green agenda and sustainable connectivity; Resources, agriculture and cohesion; and External relations.

Analysing the evolution of the accession procedure, the growing importance of the rule of law has become one of its hallmarks. As early as 1997, at the European Council, EU leaders stated that compliance with the political criteria is a prerequisite for the opening of negotiations.[80] In 2009, the Council of the European Union underlined the significance of the rule of law in the negotiation process, presenting it as a 'major challenge' that must be addressed from the early stages of negotiations.[81] In 2014, the Council highlighted the 'central importance of the rule of law', also in the economic context.[82] Political conditionality characterising the accession process was long perceived as 'the only genuine example of external pressure leading to in-depth democratization',[83] whereas accession was seen as an indicator of completed consolidation.[84] However, democratic backsliding in the enlarged EU cast doubt over the post-accession sustainability of reforms. It affects the current process. Already four potential Member States, namely Albania, Montenegro, North Macedonia, and Serbia, are covered by the latest annual rule-of-law report.[85] Pursuant to the political guidelines for the 2024-2029 European Commission, the rule of law and fundamental values will continue to be cornerstones of the EU's enlargement policy.[86] Interestingly, in the current phase, the EU explicitly states that the embracement and promotion of EU values include alignment with the EU's common foreign and security policy,[87] which is understandable given the EU's aspirations on the global scene.[88]

Throughout the process, the European Commission is responsible for monitoring the progress of the candidate State's convergence. It

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[80] Council of the European Union (n 54).

[81] Council of the European Union, 'Council conclusions on enlargement/stabilisation and association process 2984th General Affairs Council meeting', Brussels, 7 and 8 December 2009.

[82] Council conclusions on Enlargement and Stabilisation and Association Process, General Affairs Council meeting Brussels, 16 December 2014.

[83] Jørgen Møller and Svend-Erik Skaaning, *Democracy and Democratization in Comparative Perspective: Conceptions, Conjunctures, Causes, and Consequences* (Routledge 2013) 154.

[84] Wolfgang Merkel, 'Plausible Theory, Unexpected Results: The Rapid Democratic Consolidation in Central and Eastern Europe' (2008) 2 Internationale Politik und Gesellschaft 11.

[85] Commission, '2024 Rule of Law Report' (Communication) COM(2024) 800 final.

[86] Ursula von der Leyen, 'Europe's Choice. Political Guidelines for the Next European Commission 2024-2029' (2024) <https://commission.europa.eu/document/download/e6cd4328-673c-4e7a-8683-f63ffb2cf648_en?filename=Political%20Guidelines%202024-2029_EN.pdf> accessed 12 March 2024.

[87] In the latest enlargement package, the Commission noted that Albania, Montenegro, North Macedonia and Bosnia and Herzegovina had reached or maintained full CFSP alignment, whereas Georgia, Serbia and Turkey kept a low alignment rate. See Commission (n 4).

[88] Already before the 2004 enlargement, the European Commission proposed the creation of a European Conference where the EU Member States and applicant States would consult on arising issues.

informs the Council and the European Parliament through progress reports[89] on the developments in the adoption and implementation of the *acquis*. The annual enlargement report, which covers the progress made by all countries in the process, is usually published in October.[90] This report is created based on the Commission's monitoring of the situation in each country, input from the EU delegation, and other sources.[91] The European Parliament, which has significant influence regarding the financial aspects of accession,[92] issues resolutions in response to the Commission's country reports. It also maintains bilateral relations with the parliaments of countries in the process to discuss issues relevant to integration.[93]

Accession negotiations can be suspended in cases of 'serious and persistent breaches of the principles of liberty, democracy, respect for human rights, fundamental freedoms, and the rule of law'.[94] In its revised methodology, the European Commission envisages situations of 'prolonged stagnation' or even backsliding in reform implementation in the acceding State. In such situations, the Commission takes decisive measures, such as halting or reversing the process which must be proportionate. The reversibility approach[95] also allows for the reopening or resetting of closed negotiating chapters.

4.3 Accession Treaty

When negotiations on all chapters or clusters of chapters are completed, a drafting committee creates an Accession Treaty, which comprises three elements: the treaty itself, the Act of Accession, and a Final Act. This treaty represents 'the only gate to EU membership' for the acceding

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[89] In June 2023, the European Commission extraordinarily gave an oral update on Ukraine's progress. See Olivér Várhelyi, Press remarks by Neighbourhood and Enlargement Commissioner, following the informal General Affairs Council <https://ec.europa.eu/commission/presscorner/detail/en/statement_23_3460> accessed 18 February 2024.

[90] In 2023, the report was published in November.

[91] Other sources include contributions from the EU Member States and from the governments of the countries, European Parliament reports, and various international and non-governmental organisations.

[92] Its budgetary powers give it direct influence over the amounts allocated to the Instrument for Pre-accession Assistance.

[93] Parliament also appoints standing rapporteurs for all candidate and potential candidate countries.

[94] 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.

[95] The reversibility approach was also mentioned in the French non-paper where the steps taken by the European Union would vary from a suspension of the benefits granted to a step backward or even general suspension. See Non-Paper (n 16) 2–3.

country.[96] It incorporates terms and conditions, including possible safeguard clauses and transitional arrangements, and serves as a primary source of EU law.[97] The Accession Treaty between the Member States and the acceding country may be interpreted and enforced by the European Court of Justice but cannot be declared invalid.

Only after the European Parliament gives its consent can the Council unanimously approve the treaty draft. The European Commission provides a position on the draft; however, this position is not binding on the Council. Importantly, an Accession Treaty sets the conditions for all acceding countries, meaning that it is a general framework rather than a mechanism for deciding on an individual application. If ratification of a treaty fails in the Member State, the entire enlargement process is vetoed. Apart from terms and conditions, safeguard clauses, transitional arrangements, and deadlines, the Accession Treaty includes details of financial arrangements. In its legal character, it can be considered hybrid,[98] meaning that it is an international agreement between Member State(s) and acceding State(s), which has the status of primary law, but also includes provisions concerning the aforementioned transitional arrangements and adjustments to secondary legislation.

In the end, the Accession Treaty is signed by representatives of all Member States and the candidate country or countries. The last step involves submission by all contracting States for ratification in accordance with their respective constitutional requirements (eg, a referendum[99] or ratification by parliament). If an acceding country fails to ratify the Treaty of Accession, the Council can unanimously decide on adjustments or declare that provisions explicitly referring to a State that has not deposited its instruments of ratification have lapsed. This allows the Treaty of Accession to enter into force for States that have deposited their instruments.[100] International organisations may not interfere with the national acceptance process,[101] so establishing membership is a genuinely bilateral act. The Accession Treaty enters into force when it has been ratified by all EU Member States and the acceding country, which then becomes a full member of the EU on the date provided in the treaty.

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[96] Truszczyński (n 66).

[97] Primary law is the supreme source of law in the EU.

[98] ibid.

[99] Before the 2004 enlargement, ratification of the Accession Treaty in the nine acceding countries (with the exception of Cyprus) was linked to the outcome of a referendum.

[100] This is the so-called 'Norwegian clause'. See Peter van Elsuwege, *From Soviet Republics to EU Member States (2 vols): A Legal and Political Assessment of the Baltic States' Accession to the EU* (Brill 2008) 355.

[101] Schermers and Blokker (n 37) 95.

From the date of accession, the provisions of the original Treaties and the secondary legislation are binding on the new Member State and apply under the conditions laid down in the Treaties and the Act of Accession.[102] Pursuant to the principle of an integrated package, the applicant State must accede to all the Treaties. The rationale behind this requirement is perfectly clear: it upholds the integrity of the European Union.[103]

Due to ongoing discussions on the need to reform the European Union before the next enlargement and in light of geopolitical challenges,[104] it is crucial to emphasise that an Accession Treaty should only involve necessary adjustments. In *Koening*, the European Court of Justice ruled that 'no provision in the Treaty of Accession or in the accompanying Act can be interpreted as validating measures, regardless of their form, that are incompatible with the Treaties establishing the Communities'.[105]

Although, as previously mentioned, the EU does not differentiate its member status, it does recognise the status of an 'acceding State', which can be likened to the status of an 'active observer' in various international organisations. An acceding State is one that has completed the accession procedure and signed the Treaty of Accession. Before becoming a full Member State on the date specified in the Treaty, the acceding country is kept informed of EU legislation and has the opportunity to comment on proposals, communications, recommendations, and initiatives. Additionally, in relevant bodies, it has the right to speak but not the right to vote.[106] This dichotomy, where the State has all the obligations under new EU laws but none of the rights, can be a source of frustration.[107]

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[102] The Accession Treaty is followed by an Act of Accession which defines the *acquis* to be accepted and the level of representation in different EU institutions.

[103] European Parliament (n 26).

[104] Christian Calliess, 'Reform the European Union for Enlargement!' (*Verfassungsblog* 2023) <https://verfassungsblog.de/reform-the-european-union-for-enlargement/> accessed 23 May 2024; European Parliamentary Research Service, Enlargement policy: Reforms and challenges ahead, Briefing 2023 <https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/757575/EPRS_BRI(2023)757575_EN.pdf> accessed 28 May 2024; Franco-German Working Group on EU Institutional Reform, 'Sailing on High Seas: Reforming and Enlarging the EU for the 21st Century' (Paris-Berlin 2023) <https://www.politico.eu/wp-content/uploads/2023/09/19/Paper-EU-reform.pdf> accessed 21 May 2024.

[105] Case C-185/73 *Hauptzollamt Bielefeld v König* ECLI:EU:C:1974:61.

[106] Commission, 'Acceding countries' (European Neighbourhood Policy and Enlargement Negotiations), <https://neighbourhood-enlargement.ec.europa.eu/enlargement-policy/glossary/acceding-countries_en> accessed 14 April 2023.

[107] For example, the Treaty on Accession of Croatia provided that the Commission would closely monitor Croatia's commitments in the accession negotiations, including those which had to be achieved before or by the date of accession. See Frank Emmert and Sinisa Petrović, 'The Past, Present and Future of EU Enlargement' (2014) 37 Fordham International Law Journal 1402.

5 Flexibility measures in the enlargement process

In the event of difficulties arising from the adoption of the EU *acquis*, Member States have preferred to use flexibility measures instead of renegotiating the *acquis*, unless renegotiation would forward further integration[108]. The EU has demonstrated its flexibility regarding the enlargement process by expanding the range of applied instruments, including general safeguard clauses, a 'super' safeguard clause, post-accession monitoring mechanisms, and country-tailored conditions.

5.1 General safeguard clauses

The purpose of general safeguard clauses is to address difficulties arising in any sector of the economy for up to three years from the date of accession. Authorised measures under these clauses can lead to derogations from the rules of the TEU, TFEU, and the Accession Act. The general safeguard clause used in the 2004, 2007, and 2013 Accession Acts allowed a new Member State to apply for authorisation to take protective measures in the case of serious and persistent difficulties in any sector of the economy or in the event of a situation that could cause serious deterioration in the economic conditions of a particular area. Additionally, any Member State could apply for authorisation to take protective measures. It is the Commission's responsibility to determine the protective measures, the conditions for their implementation, and their modalities. These measures should be the least disruptive to the functioning of the common market.

