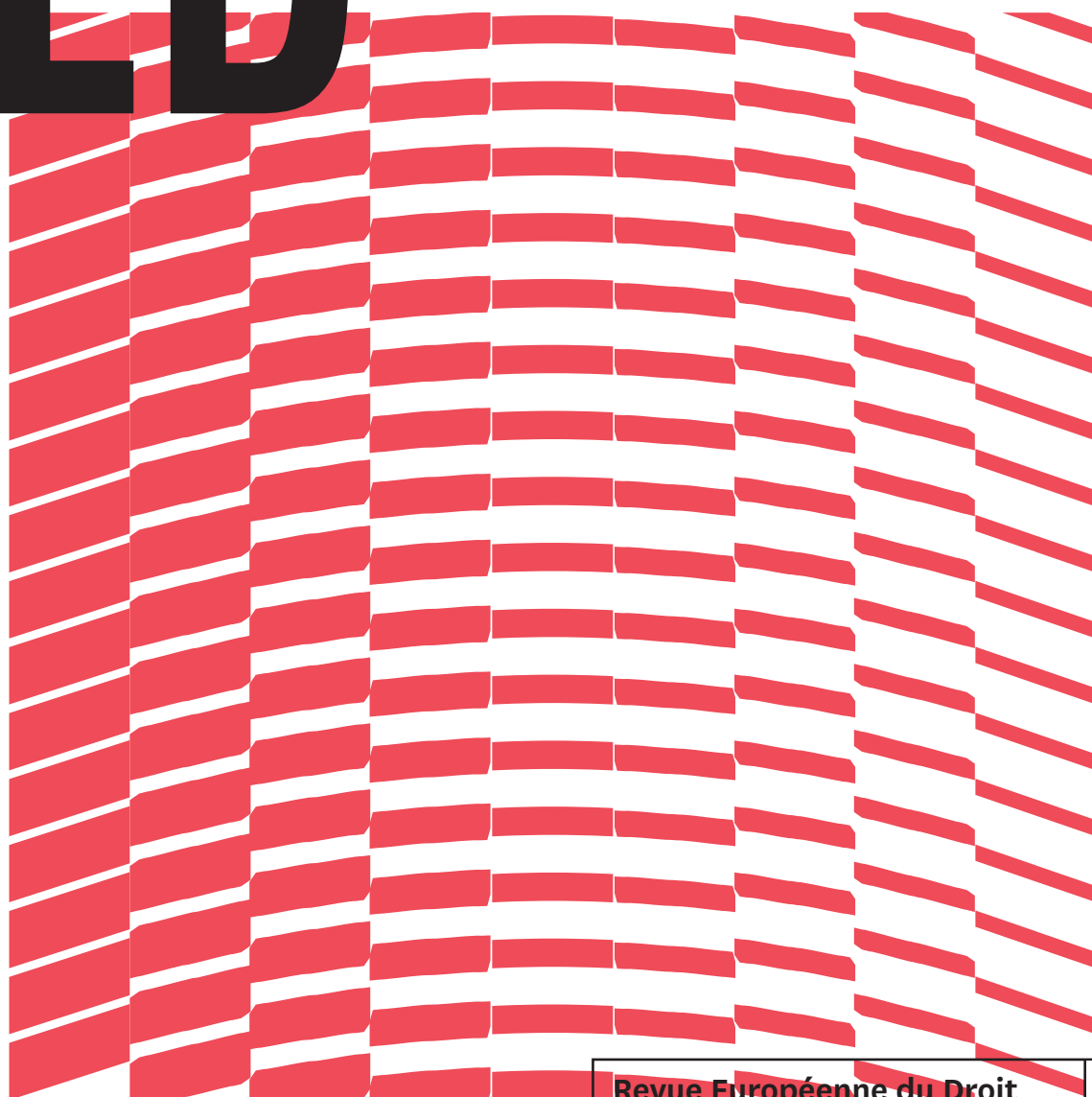


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# The Groundwork of European Power

# RED



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# RED

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## Europe – An Eminently Legal Power

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What does Europe stand for? The answer is far from straightforward, particularly in the face of increasing internal