5.2 Special safeguard clauses

Special safeguard clauses were first introduced in the 2004 Accession Treaty, covering two key areas: infringements of the internal market and the area of freedom, security, and justice. At that time, the internal market clause was considered a last-resort tool. Both measures were limited to a three-year period following accession, although they could extend beyond this period if relevant commitments were not fulfilled. These measures were employed in subsequent enlargements as well. The European Commission invoked the internal market safeguard clause for the first time before the 2007 enlargement, specifically in response to shortcomings in the Bulgarian aviation sector. This marked a significant moment in the application of safeguard clauses, demonstrating the EU's

[108] Christophe Hillion, 'EU Enlargement' in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (OUP 2011) 192.

commitment to maintaining high standards and addressing issues proactively in the accession process.

While announcing Bulgaria and Romania's membership, the European Commission gave a reminder that safeguard clauses from the Accession Treaty can be used by the Commission and stated that both countries have to report bi-annually on progress in addressing specific benchmarks until they were met.[109] Due to the lower preparedness of Bulgaria and Romania, the special safeguard clauses were strengthened to ensure closer scrutiny and compliance with EU standards. Among the safeguard clauses was an unprecedented measure that allowed the Council of the EU to impose a 12-months delay of membership for either or both countries.[110] The measure could be used by the Council (by unanimity) if there was 'clear evidence that the state of preparations or adoptions and implementation of the *acquis* in Bulgaria or Romania [was] such that there [was] a serious risk of either of those States being manifestly unprepared to meet the requirements of membership by the date of accession of 1 January 2007 in a number of important areas'.

5.3 Transitional arrangements

Transitional arrangements are flexibility measures allowing for a delay in the implementation of the *acquis* after accession. They serve as an extension of the EU's pre-accession conditionality.[111] These specific arrangements, limited in time and scope, are designed to enable smooth integration. The majority of them are to the candidate's advantage, since applicants cannot be expected to apply the entire *acquis* on accession day. They can also serve to soothe public sentiment in candidate States caused by the fear of accession. The second type is to the candidate's disadvantage, such as, for example, those related to the freedom of movement of workers. Nevertheless, they should be kept to a minimum[112] and should be accompanied by a timetable for progressive achievement.[113]

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[109] Olli Rehn, 'Bulgaria and Romania to Become Member States in the EU' (Presentation in the EP Strasbourg, 26 September 2006) <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_06_533> accessed 19 April 2009.

[110] According to Adam Łazowski, the postponement safeguard clause played a crucial political role serving as 'a stick to discipline the forthcoming members in their last minute pre-accession efforts'. See Adam Łazowski, 'And Then They Were Twenty Seven... A Legal Appraisal of the Sixth Accession Treaty' (2007) 44 Common Market Law Review 416.

[111] Kirstyn Inglis, 'The Union's Fifth Accession Treaty: New Means to Make Enlargement Possible' (2004) 41 Common Market Law Review 937.

[112] Truszczyński (n 66).

[113] Alan Mayhew 'Enlargement of the European Union: An Analysis of the Negotiations with the Central and Eastern European Candidate Countries' (2000) SEI Working Papers (39) 12–13.

5.4 Cooperation and Verification Mechanism

For Bulgaria and Romania, the process of accession was delayed by nearly three years due to concerns about corruption, the fight against organised crime, and criminal justice systems. When they finally accessed the European Union, it happened without these two countries fully meeting the accession criteria. In 2016 the European Court of Auditors admitted that both countries joined despite the auditors' negative opinion.[114] Since both countries had to continue changes in the areas of judicial reform, corruption and organised crime (the case of Bulgaria), the European Commission underlined the need for 'further tangible results' and in 2006 established a Cooperation and Verification Mechanism (CVM) which allowed for the continuity of assessment of Bulgaria and Romania. The Commission's assessments were based on analysis and on monitoring and dialogue with the two new Member States. Other EU Member States, NGOs, independent experts and international organisations were also involved. Apart from the assessment, reports included recommendations. In 2019 the last report for Bulgaria was issued. As of Romania, it met the CVM commitments in 2022.[115]

6 Plural accession

According to research, the EU prefers to negotiate with groups of States that have already established relations with one another.[116] The accession process can be advanced not only by good relations between Member States and a candidate country or a group of candidate countries,[117] but also by fostered links between aspiring States.[118] As early as 1994, the European Council emphasised the importance of 'cooperation between the associated countries for the promotion of economic development and good neighbourly relations' to ensure they can assume their responsibilities as future Member States.[119]

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[114] Georgi Gotev, 'Romania and Bulgaria Were Not Ready for Accession, EU Auditors Confess' (*Euractiv* 2016) <https://www.euractiv.com/section/enlargement/news/auditors-romania-and-bulgaria-were-not-ready-for-accession/> accessed 12 March 2024.

[115] Commission, 'The reports on progress in Bulgaria and Romania' <https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/assistance-bulgaria-and-romania-under-cvm/reports-progress-bulgaria-and-romania_en> accessed 19 April 2024.

[116] Andreas Staab, *The European Union Explained: Institutions, Actors, Global Impact* (Indiana University Press 2013) 36.

[117] Eli Gateva, *European Union Enlargement Conditionality* (Palgrave Macmillan 2015).

[118] Staab (n 116).

[119] European Council, European Council Meeting on 9 and 10 December 1994 in Essen <https://www.europarl.europa.eu/summits/ess1_en.htm#ext> accessed 27 February 2024.

With numerous candidate countries, it is challenging to ensure even progress. In Agenda 2000, the European Commission emphasised that each country would be evaluated based on its own progress. Pursuant to the so-called regatta approach, negotiations at that time were started only with five countries.[120] Before the 2004 enlargement, it was pointed out that countries advanced in their reform efforts cannot be obliged to wait for those that are slower in their progress.[121] Similarly, in the current phase, the Council stressed that the progress of each country would depend on its own merit in meeting the Copenhagen criteria and the EU's absorption capabilities.[122] The European Union will, however, need to apply conditionality consistently and credibly. As noted by the European Council in 1997, all States in the process are 'destined to join the European Union on the basis of the same criteria' and participate in the process on an 'equal footing'.[123]

With the current number of States in the accession process, the possibility of a second 'big bang enlargement' to the East is increasingly plausible considering that currently ten States are in the process, including six in the Western Balkans,[124] three from the Association Trio,[125] and Turkey.[126] In this regard especially interesting is the situation in the Western Balkans where neighbourly relations and regional cooperation are pillars of the Stabilisation and Association Process (SAP) and enlargement process. According to the European Commission, the list of outstanding bilateral issues includes border issues, justice to war victims, identifying remaining missing persons, and establishing records of past atrocities.[127] Interestingly, the conviction among policy makers and experts that crisis

[120] Czech Republic, Hungary, Poland, Slovakia and Estonia.

[121] Agence Europe, 'EU/Enlargement. Applicant Countries that Have Made Further Progress Do Not Have to Wait for Others, Say Mr Kinkel and Mr Schussels' 23 July 1997.

[122] European Council meeting (23 and 24 June 2022) – Conclusions. Brussels, 24 June 2022, EUCO 24/22 <https://www.consilium.europa.eu/media/57442/2022-06-2324-euco-conclusions-en.pdf> accessed 19 April 2024; Presidency Conclusions, European Council Meeting in Laeken, 14 and 15 December 2001 <https://www.consilium.europa.eu/media/20950/68827.pdf> accessed 17 April 2024.

[123] Luxembourg European Council, 'Presidency Conclusions (12 and 13 December 1997)' <https://www.europarl.europa.eu/summits/lux1_en.htm> accessed 23 March 2024.

[124] Albania, Bosnia and Herzegovina, Montenegro, North Macedonia, Serbia and Kosovo which is a potential candidate.

[125] Ukraine, Georgia and Moldova. However, due to action taken by the Georgian government, the process has been suspended. In its latest 'Enlargement package', the Commission noted insignificant progress on the implementation of the nine steps that had been set by the European Commission.

[126] Negotiations with Türkiye have been at a standstill due to the deterioration of democratic standards.

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

mitigation measures lie in their economies[128] was one of the pillars of the SAP launched in 2000. Established separately from the EU accession negotiations, its aims were to help prepare Western Balkan States for eventual EU membership. SAP introduced the second – after the Copenhagen criteria, set of conditions for membership, therefore introducing double conditionality. According to the European Commission, this enhancement of rigour should help the countries tackle the advanced challenges they face throughout their reforms.[129] Although it sets out common goals, each country's progress is evaluated on its own merits.

Interestingly, the future case of plural accession would mark a departure from the enlargement strategy set in 2005, which stated that there would be 'no further enlargement with a large group of countries at the same time'.[130]

7 Conclusions

Membership in the European Union creates rights and obligations not only for the State but also for its citizens, business entities, and other organisations. From the date of accession, the provisions of the original Treaties and the secondary law become binding on the new Member State and apply under the conditions laid down in the Treaties and the Act. Over time, the accession process has evolved and adjusted to both internal and external factors. Each enlargement adds a layer of complexity for subsequent candidates. Moreover, the volume of the *acquis*, which candidate countries must accept before they can join the EU is constantly evolving and continues to grow until and beyond the country's accession. Therefore, the EU prefers candidate countries to adopt and implement as much of the *acquis* as possible prior to membership. Unsurprisingly, the implementation of the *acquis* is a crucial part of the negotiations.

Although negotiations are perceived as a technical process, with the European Commission playing a dominant role, they have clearly become more demanding than in the past, involving more scrutiny from the Council and the Member States.[131] Furthermore, it is a predominantly political process initiated by the aspiring State and concludes with a

[128] Bartlomiej Kaminski and Manuel de la Rocha, 'Stabilization and Association Process in the Balkans: Integration Options and their Assessment' (2003) World Bank Policy Research Working Paper 3108 <https://documents1.worldbank.org/curated/ru/873921468771103431/105505322_20041117165013/additional/multi0page.pdf> accessed 27 March 2024.

[129] Commission, *Revised Enlargement Methodology: Questions and Answers* <https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_182> accessed 12 November 2023.

[130] Commission, '2005 Enlargement Strategy Paper' (Communication), COM (2005) 561 final.

[131] Albeit no preparations for this have been made so far.

primarily political decision by the international organisation to admit the applicant State.[132] This organisation – the European Union – sets the conditions for assistance and ultimately for accession.[133] The nature of the conditionality gives the European Union stronger influence over various policies and processes than those typically falling under Union competence in the existing EU. Therefore, EU institutions must preserve credibility throughout the process to sustain reform momentum and public support in the aspiring State. The risk of refusal by the organisation may slow the process and diminish public support for accession.

Additionally, they need to develop new instruments of flexibility and enhance pre-accession support. This involves creating mechanisms that can address the specific challenges faced by candidate countries while ensuring that the enlargement process remains rigorous and credible. The EU has demonstrated flexibility in the past by expanding its range of instruments, such as safeguard clauses, 'super' safeguard clauses, post-accession monitoring mechanisms, and country-tailored conditions, and must continue to innovate to effectively manage future enlargements.

Suggested citation: SK Mazur, 'On the Verge of the Next EU Enlargement. Accession Legal Framework: Conceptual Overview' (2024) 20 CYELP 105.

[132] Schermers and Blokker (n 37) 94.

[133] Ulrich Sedelmeier and Helen Wallace, 'Eastern Enlargement: Strategy or Second Thoughts?' in Helen Wallace and William Wallace (eds), *Policy-Making in the European Union: The New European Union Series* (OUP 2000) 427.

NEW FRONTIERS FOR ARTICLE 19(1) TEU: A COMMENT ON JOINED CASES C-554/21, C-622/21 AND C-727/21 HANN-INVEST

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Abstract: Hann-Invest *is the first case of the Court of Justice of the EU assessing the state of the rule of law and independence of the judiciary in Croatia, and the most important judgment for the country since its accession to the European Union. But the judgment also has profound transversal relevance for future developments in EU law. In* Hann-Invest, *the Court of Justice ruled that Article 19(1) TEU precludes the Croatian judicial mechanism from ensuring the uniform application of the national case law. The disputed mechanism authorised the involvement of the national courts' judicial administration into the decision-making process of the competent judicial panels, in particular through the so-called 'registrations judges' who were assigned to monitor the coherence of decisions leaving the court's docket and by referring problematic cases to the collective decision-making of the judicial plenums in extra-procedural meetings. By declaring such an organisation of the national judiciary incompatible with EU law, the Court of Justice has established the initial doctrinal framework of 'internal judicial independence' under Article 19(1) TEU – further developing and reaffirming the value of the individual autonomy of national judges which, in its essence, has been considered central to the effective application of Union law since the* Simmenthal *ruling. Moreover, with* Hann-Invest, *the Court has set the trajectory of its future jurisprudence on Article 19(1) TEU beyond the scenarios of rule-of-law 'backsliding', potentially signalling the beginning of intense involvement with standard modes of operation of national judiciaries, which were until recently considered outside the EU's reach.*

Keywords: Article 19(1) TEU, judicial independence, organisation of national judiciaries, scope of EU law, rule of law, judicial autonomy, effective application of EU law.

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1 Introduction

On 11 July 2024, the Court of Justice of the European Union delivered its judgment in Joined Cases C-554/21, C-622/21 and C-727/21 *Hann-Invest*,[1] the first case on the state of the rule of law and independence of the judiciary in Croatia. In the judgment, going contrary to the Opinion of Advocate General Pikamäe,[2] the Court's Grand Chamber ruled that Article 19(1) TEU must be interpreted as precluding the Croatian judicial mechanism for ensuring the uniformity and consistency of case law, in particular of second-instance courts and the Supreme Court. In the national judicial architecture, this mechanism allows, within those courts, for the judgments of a deciding judicial panel in a particular case to be vetted and possibly blocked by internal judicial administration, essentially composed of two aspects. The first is the court's 'registrations judge' who is – sitting outside the deciding panel – assigned by the court's president to monitor the coherence of judgments leaving the court's docket. The second is the court's extra-procedural meeting of all judges (sitting in a section or a full court) who are – on contentious issues – empowered to issue abstract 'legal positions'. These abstract positions, in turn, should bind the judicial panels assigned to individual disputes, even to the extent of altering, *post-facto*, the content of their previously delivered judgments, prior to their notification to the parties. The referring national judges in the present cases were caught in precisely such a deadlock with the court's internal administration, seeking refuge in the Luxembourg promise to uphold the rule of law and the independence of the national judiciary. The Court of Justice responded and delivered a judgment with profound national, as well as supranational, relevance.

Indeed, *Hann-Invest* is the most important judgment of the Court of Justice for Croatia since its accession to the European Union, setting aside the standard and long-lasting operating mode of its judiciary. At the same time, the judgment has transversal relevance. In *Hann-Invest*, the Court established the initial doctrinal framework of internal judicial independence under Article 19(1) TEU, further developing and effectively reaffirming the value of national judges' individual autonomy which, in its essence, has been considered central to the effective application of Union law since the times of *Simmenthal*.[3] By doing so, the Court set the trajectory of its future jurisprudence concerning Article 19(1) TEU beyond rule-of-law 'backsliding', signalling the beginning of potentially

[1] Joined Cases C-554/21, C-622/21 and C-727/21 *Hann-Invest d.o.o., Mineral-Sekuline d.o.o. and Udruga KHL Medveščak Zagreb* ECLI:EU:C:2024:594 (hereinafter *Hann-Invest*).

[2] Joined Cases C-554/21, C-622/21 and C-727/21 *Hann-Invest* ECLI:EU:C:2023:816, Opinion of AG Pikamäe.

[3] Case 106/77 *Simmenthal* ECLI:EU:C:1978:49.

'very intense involvement' with standard modes of operation of national judiciaries.[4]

Such a level of Union intervention into the spheres traditionally perceived as within the national domain is certainly not without its controversies. This is likewise evident from the Court's stark disagreement with its Advocate General Pikamaë who wrote the Opinion in this case. In effect, the Court and the AG went in entirely opposite directions – on both the issue of admissibility of such systemic rule-of-law questions which have no material links to EU law under Article 267 TFEU, and in the final answer to the compliance of the Croatian mechanism with Article 19(1) TEU.

In an earlier contribution to this volume of the Yearbook, we analysed in detail and argued against the Opinion of AG Pikamäe by unravelling the true nature and problematic origins of Croatia's coherence mechanism, inviting the Court to set it aside as contravening the very essence of judicial independence required for the effective application of Union law protected under Article 19(1) TEU.[5] The Court followed the cue. In the present contribution, our aim is to build on our previous arguments and round off the analysis of *Hann-Invest* by juxtaposing the disagreement of the Court with its Advocate General and assessing in detail the grounds of the judgment.

To do so, after outlining the questions posed by the referring national court and the relevant national framework, we will assess the preliminary issue of the admissibility of references for a preliminary ruling such as the one in *Hann-Invest*, which questions the compatibility of national judicial systems and procedures with Article 19(1) TEU. We will then discuss the merits of the questions raised by the referring court in *Hann-Invest*, under which the Croatian mechanism for ensuring the uniformity of case law was declared incompatible with the Treaties.

Finally, we will reflect on the implications of this judgment for the national judicial system, outline the main doctrinal contributions of the judgment and discuss its potential in further developments in Luxembourg's jurisprudence on the rule of law and independence of the national judiciary.

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[4] D Sarmiento and S Iglesias, 'Is This the End? – From the Polish Parliamentary Election to the Croatian HANN-INVEST Case' (*EU Law Live*, 31 October 2023) <https://eulawlive.com/insight-is-this-the-end-from-the-polish-parliamentary-election-to-the-croatian-hann-invest-case-by-daniel-sarmiento-and-sara-iglesias/> accessed 20 November 2024.

[5] N Bačić Selanec and D Petrić, 'Internal Judicial Independence in the EU and Ghosts from the Socialist Past: Why the Court of Justice Should Not Follow AG Pikamäe in *Hann Invest*' (2024) 20 Croatian Yearbook of European Law and Policy ('Online First') <https://www.cyelp.com/index.php/cyelp/article/view/565> accessed 22 November 2024.

2 The national framework and the questions referred

The reference in *Hann-Invest* comes from three appeals procedures before the Croatian High Commercial Court, in which the merits of the cases had no substantive relation to EU law. In particular, the first two cases concerned reimbursements of costs relating to insolvency proceedings, and the third concerned a rejected application to open court-supervised administration proceedings.[6] But the substance of these cases was not even relevant for the issue at stake. Rather, the central problem facing the referring court was of a procedural nature. In all three cases, the competent judicial panels (of three judges) decided to dismiss the appeals and, having signed their judgments, delivered them to the court's case law registration service, in accordance with Article 177(3) of the Rules of Procedure of the Courts.[7] This Article provides:

> A case before a court of second instance shall be deemed to be closed on the date on which the decision is sent from the office of the judge concerned, after the case has been returned by the Registration Service. The Registration Service shall be required to return the case file to the office of that judge *as promptly as possible* after receipt thereof. That decision shall then be notified [to the parties] within a further period of eight days.[8]

In the cases at hand, however, such a prompt return of the judgments following their 'registration' did not occur. In fact, the registrations judge refused to register the judgments on account of his disagreement with the legal positions adopted by the competent judicial panel. To support his decision, in two of the three cases he relied on the existence of opposing legal positions adopted on the same point of law by other panels, one adopted earlier and the other adopted later than the one by the referring court. In the third case, no contravening case law was even cited. In all three cases, the registration of decisions (as a pre-requisite to close the procedure and deliver the judgment to the parties) was conditioned on complying with an alternative approach clearly favoured by the registrations judge, even in situations of existing conflicting trends in the case law of the referring court.[9]

Referring to the text of Article 177(3) of the Rules of Procedure, one may think that such an extensive authority of the registration judge,

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[6] *Hann-Invest* (n 1) para 10.

[7] Rules of Procedure of the Courts (Sudski poslovnik) Official Gazette 37/14, 49/14, 8/15, 35/15, 123/15, 45/16, 29/17, 33/17, 34/17, 57/17, 101/18, 119/18, 81/19, 128/19, 39/20, 47/20, 138/20, 147/20, 70/21, 99/21 and 145/21.

[8] Emphasis added.

[9] *Hann-Invest* (n 1) paras 12–14.

which effectively allows him to influence the judgments' final outcome, is not even prescribed by law. However, this provision of the Rules of Procedure does not exist in isolation, but within the wider framework of national law prescribing a mechanism for ensuring the consistency of the case law leaving a court's docket, in which judicial administration, and in particular the registrations judge, plays a crucial role. When the described deadlock occurs between the registrations judge and a deciding judicial panel, in line with long-lasting judicial practice, the matter is referred to a plenary meeting of judges, sitting in their extra-procedural formation (a section or a full court), and their majority vote should break the tie. The national legislation on the organisation of the judicial branch, and in particular Article 40 of the Law on Courts, provides for such an extra-procedural mechanism for ensuring the consistency of the case law, by prescribing as follows:

1. A section meeting or a meeting of judges shall be convened where it is found that there are differences in interpretation between sections, chambers or judges regarding questions relating to the application of the law or where a chamber or a judge of a section departs from the legal position previously adopted.

2. The legal position adopted at the meeting of all the judges or of a section of the Supreme Court [or of the second-instance courts, including the High Commercial Court] shall be *binding* on all the chambers or judges at second instance of the section or court concerned.[10]

In simpler terms, when a judicial panel competent to decide a particular case refuses to comply with the position of the registrations judge (which might or might not differ from the other judgments of the same court), the contentious questions on the proper interpretation of the law are referred to the court's (section) meeting. In this meeting, held behind closed doors, all sitting judges of the court – the judges originally assigned to the case, and those who are not, including the registrations judge – deliberate on the matter and deliver a joint 'legal position' by a majority vote. This entire process and the intervention of the registrations judges or the judicial meeting, moreover, occurs without any knowledge or intervention of the parties in the original dispute. And indeed, in accordance with Article 40 of the Law on Courts, the legal position adopted at the judicial meeting should be binding on all judicial panels of that court in subsequent decisions, including the unregistered judgment from which the dispute originated. Even if such a judgment was previously adopted and voted on by the deciding panel, the judgment should subsequently be altered to comply with the majority's legal position, or else the

[10] Law on Courts (Zakon o sudovima) Official Gazette 28/13, 33/15, 82/15, 82/16, 67/18, 126/19, 130/20 (emphasis added).

original judgment may be stuck in a judicial administration limbo, being delivered by the competent panel, but unregistered in the registration services' drawers, which keeps it from being notified to the parties.

Being stuck in such circumstances in the three cases of *Hann-Invest*, the national court referred two questions to the Court of Justice concerning the compatibility of such (extra-)procedural judicial mechanisms designed to ensure the consistency of the case law with the standards of judicial independence under Union law. More particularly, the questions were: are Article 177(3) of the Rules of Procedure (prescribing the role and duties of the court's registrations' office) and Article 40(2) of the Law on Courts (laying down that the court's abstract 'legal positions' are binding on its individual panels) compatible with Article 19(1) TEU and Article 47 of the Charter?[11]

3 Jurisdiction and admissibility

To get a reply from the Court of Justice on the substance of the referred questions, the first obstacle is always the question of admissibility. As is well known, in the framework of the preliminary ruling procedure under Article 267 TFEU, the Court's interpretations of the provisions of EU law are meant to enable the national court to 'give judgment' in the main proceedings. So, if there is no link between the provisions of EU law whose clarification the referring court seeks and the dispute before it, there is nothing for the Court of Justice to interpret. In such situations, the Court will consider the referred questions to be inadmissible. And the reason is that the Court refuses to issue advisory opinions or interpret EU law in abstract terms or in relation to hypothetical disputes. In its view, the purpose of the preliminary ruling procedure is to establish *meaningful* cooperation through which the Court supports the administration of justice before national courts. So, the Court needs to provide a useful answer to the national judge to directly assist that judge in resolving the real dispute in the main proceedings.

To complicate matters, we have the ruling in *Portuguese judges*.[12] Here, as is also well known, the Court of Justice interpreted the scope of Article 19(1) TEU, which requires Member States to 'ensure effective legal protection in the fields covered by Union law', in a broad manner, in fact more broadly than the scope of Article 47 of the Charter of Fundamental Rights, which requires Member States to guarantee the right to an effective remedy and the right to a fair trial but only when they are 'implementing EU law', in the sense of Article 51(1) of the Charter. So, from

[11] *Hann-Invest* (n 1) paras 24–25.

[12] Case C-64/16 *Associação Sindical dos Juízes Portugueses (ASJP)* ECLI:EU:C:2018:117.

Portuguese judges it follows that Article 19(1) TEU requires all national courts to remain independent at all times and be capable of ensuring effective legal protection in general, and not only in particular situations when they are applying EU law to solve disputes. But then the question is in which cases are interpretations of Article 19(1) TEU – related to, say, systemic concerns over judicial appointments – really necessary for a national court to 'give judgment' in the main proceedings whose subject matter is related to something very specific, such as protection of copyright?

In *Hann-Invest*, the referring court considered that the interpretation of Article 19(1) TEU was essential for solving, as a preliminary matter (or *in limine litis*), an issue of national procedural law, which contained mechanisms that were threatening its independence. Only after that, the referring court considered, would it be able to bring the disputes in the main proceedings to a close. Yet, importantly, those disputes – which arose in the framework of insolvency proceedings, as already mentioned – had no apparent substantive connection to EU law. Still, the fact was that the referring court could be called upon to rule on questions of interpretation and application of EU law and therefore constitutes part of the judicial system providing legal remedies in Croatia. As such, the referring court is tasked with ensuring effective legal protection in the 'fields covered by Union law', in accordance with Article 19(1) TEU after *Portuguese judges*.[13] So, in relation to such a national court, the Court of Justice does have jurisdiction to interpret Article 19(1) TEU.[14] No surprises there. But this does not tell us anything about whether an interpretation of Article 19(1) TEU in relation to Croatian procedural law is necessary for the referring court to solve disputes about insolvency law in the main proceedings. This is where the admissibility question kicks in.

At first glance, there appears to be a precedent for dealing with admissibility in circumstances like these. This is *Miasto Łowicz*.[15] In this judgment, the Court of Justice laid down scenarios in which the referred questions need to fall in order to be accepted as admissible. The key thing is whether there exists 'a connecting factor between that dispute and the provisions of EU law whose interpretation is sought, by virtue

[13] *ASJP* (n 12) paras 29–37.

[14] *Hann-Invest* (n 1) paras 34–38. See also Case C-824/18 *AB and Others v Krajowa Rada Sądownictwa* ECLI:EU:C:2021:153, paras 108–114; and Case C-896/19 *Repubblika v Il-Prim Ministru* ECLI:EU:C:2021:311, paras 36–39. However, compared to these cases, the Court in *Hann-Invest* relied on a broad scope of Article 19(1) TEU to establish its jurisdiction in the context of verifying whether the referred questions are admissible, rather than in the central part of the judgment in which the Court discusses the merits of the referred questions.

[15] Joined Cases C-558/18 and C-563/18 *Miasto Łowicz* ECLI:EU:C:2020:234.

of which that interpretation is objectively required for the decision to be taken by the referring court'.[16] This 'connecting factor', which can be direct or indirect, is taken to exist in the following three situations.[17] In the first, it is direct when the dispute in the main proceedings is *substantively* connected to EU law whose interpretation is sought, and the referring court needs to apply that law to solve the dispute. In the second, it is indirect when the referring court has to apply some *procedural* provision of EU law, whose interpretation it needs before it can deliver a ruling in the main proceedings. And in the third, it is also indirect when the referring court seeks an interpretation of EU law to allow it to resolve a *procedural* question of *national* law, before being able to rule on the substance of the dispute before it. In this third situation, the general impression was that the substance of the dispute before the referring court had to have some relation to EU law.[18]

In his Opinion, AG Pikamäe proposed that the Court should reject the reference in *Hann-Invest* as inadmissible. The reason was that the referred questions do not correspond to either of the three admissibility scenarios, and as such lacked the requisite 'connecting factor'. The main problem was that the disputes before the referring court did not have a clear substantive link to EU law – or better, the referring court did not establish the existence of such a link. Hence, in his view, the referring court failed to prove that the interpretation of Article 19(1) TEU was indeed necessary for it to deliver a ruling in the main proceedings.

Moreover, the AG suggested that, as a general matter, these are not the kinds of questions that the Court of Justice should be dealing with in the preliminary ruling procedure under Article 267 TFEU. To him, the reference in *Hann-Invest* was similar to other references thrown at the Court following the landmark *Portuguese judges* ruling, which concerned questions such as the allocation or transfer of cases within a court, the promotion of judges or their salary scales, which likewise had no clear link to the substance of disputes in the main proceedings.[19] These references are, then, concerned with issues that are of limited and singular importance, which do not result in serious and systemic infringements of the rule of law in the Member State concerned. In fact, the AG considered that some national courts that wish to draw the Court into deciding on these controversies are abusing the preliminary ruling procedure. They

[16] ibid, para 48.

[17] ibid, paras 49–51.

[18] As it followed from Joined Cases C-585/18, C-624/18 and C-625/18 *AK and Others* ECLI:EU:C:2019:982, to which the Court referred when describing this third admissibility scenario.

[19] *Hann-Invest*, Opinion of AG Pikamäe (n 2) para 30.

are trying to come up with any 'procedural pretext […] to present before the Court […] [their] dissatisfaction with and/or criticism of the functioning of the national judicial system'.[20] This is 'contrary to the spirit and purpose' of Article 267 TFEU, the AG suggested.[21] Therefore, the Court should be more cautious not to get drawn into these controversies. To stay out of them, it has to be more rigorous in assessing the admissibility of these references, even if this means rejecting them to limit the barrage of questions that are inappropriate for its involvement, and ultimately to discourage national courts from referring them in the first place.

Despite this, AG Pikamäe admitted that his proposal did not sit well with some recent decisions of the Court of Justice. He mentioned several cases in which the Grand Chamber of the Court agreed to rule in circumstances comparable to those in *Hann-Invest*, and accepted the references in question as admissible.[22] The relevant case law on this point was thus not settled. With concerns of institutional policy in mind, the AG urged the Court to adopt a stricter and tighter admissibility check, hence choosing a less expansive approach and implicitly discarding those several recent rulings as outliers and aberrations. If the Court did not follow his proposal, AG Pikamäe saw the floodgates opening. In his view, (too) loose admissibility criteria plus a far-reaching interpretation of Article 19(1) TEU on the merits would mean 'an extensive, not to say unlimited, application of that provision in a field, the organisation of justice in the Member States, which is supposed to fall within the jurisdiction of the Member States'.[23] Is, therefore, a restrained court, which stays away from somewhat sensitive (or perhaps petty) issues – usually of a procedural nature – which national judges face, a good court?

The Grand Chamber of the Court of Justice did not think so, and refused to follow the proposal of AG Pikamäe. As some authors predicted,[24] it established its jurisdiction to interpret Article 19(1) TEU and declared the references admissible. And it did so laconically and without spilling too much ink. Without reflecting on the admissibility criteria from *Miasto Łowicz*, the Court simply asserted that its reply was necessary for the referring court to conclude three disputes in the main proceedings in

[20] ibid, para 30 fn 13.

[21] ibid, para 30.

[22] Citing Case C-256/19 *S. A. D. Maler und Anstreicher* ECLI:EU:C:2020:523 (Order of the Court); Joined Cases C-748/19 to C-754/19 *Prokuratura Rejonowa w Mińsku Mazowieckim and Others* ECLI:EU:C:2021:931; Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 *Asociația 'Forumul Judecătorilor din România' and Others* ECLI:EU:C:2021:393; and Joined Cases C-615/20 and C-671/20 *YP and Others* ECLI:EU:C:2023:562; see *Hann-Invest*, Opinion of AG Pikamäe (n 2) paras 42–43.

[23] *Hann-Invest*, Opinion of AG Pikamäe (n 2) para 45.

[24] Sarmiento and Iglesias (n 4).

which it had already reached decisions, yet where those proceedings were interrupted first by the registrations judge who refused to register those decisions and deliver them to the parties, and then by the section meeting that adopted a 'legal position', which was meant to bind the referring court and force it to change the content of its initial decisions.[25] To put it simply, the referring court faced a very practical and concrete dilemma: if the Croatian mechanism for ensuring the uniformity of case law was compatible with the standards of judicial independence under the Treaties, the referring judges would have to abide by the 'legal position' and modify their decisions. And if not, the referring judges could keep their original decisions which would have to be delivered to the parties without delay. In this sense, the 'connecting factor' was established between Article 19(1) TEU, to which the referring court turned in its reference, and the disputes in the main proceedings before that court. So, it was necessary for the referring court to receive an interpretation of that provision from the Court of Justice, and – by following the guidance provided by the Court therein – to bring the disputes in the main proceedings to an end.[26]

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[25] *Hann-Invest* (n 1) para 41.

[26] This is where the fourth reference from the same court failed and was consequently declared inadmissible: see Case C-327/22 *Prom-Vidija* ECLI:EU:C:2023:757 (Order of the Court). In it, the referring court questioned the compatibility of provisions found in the Rules of Procedure of the Courts and the decisions of the president of their court with Article 19(1) TEU. These provisions set the order in which cases have to be dealt with by judicial panels of the same court, whereby cases received years earlier had to be given priority and treated in an urgent manner. The same provisions also prohibited delivery to the parties of judgments that were not issued in this pre-determined order. The task of ensuring that the order of handling cases is complied with was shared between the registrations judge and the vice-president of the court. The fact that in this way some decisions may be held back for months was, in the referring court's view, contrary to the requirements of efficient judicial protection and the parties' access to justice. However, the Court of Justice noted that the interpretation of Article 19(1) TEU was not necessary for the referring court to solve the substance of the dispute in the main proceedings. Namely, when the registrations judge and the vice-president informed the referring judges that their decision cannot be delivered to the parties because it was not issued in the determined order, they did not require the content of that decision to be changed, unlike what we saw in *Hann-Invest*. Rather, the problem occurred with the timing of the delivery of the decision, and the Court's reply would not change anything in that respect since the merits of the dispute in the main proceedings had already been settled by the referring court. For this reason, the Court rejected this reference as inadmissible. Note also that the fifth reference from the same court, which contained identical questions to the three references joined in *Hann-Invest*, was withdrawn after the Court's registrar informed the referring court of the ruling in *Hann-Invest*, since thereby all the questions had been answered. See Case C-361/21 *Pet-Prom* ECLI:EU:C:2024:913 (Order of the President of the Court). And there is a sixth and final reference from this Croatian court, in Case C-403/24 *Prvo plinarsko društvo*, currently pending before the Court of Justice, in which one of the referred questions concerns the role of the registrations judge under Article 177(3) of the Rules of Procedure of the Courts and its compatibility with Article 19(1) TEU, which was resolved in *Hann-Invest* and thus became moot. The other referred question concerns the obligation of courts in civil proceedings, involving payments based on contracts for gas supply from a Russian company, to take into account decisions of the Council adopted in the area of the Common Foreign and Security Policy.

From this we can see that, compared to the AG, the Court had a much broader understanding of what is 'necessary to enable [a national court] to give judgment' under Article 267 TFEU. The AG read this as meaning that the Court's ruling needs to be necessary for the national court to determine or change the substance of its judgment. The Court read it as meaning that its ruling is also necessary to enable the national court to physically issue its judgment and literally 'give' it to the parties so that it can start producing effects. So, the AG's reading would be a narrower, content-dependent, and 'substantive-questions-only' one, while the Court's would be a wider, content-independent, and 'procedural-questions-also' reading.[27] It remains to be seen whether this approach will be consolidated in future cases, so that requested interpretations of Article 19(1) TEU will always be acknowledged as necessary for national courts to resolve procedural questions of national law pertinent to the ongoing main proceedings (even though those proceedings have no substantive link to EU law) and as such make the references for a preliminary ruling admissible.[28]

4 Merits of the judgment: can judges depend on other judges when judging?

After dealing with the questions of jurisdiction and admissibility, what was left were the merits of the case. Here again, we saw a stark disagreement between AG Pikamäe and the Court of Justice concerning the interpretation of Article 19(1) TEU and what it means specifically in relation to this 'internal' dimension of judicial independence, as was brought out by the circumstances of the reference in *Hann-Invest*.

The AG did not offer many arguments to support his conclusion that Article 19(1) TEU does not preclude the application of a procedural mechanism such as the Croatian one for ensuring the consistency and uniformity of case law, for which he had already been criticised at length.[29] His positive assessment was essentially hanging on an assumption about the difference between the 'interpretation' and the 'application' of the law.[30]

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[27] For an earlier discussion of the Court's understanding of what is necessary for a national court to give a judgment, see Sébastien Platon, 'Preliminary References and Rule of Law: Another Case of Mixed Signals from the Court of Justice Regarding the Independence of National Courts: *Miasto Łowicz*' (2020) 57 Common Market Law Review 1843, 1855 ff.

[28] Cf *Hann-Invest*, Opinion of AG Pikamäe (n 2) paras 39–41, where he argued that 'the basis for the Court's jurisdiction cannot be the basis for the admissibility of references for a preliminary ruling, as this would confuse two separate legal concepts and render that latter requirement meaningless'.

[29] See Bačić Selanec and Petrić (n 5).

[30] To make this assumption more plausible, the AG recalled a familiar example: preliminary ruling mechanisms that exist in many Member States, including the one from Article 267

Therefore, in the key parts of this Opinion, the AG argued that 'if the distinction between interpretation and application of a legal rule is accepted',[31] then the Croatian mechanism raises no concerns for the independence of judges that are tasked with solving a particular dispute or for the right to a fair trial of the parties to that dispute. In his view, when delivering 'legal positions', section meetings are only concerned with the interpretation of disputed legal provisions in abstract terms. They do not decide on the application of those provisions to a particular set of facts in concrete disputes. This is a task for the deciding judges, who are bound only by the abstract interpretations contained in 'legal positions', which they remain free to apply to specific factual circumstances. So, the independence of the deciding judges remains. It remains intact even after the intervention of the registrations judge, since that judge cannot, in the AG's view, impose his view on the deciding chamber, influence the content of their decision, or ultimately determine what the adopted 'legal position' will be. On paper at least, the registrations judge can only warn the deciding judges about possible inconsistencies with earlier case law, and later alert the president of the court about their disagreement. And it is only the president who can decide whether a section meeting has to be convened; and it is only the section meeting that can adopt a binding 'legal position', in which the view of the deciding judges or the view of the registrations judge will be endorsed.[32]

Since the interpretation of the law is 'by its nature, the work of a judge', the AG continued, section meetings do not have to be open to the parties in disputes.[33] In short, *iura novit curia*, only stretched to its limit. Under this principle, often taken to an authoritarian extreme by post-socialist judiciaries,[34] the law is removed from the parties' sight, and left exclusively in the hands of the court. The interpretation is not a

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TFEU, where the ideal division of tasks is that the Court of Justice interprets EU law but cannot apply it to specific cases, which is for the referring court to do freely and on its own. See *Hann-Invest*, Opinion of AG Pikamäe (n 2) para 68.

[31] ibid, paras 69 and 78.

[32] ibid, para 70.

[33] ibid, paras 67, 71, 77.

[34] As beautifully explained by Zdeněk Kühn, who wrote that this principle, whose original logic in the Continental legal tradition was to oblige the courts to raise points of law even without the parties' request, in the post-socialist countries received the following traits: 'the pluralism of opinions is absent'; '[t]he "right" answer is achieved through a "one-way" process and is backed entirely by threat and force'; '[t]hose to whom decisions are addressed cannot participate in finding the "right" answers; instead of being subjects, they are rather objects of authoritarian decision-making'; 'legal meanings are produced from above and […] the existence of any dispute, questioning, legitimate disagreement, or construction of the law from the bottom-up is unthinkable'. See Z Kühn, 'The Authoritarian Legal Culture at Work: The Passivity of Parties and the Interpretational Statements of Supreme Courts' (2006) 2 Croatian Yearbook of European Law and Policy 19, 20–25.

discursive and argumentative process but a magisterial and bureaucratised one. The legal 'positions' are unmistakeably found at the top and imposed on those below. Only by understanding interpretation and the law in this way was it possible for the AG to conclude that there are no problems with formulating binding 'legal positions' behind closed doors, during meetings to which the parties have no access, and which are not regulated by rules of judicial procedure; or that these 'legal positions' come with no reasoning or argumentation to justify the majority decision of the judges that took part in the meeting. A meeting is not a hearing or a trial, so nothing that happens at that meeting or comes out of it can affect the parties' right to a fair trial.

Where AG Pikamäe went left, the Grand Chamber went right, taking an opposite direction. To espouse its own view of the questions raised by the referring court, it first had to set the scene. The background to the scene was made of familiar pieces from the earlier case law on judicial independence.

The Court started by saying that all national rules and practices that aim at ensuring the consistency and uniformity of the case law and at safeguarding legal certainty, which is itself an important element of the rule of law, must be compatible with the requirements that stem from Article 19(1) TEU.[35] In so doing, the Court referred to its standard expression of supremacy of EU law, which operates even over retained competences of the Member States, such as the organisation of the judiciary, in cases where the two overlap. The Court stated that even if, in principle, the establishment, composition and functioning of national courts fall within the competence of the Member States, in exercising that competence, the Member States must comply with EU law and, in particular, the standards of independence of the judiciary as prescribed in Article 19 TEU.[36] This 'spillover' formula indeed demands that Member States comply with the 'radiating' requirements of EU law even in the areas of their exclusive competence; or, on the flipside, it enables those general requirements of EU law to apply in the areas where Member States have not conferred competence on the EU, such as the organisation of national justice systems.[37] In this way, EU law as interpreted by the Court of Justice 'frames' national substantive and procedural laws.[38]

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[35] *Hann-Invest* (n 1) para 48.

[36] See N Bačić Selanec, 'A Realist Account of EU Citizenship' (doctoral dissertation, University of Zagreb 2019) 282–294; see also L Azoulai, 'The "Retained Powers" Formula in the Case Law of the European Court of Justice: EU Law as Total Law?' (2011) 4 European Journal of Legal Studies 192.

[37] Other typical examples include criminal law, direct taxation, attribution of nationality, health, education, social security, citizens' civil status, marriage and adoption laws, and so on.

[38] K Lenaerts, 'Federalism and the Rule of Law: Perspectives from the European Court of Justice' (2010) 33 Fordham International Law Journal 1338, 1343 ff.

The supremacy clause was followed by reiterating well-established case law, from which it follows that an essential requirement under Article 19(1) TEU is the independence of national courts. This independence comes in two dimensions, external (institutional) and internal (vis-à-vis the subject matter of the dispute or the parties to it), as is well known. Yet in *Hann-Invest*, the Court confirmed for the very first time that the 'external' dimension of judicial independence, although originally intended to shield judges from interference of the legislature and the executive, since it revolves around the idea of the separation of powers,[39] also protects them from undue influences that come from within their courts.[40] With this, the Court added an internal dimension to the already recognised external one. It clearly differentiated between a 'court' in the institutional sense, which can be subject to undue pressure from other institutions of the government (external independence), and a 'court' in the functional sense, as a judge or a panel of judges seized of a dispute, who may be subject to undue pressure from other judges holding administrative positions within their own institution (internal–external independence).

Besides the requirements of judicial independence and impartiality, the Court continued by elaborating another requirement that follows from Article 19(1) TEU, and that is the existence of a court 'previously established by law'.[41] This principle in EU law covers not only the legal basis of a court or the composition of its bench in particular cases. It also implies that the judicial panel originally seized of a case is the only one that can make the decision to bring proceedings to an end. This confirms the autonomy of judges in the functional sense, ie their exclusive power to determine the content of their rulings and the procedural fate of the cases they hear, where any external instructions or interventions are entirely prohibited, including those coming from their peers, especially those who enjoy administrative powers.[42] In simple terms, judges judge, and (judicial) administrators administer.[43]

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[39] Cf Case C-430/21 *RS (Effect of the decisions of a constitutional court)* ECLI:EU:C:2022:99, para 42: 'In accordance with the principle of the separation of powers which characterises the operation of the rule of law, the independence of the courts must be ensured in relation to the legislature and the executive'.

[40] *Hann-Invest* (n 1) para 54, referring to *Parlov-Tkalčić v Croatia* App No 24810/06 (ECtHR, 22 December 2009) para 86.

[41] *Hann-Invest* (n 1) para 55.

[42] The same idea was already included in *Portuguese judges*, where the Court held that '[t]he concept of independence presupposes, in particular, that the body concerned *exercises its judicial functions wholly autonomously*, without being subject to any hierarchical constraint or subordinated to any other body and *without taking orders or instructions from any source whatsoever*, and that it is thus *protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions*' (emphasis added). See *ASJP* (n 12) para 44.

[43] Cf A Uzelac, 'The Meaning of "Court"' in B Hess, M Woo, L Cadiet, S Menétrey and E Vallines García (eds), *Comparative Procedural Law and Justice* (Max Planck Institute

In addition, the principle of a court 'previously established by law' requires that in the course of judicial proceedings, all procedural guarantees are ensured.[44] These guarantees include the parties' right to be heard, as an essential element of their right to a fair trial and effective judicial protection expressed in Article 47 of the Charter.[45] Parties, therefore, must have the opportunity to hear and respond to all points of law and fact that may be decisive for the outcome of their dispute.[46] The composition of the judicial panel that decides on their matter must be transparent and known to them in advance, which excludes the possibility of any 'external' interference in the decision-making process by judges or officials who were unknown to the parties and with whom they did not have the chance to argue about relevant legal or factual questions.[47] With this, the Court adopts a conception of judicial proceedings and interpretation of law which is radically different from AG Pikamäe's. Here, the parties are involved through and through, and judicial decision-making is a process more inclusive, discursive, and argumentative than what the AG imagined. This picture fits well with the recent landmark rulings of the Court, which link Article 47 of the Charter and the parties' role in judicial proceedings to the duty of national courts to state reasons for their interpretations of EU law and refusals to refer questions of interpretation to the Court of Justice,[48] which in a similar manner speaks of how the Court sees the nature of the judicial process.

Moving from the general to the specific part of the judgment, the Court decided to further assist the referring court. It acknowledged, as always, the sole jurisdiction of the Croatian court to take previously described EU requirements of judicial independence, which were interpreted in an abstract manner and in the form of guidance, and apply them when assessing the compatibility of the Croatian procedural mechanism with Article 19(1) TEU in specific cases. But this time, the Court decided to throw in its own view of the matter, invoking the spirit of cooperation looming over the preliminary ruling procedure which requires it to give

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Luxembourg for Procedural Law, University of Luxembourg 2024) para 60 <https://www.cplj.org/publications/2-1-organization-of-the-civil-justice-system-and-judicial-independence> accessed 25 November 2024.

[44] *Hann-Invest* (n 1) para 57.

[45] ibid, para 58.

[46] ibid. In this respect, cf *Kress v France* App No 39594/98 (ECtHR, 7 June 2001) para 74: '[T]he concept of a fair trial also means in principle the opportunity for the parties to a trial to have knowledge of and comment on all evidence adduced or observations filed […] with a view to influencing the court's decision'.

[47] *Hann-Invest* (n 1) para 59.

[48] See Case C-561/19 *Consorzio Italian Management* ECLI:EU:C:2021:799, especially para 51.

a 'useful' answer to its interlocutor,[49] hence preordaining the outcome at which the referring court should eventually arrive.

Firstly, concerning the more important issue of the power of section meetings to adopt 'legal positions' by which they can force the deciding judicial panels to change their rulings after they have already been adopted, the Court ruled that the provisions of national law in question are incompatible with Article 19(1) TEU. To get there, at the outset the Court expressly disregarded the suggested difference between the abstract 'interpretation' and concrete 'application' of the law, which was relied on by AG Pikamäe in his positive assessment of the Croatian rules. It did so by noting that although the section meeting does not decide on the application of the law to specific facts, when adopting a 'legal position' it does interpret the law in the light of the specific dispute that gave rise to its convening and intervention.[50] So, this formalistic difference was not able to save the national provisions from being strictly scrutinised by the Court.

Going further, the Court rightly pointed out that the section meeting enables a number of judges who are not members of the deciding judicial panel to influence the content of the final ruling which was already deliberated and agreed upon by that panel.[51] The Court then explained the most problematic aspects of this arrangement. On the one hand, there are no sufficiently objective criteria that govern circumstances in which the section meeting intervenes in a given proceeding. Although the Croatian Law on Courts does mention existing or potential departures from the established case law of a high court, the cases before the referring judicial panel revealed that the section meeting can be convened even when there is no alleged inconsistency in the case law, or only because the registrations judge disagrees with the legal view adopted by the deciding panel. As a consequence, the autonomy of the deciding judges inherent in the judicial function is negated, and the majority of their peers can easily downgrade them to something like ordinary bureaucrats. These kinds of external interventions are therefore clearly incompatible with the principle of a court previously established by law, and threaten the independence of individual judges and their decision-making. On the other hand, the parties to the proceedings before the deciding panel are left in total darkness regarding the continuation of their case. They are not aware of anything happening during the section meeting. They have no idea of the judges who sit and decide at that meeting (which can, in some cases, raise concerns about judicial partiality). They have no information or knowledge about the reasoning behind the 'legal position'

[49] *Hann-Invest* (n 1) para 60.

[50] ibid, para 73.

[51] ibid, paras 75–76.

adopted at the section meeting. All this leads to a complete disregard of the parties' procedural right to be heard and their right to argue about the applicable law.[52] In such circumstances, the effective judicial protection of their rights clearly remains a mere illusion.

With a similar tone, the Court of Justice went on to examine the power of the registrations judge to intervene and block the delivery of decisions to the parties and hence prevent the decisions from becoming final. The Court ruled that this practice is likewise incompatible with Article 19(1) TEU. In this part of the judgment, it is interesting how the Court deeply engaged with the reading of national law, and in several places rightly pointed out that such a role of the registrations judge is not even envisaged in the national law.[53] The Court emphasised that, although the registrations judge cannot directly influence the content of the ruling of the deciding judicial panel, the intervention of the registrations judge can in practice nevertheless influence the final outcome.[54] This influence is exerted by refusing to register the ruling and returning it to the deciding panel for re-examination; and where the panel disagrees with the registrations judge's observations, the latter can invite the president of the court's section to convene a meeting which adopts a 'legal position' that will strictly bind the deciding panel.

In the Court's view, there are two particularly problematic things related to such an intervention of the registrations judge, which mirror those highlighted when examining the powers of the section meetings. The first is that it happens after the deciding panel has deliberated and adopted its ruling, even though the registrations judge is not a member of that panel and does not participate in the proceedings that lead to the decision.[55] And the second is that that intervention is not based on clear and objective criteria provided in national law.[56] The discretion of the registrations judge is therefore practically unlimited, and the registrations judge is not required to provide a specific justification of his or her intervention. That this is not merely a hypothetical possibility can be seen in the cases before the referring judicial panel, where the registrations judge returned to them decisions either without pointing to an alleged inconsistency with the case law of their court or because the registrations judge preferred a different legal view or outcome. So, these kinds of interventions of the registrations judge in the judicial procedure and decision-making are likewise contradictory to the EU law requirements

[52] ibid, paras 77–78.

[53] ibid, paras 61–63, 66.

[54] ibid, paras 64–65.

[55] ibid, para 67.

[56] ibid, para 68.

of a court previously established by law and judicial independence and autonomy, which are there to guarantee effective judicial protection.

Before signing off on its judgment, the Court of Justice at the very end decided to go above and beyond the reply to help the referring court in solving the immediate case. In the very last paragraph, the Court added several lines that can be read as a general message not only to the Croatian judiciary but all national judiciaries in the EU. There, the Court sketched the contours of procedural mechanisms whose aim would be to ensure consistency and uniformity of the case law and safeguard legal certainty, yet which would remain within the framework of Article 19(1) TEU requirements.[57]

Firstly, and obviously, the judicial panel originally seized of the case can always decide autonomously and of its own will to refer contentious points of law raised in the course of the proceedings to an extended formation of the same court. Indeed, mechanisms like this already exist in different Member States, and as such are not suspect from the perspective of judicial independence and effective judicial protection.[58]

Secondly, and more importantly, are the mechanisms that allow judges who *are not* members of the panel originally seized of the case to refer the matter to an extended formation of their court. They can remain in place or be introduced only if the following conditions are met: (i) the judicial panel originally seized of the case has not yet deliberated and adopted its decision; (ii) national legislation contains clear criteria under which such referral can be made; and (iii) the referral to an extended

[57] ibid, para 80. Elsewhere, the Court somewhat similarly elaborated on the substantive and procedural conditions which must be met to ensure respect for judicial independence in procedures which involve external interferences (ie from the legislator or the executive) with the functioning of national judiciaries. See Case C-619/18 *Commission v Poland (Independence of the Supreme Court)* ECLI:EU:C:2019:531, para 111: '[T]he fact that an organ of the State such as the President of the Republic is entrusted with the power to decide whether or not to grant any such extension [of judges' mandate or term in office] is admittedly not sufficient in itself to conclude that that principle [of judicial independence] has been undermined. However, it is *important to ensure that the substantive conditions and detailed procedural rules governing the adoption of such decisions* are such that they cannot give rise to reasonable doubts, in the minds of individuals, as to the imperviousness of the judges concerned to external factors and as to their neutrality with respect to the interests before them' (emphasis added).

[58] Some of them were mentioned by AG Pikamäe in his Opinion, yet were improperly equated to the Croatian mechanism in *Hann-Invest* by a failure to notice that (i) some of those mechanisms result in a non-binding decision of an enlarged judicial formation, which is addressed only to the initial judicial panel and not to other panels of the same court; or that (ii) sessions of an enlarged judicial formation can be convened only at the initiative of the judicial panel originally seized of the dispute and not of some other administrative body of the same court; or that (iii) proceedings before an enlarged judicial formation are regulated by national procedural rules, which guarantee the rights of the parties to the original dispute. See *Hann-Invest*, Opinion of AG Pikamäe (n 2) paras 71–72 and fn 34–35.

judicial panel guarantees all procedural rights of the parties to the original dispute.

Interestingly, in setting out these conditions, it seems that the Court of Justice had in mind a mechanism for ensuring the consistency of case law that has recently become available in the national procedural framework. In 2019 and 2022, the Croatian Law on Civil Procedure was amended to introduce another mechanism of referring cases which are problematic for the equal application of the law to a higher-instance judicial formation of the Supreme Court – so-called 'extended panels'. This highest formation of the national Supreme Court is composed of thirteen judges to whom cases may be referred within the Supreme Court on contentious legal issues relevant to the uniform interpretation and application of the law, either by regular five-judge panels of the Supreme Court in the case of their mutual disagreements,[59] but also by lower courts.[60] These recent legislative novelties push the Croatian judicial system towards better procedural mechanisms for resolving inconsistencies in the case law of the courts which are arguably in full compliance with the requirements of Article 19(1) TEU. They also show that Croatia does have an alternative solution for ensuring the equal application of the law, instead of insisting on outdated and malleable extra-procedural techniques relying on judicial administration, such as the one in *Hann-Invest*. Regardless of the spiteful resilience of Croatia's old coherence regime, especially in the light of the new alternatives, it was truly time for the mechanism to be struck down.

5 The national dimension and violation of EU law: federalism strikes back

National judicial circles received the verdict with understandable initial shock, especially considering that the AG's Opinion initially suggested the Court might take a different, more lenient route. Still, all the

[59] See Article 390(2) of the Law on Civil Procedure (Zakon o parničnom postupku) Official Gazette 80/22.

[60] This so-called 'model procedure', in a way, operates similarly to the dialogue of national courts with the Court of Justice in the preliminary reference mechanism, just at the national level. Through the model procedure, 'any judicial chamber of a lower court facing a contentious legal issue that could be "important for ensuring the uniform application of law" can refer the case to the Supreme Court which can, in turn, decide to seize the dispute if it estimates that systemic disruption in the judicial system could occur because of a large number of similar cases pending in front of lower courts, justifying the need for an early intervention prior to the exhaustion of regular judicial remedies. The Supreme Court would then decide a single case on the merits in full compliance with the rules of civil procedure, by delivering a "model" judgment which becomes binding on all courts deciding on the same points of law'. See Articles 502i–502n of the Croatian Law on Civil Procedure (Zakon o parničnom postupku) Official Gazette 70/19, and Bačić Selanec and Petrić (n 5) 7.

relevant national actors soon responded in a conciliatory tone. Despite the inevitable side-comments about how *Hann-Invest* would 'impact legal certainty for Croatian citizens', and result in 'increasing judicial contradictions', both the President of the Supreme Court and the Minister of Justice immediately issued statements confirming that Croatia would comply with the Court's judgment and make prompt efforts to align its sub-legislative and legislative acts, and the resulting judicial practice, with Article 19(1) TEU.[61]

At present, more than five months after the judgment, no such legislative or even sub-legislative consolidation with EU law has taken place.[62] Assuming (and hoping) this will eventually occur means that, in hindsight, the Croatian Constitutional Court will remain the lone outcast.

Two and a half years ago, while the reference in *Hann-Invest* from the High Commercial Court on the same point was already pending before the Court of Justice, the Croatian Constitutional Court took matters into its own hands. In two decisions issued in April 2022, it declared that the Croatian coherence mechanism (simultaneously being reviewed in Luxembourg) does not violate either national constitutional law, *or*

[61] See Ministry of Justice, Administration and Digital Transformation of the Republic of Croatia, 'Ministar Habijan o odluci Suda EU: Analizirat ćemo odluku i pristupiti izmjenama – ključno je da građani imaju pravnu sigurnost' [Minister Habijan on the judgment of the CJEU: We will analyse the decision and implement the amendments – ensuring citizens' legal certainty is central] (11 July 2024) <https://mpudt.gov.hr/vijesti/ministar-habijan-o-odluci-suda-eu-analizirat-cemo-odluku-i-pristupiti-izmjenama-kljucno-je-da-gradjani-imaju-pravnu-sigurnost/28373> accessed 29 November 2024; see also Supreme Court of the Republic of Croatia, 'Sudbena vlast Republike Hrvatske provest će odluku Suda Europske unije, no očekuje se povećanje suprotnih sudskih odluka' [Judicial government of the Republic of Croatia will implement the decision of the CJEU, but an increase in contradictory judicial decisions is expected] (11 July 2024) <https://www.vsrh.hr/sudbena-vlast-republike-hrvatske-provest-ce-odluku-suda-europske-unije-no-ocekuje-se-povecanje-suprotnih-sudskih-odluka.aspx> accessed 29 November 2024.

[62] At the moment of finalising this paper, we cannot confirm with certainty that, despite the announcements, the Croatian authorities will truly conform with the Court's judgment in *Hann-Invest*. The Ministry of Justice has formed a working group for the implementation of the judgment composed of government officials, judges of the Supreme Court and external experts in procedural law (not EU or constitutional law, *nota bene*), who are supposed to create a package of proposals for the requisite legislative reforms. However, the working group was formed only in mid-October (four months after *Hann-Invest*) and, to our knowledge, to date, its progress is slow, with no results visible or available to the public. Another important development that will need to occur to align the national framework with *Hann-Invest* is at the level of the Supreme Court – which will have to amend its own internal Rules of Procedure, in which the powers of the registrations judge to block judgments and refer them (via the court's president) to the court's (section) meeting is directly prescribed. This is actually the only (sub)legislative act which explicitly envisages such extensive powers of the registrations judge which the Court of Justice declared contrary to Article 19(1) TEU in *Hann-Invest*. See Articles 37, 40 and 40a of the Rules of Procedure of the Supreme Court (Consolidated version from 11 December 2023) <https://www.vsrh.hr/EasyEdit/UserFiles/normativni-akti/2024/procisceni-tekst-poslovnika-vsrh-od-5-2-2024.pdf> accessed 30 November 2024. At the moment, these Rules of Procedure are still in force.

EU law, given that it does not prevent national courts from submitting references to the Court of Justice under Article 267 TFEU.[63] What the Constitutional Court completely ignored – and which was highlighted in the dissenting opinion – were the implications of the mechanism under the standards of judicial independence under Article 19(1) TEU.[64]

By failing to stay its own proceedings or join the reference, the Constitutional Court jumped the gun, while downgrading national constitutional standards of judicial independence far below the European level. Federalism struck back. *Hann-Invest* clearly confirms that the Croatian Constitutional Court violated its own obligations under the Treaties to refer the final decision on the interpretation of EU law (and the corresponding compliance of the national judicial architecture with Article 19(1) TEU) to the Court of Justice in Luxembourg. The operation of supranational checks and balances truly worked at its very best.

And indeed, from a constitutional perspective, this case presents a classic tale of federal checks and balances, exemplifying successful recourse to the supranational level when the national level fails. Long before the matter was referred to Luxembourg, or even to the national Constitutional Court, the Croatian coherence mechanism had been the subject of controversies and continuous disputes in the national arena, not least because of its problematic origins. Our original and detailed analysis of its true nature and origins has already been published in our earlier contribution to this Yearbook on the Opinion of the Advocate

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[63] Croatian Constitutional Court, Decisions no U-I-6950/2021 of 12 April 2022 (challenging Article 40(2) of the Law on Courts on the binding nature of 'legal positions') and U-II-1171/2018 et al of 12 April 2022 (challenging Article 177(3) of the Rules of Procedure on the powers of the registrations service).

[64] See the Dissenting Opinion of Justices Abramović, Kušan and Selanec in Decisions nos U-I-6950/2021 and U-II-1171/2018 (ibid). The position of the majority never actually responded to the claimants' arguments of unconstitutional compromises made for the independence of the judiciary, even if their pleadings were backed by an overwhelming number of concurring academic opinions. The decision of the Court's majority was, in general, strikingly inconsistent. For example, the Court first cited the Consultative Council of European Judges, whose opinion from 2017 clearly provides that abstract interpretational statements of courts 'raise concerns' for the role of the judiciary in the system of separation of powers, and that the uniformity of case law should rather be ensured by procedural mechanisms and judicial remedies. See Consultative Council of European Judges (CCJE) Opinion No 20 (2017) 'The Role of Courts with Respect to the Uniform Application of the Law' <https://rm.coe.int/opinion-ccje-en-20/16809ccaa5> accessed 30 November 2024. However, the Constitutional Court never even referred back to its own citation; see point 17.1 of the Court's Decision no U-I-6950/2021 (ibid). The most extensive part of the Decision is actually a misplaced and weak analysis of a potential violation of EU law – claiming that the uniformity mechanism is not at odds with the judicial prerogatives to ask preliminary questions under Article 267 TFEU, while not even mentioning the independence concerns under Article 19(1) TEU. In its final conclusion, the Court merely proclaimed, with no substantive analysis to support it, that no concerns were raised under the Constitution.

General, and we will not revisit it at length here.[65] In a nutshell, the entire mechanism as it operated in Croatia until now was a relic of the Yugoslavian socialist regime, utilised to ensure hierarchical judicial dependence in the system of uniform communist government.[66] As such, the very nature of the coherence mechanism designed to ensure judicial obedience stands at striking odds with the requirement of the separation of powers and the true substantive independence of the judicial branch under the rule of law. Over time, the original procedural features of the socialist mechanism were attenuated by numerous legislative amendments, especially those from the times of Croatian accession to the EU. Still, the mechanism remained resilient and vigilant in Croatian judicial practice. When the national Constitutional Court was called upon to intervene and set the mechanism aside, it failed to achieve this task. Still, a much-needed remedy for this contentious constitutional issue finally came from the supranational level. In its judgment, the Court of Justice made clear that the functioning of national judiciaries in such ways – permitting competent judicial panels to be blocked in their autonomous decision-making by the structures of judicial administration – simply cannot be reconciled with the Union's core value of the rule of law and the true independence of the judicial branch.

6 Setting the standards of internal judicial independence and the new trajectories for Article 19(1) TEU

In the overall development of Luxembourg's rule of law jurisprudence, *Hann-Invest* truly comes with the potential of becoming one of the most important pieces.

At a conceptual level, *Hann-Invest* confirms that judicial independence under EU law must entail the protection of national judges from undue pressures not only from the political branches of government, direct or indirect, as in Luxembourg's prior case law on the rule of law

[65] See Bačić Selanec and Petrić (n 5).

[66] Interestingly, the initial origins of judicial 'registration' services date back even to the times of the Habsburg Monarchy, of which Croatia formed part. The original design of the registration (evidentiary) services, or 'Evidenzstelle' and 'Evidenzsenate', was actually designed in the middle of the 19th century for Austrian courts, and was copied in the rest of the monarchy. In the 20th century, the mechanism was taken over by communist governments of the post-Habsburg countries in Eastern Europe (and beyond), further instrumentalising the mechanism to secure the goals of uniform governance of the communist parties. For this reason, a similar mechanism to the one in Croatia was until recently, or even up to the present, found in a number of post-Austro-Hungarian countries. See 'Introduction' in M Bobek, P Molek and V Šimíček (eds), *Komunistické právo v československu: Kapitoly z dějin bezpráví* [Communist Law in Czechoslovakia: Chapters from the History of Lawlessness] (Masaryk University 2009). We would like to thank Michal Bobek for pointing out this historic gem.

– but also from their peers within the same judicial ranks. In other words, the concept of judicial independence protected under Article 19(1) TEU also includes an internal dimension. In making this determination, the Court of Justice relied on the already developed jurisprudence of the Strasbourg court in that regard.[67] In *Parlov-Tkalčić*, the European Court of Human Rights had defined the concept as requiring judges in their individual capacity to be 'free from directives or pressures from fellow judges or those who have administrative responsibilities in the court, such as the president of the court or the president of a division in the court' … 'judicial independence demands that individual judges be free not only from undue influences outside the judiciary, but also from within'.[68]

Luxembourg's conclusions follow Strasbourg, but also go beyond.[69]

In *Hann-Invest*, the Court of Justice developed the concept of internal judicial independence within the specific context of Union law. The judgment confirms that internal judicial independence under Article 19(1) TEU protects the unfettered autonomy of judges and judicial panels deciding a case, which must remain solely responsible for taking a final decision on the merits, with no undue or prevailing influence from judicial administration, including registrations judges or extra-procedural meetings of their peers. To that extent, the judgment should be considered a welcome continuation of Luxembourg's case law, emphasising the central role of the individual autonomy of national judges, as the essence

[67] For a detailed analysis of the concept of internal judicial independence as developed in Strasbourg's jurisprudence, see J Sillen, 'The Concept of "Internal Judicial Independence" in the Case Law of the European Court of Human Rights' (2019) 15 European Constitutional Law Review 104.

[68] *Parlov-Tkalčić v Croatia* (n 40) para 86.

[69] See also ECtHR judgments in *Cupara v Serbia* App no 34683/08 (ECtHR, 12 July 2016), and *Popova and Popov v Bulgaria* App no 11260/10 (ECtHR 11 April 2019). In these judgments, the Court in Strasbourg declared that there is no violation of the right to a fair trial under Article 6 ECHR arising from the inconsistent application of case law by national courts, as the national legal systems in these countries envisage a 'mechanism capable of remedying the case-law inconsistencies'. A particular problem with these judgments in light of *Hann-Invest* is that the national coherence mechanisms in question – just like the Croatian one – relied on the involvement of registrations judges and the joint legal position of the courts' (section) meetings. The Serbian mechanism was even a direct transposition (and succession) of the former Yugoslavian Law on Courts, exactly the same as the Croatian version thereof. One could thus argue that, indirectly, the ECtHR had found no problems under Article 6 ECHR with the Croatian-type coherence regime. We strongly disagree. In these judgments, the Court in Strasbourg never directly assessed the compliance of this coherence regime with the standards of judicial independence – nor was such a request even made by the applicants. Instead, the Court's only conclusion was that since, in principle, the Bulgarian and Serbian national legislation provides a mechanism to ensure case law coherence, there is no violation of the parties' rights to the uniform application of the law under Article 6, when the outcome of their case differs from an alternative line of case law. Arguably, after *Hann-Invest*, Strasbourg's future cases on such matters might take a different route.

of their European mandate required for the effective application of EU law, following the original logic of the Court's empowerment of national judiciaries going all the way back to the establishment of the principles of the supremacy of Union law and its direct effect. In other words, in *Hann-Invest*, the jurisprudence under Article 19(1) TEU meets and greets *Simmenthal*, complementing its standards of judicial autonomy underpinning the European mandate of national courts.[70] Along those lines, *Hann-Invest* should also be considered as following the trends of more recent developments in the case law of the Court of Justice on the principle of supremacy of Union law. This particularly relates to the Court's judgments on the Romanian judges, such as *Euro Box, RS*, or *Lin*, which emphasise that no higher judicial instances or the pressures of higher courts (in those cases, in the form of decisions of the national Supreme or Constitutional Court) can prevent the competent lower-instance national court from autonomously applying Union law.[71] In these judgments, the Court confirmed that

> any national rules or practice which might impair the effectiveness of EU law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary *at the moment of its application* to disregard a national provision or practice which might prevent EU rules from having full force and effect are incompatible with the requirements which are the very essence of EU law.[72]

This power is, moreover, 'an integral part of the role of a court of the European Union [...] and the exercise of that power constitutes a guarantee that is essential to judicial independence as provided for in the second subparagraph of Article 19(1) TEU'.[73] *Hann-Invest* reaffirms the same rationale, placing the individual autonomy of the deciding national judges on the central pedestal.

Certainly, the judgment confirms that national judges may always have recourse to Article 19(1) TEU when the underlying dangers and undue pressures on their judicial autonomy result from the structural rules on the organisation of the national judiciary. The mechanisms for ensuring consistency of case law overly relying on the involvement of judicial administration are precisely such a problematic structural threat. It is all the more relevant to note this, as Croatia is not the only post-socialist country that has maintained such a judicial regime long after cutting ties with its communist past from which the regime was inherited. Up to now,

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[70] For a more elaborate version of this argument, see Bačić Selanec and Petrić (n 5).

[71] See Joined Cases C-357/19 et al *Euro Box Promotion* ECLI:EU:C:2021:1034; Case C-430/21 *RS* ECLI:EU:C:2022:99; and Case C-107/23 PPU *Lin* ECLI:EU:C:2023:606.

[72] *Euro Box Promotion* (n 71) para 258.

[73] ibid, para 257.

several other Member States of the EU retain a very similar mode of internal operation to ensure the uniformity of case law as the one in *Hann-Invest*, which arguably makes all these mechanisms immediately contrary to EU law and subject to the direct operation of Article 19(1) TEU.[74]

To this extent, we are certain that *Hann-Invest* will serve as an important precedent for future cases reviewing structural barriers to judicial autonomy, in national mechanisms for ensuring the equal application of the law in the case law of national courts, and beyond. The judgment has truly set the stage for further doctrinal developments in requisite standards in the organisation of national judiciaries. In which directions these developments might head is at this moment a point of speculation. But the possibilities are plentiful, in particular when the organisation of the post-socialist judiciary in Central and Eastern European Member States is at stake. A number of prominent scholars studying the judiciary in Central and Eastern Europe have long warned that many of these countries have not yet fully internalised the rule of law values of liberal democratic constitutionalism.[75] Despite the formal adoption of rule-of-law standards (which mostly occurred during the process of EU accession), many of these countries still maintain significant patterns of inherited authoritarian legal culture and post-socialist mindset, in particular in the modes of organisation and operation of their judiciary, which stands at odds with the liberal understanding of judicial autonomy and substantive independence. This is further supported by recent research by Sillen, who found that all the violations of 'internal' judicial independence found to date by the European Court of Human Rights in Strasbourg pertains to post-communist countries.[76]

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[74] To our best knowledge, a comparable mechanism of ensuring the uniformity of case law still exists in Hungary, Slovakia, Bulgaria, Romania and Poland. Other countries have, in contrast, disposed of such mechanisms through national legislative reforms or constitutional reviews, despite having a history of using such mechanisms in the past (such as Estonia, Latvia, Lithuania and Slovenia). See Bačić Selanec and Petrić (n 5). See also Consultative Council of European Judges (CCJE) Opinion No 20 (2017) 'The Role of Courts with Respect to the Uniform Application of the Law' <https://www.coe.int/en/web/ccje/the-role-of-courts-with-respect-to-uniform-application-of-the-law> accessed 23 November 2024.

[75] To name only a few early works, see S Rodin, 'Discourse and Authority in European and Post-Communist Legal Culture' (2005) 1 Croatian Yearbook of European Law and Policy 1; T Ćapeta, 'Courts, Legal Culture and EU Enlargement' (2005) 1 Croatian Yearbook of European Law and Policy 23; Z Kühn, 'European Law in the Empires of Mechanical Jurisprudence: The Judicial Application of European Law in Central European Candidate Countries' (2005) 1 Croatian Yearbook of European Law and Policy 55; F Emmert, 'The Independence of Judges: A Concept Often Misunderstood in Central and Eastern Europe' (2001) 3 European Journal of Law Reform 405; M Bobek, 'The Fortress of Judicial Independence and the Mental Transitions of the Central European Judiciaries' (2008) 14 European Public Law 99; A Uzelac, 'Survival of the Third Legal Tradition?' (2010) 49 Supreme Court Law Review 377.

[76] See Sillen (n 67).

But the effects of such a type of review should and hopefully will not be limited to the EU's 'Eastern Bloc'. On the contrary, *Hann-Invest* should serve as an important precedent for the operation of mechanisms to ensure the uniformity of the case law at the level of appellate and supreme courts in all EU Member States, and will surely make a major contribution to an already burgeoning Europewide debate on the proper modes of organisation of national judiciaries.[77]

That, perhaps, is the judgment's most important transversal value. *Hann-Invest* has confirmed that Article 19(1) TEU no longer serves as an ultimate remedy for addressing rule-of-law 'backsliding', the grave and systemic disruptions of the rule of law in EU Member States or the reforms of the structure of national (judicial) bodies undermining the effective application of Union law. Rather, *Hann-Invest* has opened a Pandora's box of using Article 19 TEU as a standard mode of supranational review of the standard (even long-lasting) modes of national judiciaries.[78] The future developments of Luxembourg's jurisprudence on the rule of law will most likely follow the same path.

7 Conclusion

In *Hann-Invest*, the Court of Justice set the foundation for the EU's standards of internal independence of the judiciary under Article 19(1) TEU. Taking a generous approach to the requisite standards for effective judicial protection under national law, the judgment confirms that deciding national courts cannot be blocked in their autonomous decision-making by the structures of judicial administration. To that extent, *Hann-Invest* should certainly be added to the list of the most important judgments of the Court of Justice defining the essence of the national court's independence and autonomy required for the successful fulfilment of its European mandate.

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[77] A case raising similar concerns is currently pending before the ECtHR; see *Kuijt v the Netherlands*, App No 19365/19 (ECtHR, lodged on 4 April 2019). The case involves a challenge against the practice of the Dutch Hoge Raad, regulated by internal and publicly available acts of that court, by which the so-called 'reservisten' judges (who are not members of the judicial panel originally seized of the case) may join the deliberation phase yet cannot participate in the final vote on the outcome. The applicant claimed that this practice is incompatible with Article 6 of the Convention, as it goes against the principle of a court 'previously established by law' and enables undue influence of the 'reservisten' judges over the deciding judges, thus jeopardising the latter's independence and impartiality. For a further elaboration of this case and its underlying issues, see the discussion in Marc de Werd, 'Uninvited Oversight: Judges Watching Judges – The ECJ Hann-Invest Case' (*Amsterdam Centre on the Legal Professions and Access to Justice Blog*, 16 July 2024) <https://aclpa.uva.nl/en/content/news/2024/07/blog-marc-de-werd.html?origin=iR%2FZNOHmRye9b1db42mh1Q> accessed 23 November 2024.

[78] Bačić Selanec and Petrić (n 5) 24.

Moreover, this judgment might become the key for deciding on the admissibility of references that question the compatibility of national judicial systems and procedures with Article 19(1) TEU, which arrive at the Court of Justice from disputes whose substance is not linked to EU law. The logic of admissibility underlying the preliminary ruling procedure was interpreted widely, which suggests that the Court intends not to shy away from engaging with issues of the organisation of national justice systems. To that extent, *Hann-Invest* could open the doors for interested national judges to bring forward more questions concerning the operation of their national judicial systems and challenge their compatibility with the EU rule-of-law standards.

And indeed, aside from its important doctrinal developments, the judgment in *Hann-Invest* is remarkable for its potential, and its constructive tone. Despite a clear and persuasive line of reasoning that led to declaring the Croatian mechanism incompatible with the EU's standards of judicial independence, in *Hann-Invest* the Court made an obvious effort not to draft the judgment in a condescending or a forceful tone, but to constructively assist the national judicial system to ensure that the 'red lines' of Article 19(1) TEU are not crossed.[79] Reading the judgment, one cannot but notice the Court's thoughtful engagement with the facts, and a thorough analysis of the structure of the national judiciary, clearly outlining and even suggesting to the national system which elements of its internal modes of functioning are problematic, how to fix them, and how to use other procedural mechanisms for ensuring the consistency of the case law that are already in place.

In *Hann-Invest,* the Court of Justice made a visible effort to engage in a constructive dialogue with the national judiciary over the proper understanding of common rule-of-law standards as they are applied to the judicial branch. The Court's intention must have been to demonstrate that Article 19(1) TEU can indeed be used to remedy not only grave disruptions or attacks on the independence of national judiciaries, but also the standard modes of their operation which might, because of their systemic nature, in principle impact the effective application of Union law. As suggested in our previous contribution to this Yearbook, this has set the trajectory of Article 19(1) TEU jurisprudence beyond rule-of-law 'backsliding'. As 'judicial umpiring' of the common legal order under the rule of law evolves and matures, *Hann-Invest* brings it a step closer to a full-fledged constitutional review of national judicial architectures:

[79] On the 'red lines' of Article 19(1) TEU, see A von Bogdandy, P Bogdanowicz, I Canor, M Taborowski and M Schmidt, 'Guest Editorial: A Potential Constitutional Moment for the European Rule of Law: The Importance of Red Lines' (2018) 55 Common Market Law Review 983.

supranational, through a framework of cooperation. If we are to judge by the dialogical standards set therein, interesting new developments in the case law surely lie ahead. Dancing on a thin line between federal overreach and constructive assistance, Luxembourg has this time around 'not failed to meet the challenge'.[80]

Suggested citation: N Bačić Selanec and D Petrić, 'New Frontiers for Article 19(1) TEU: A Comment on Joined Cases C-554/21, C-622/21 and C-727/21 *Hann-Invest*' (2024) 20 CYELP 127.

[80] K Lenaerts, 'Constitutionalism and the Many Faces of Federalism' (1990) 38 American Journal of Comparative Law 205, 263.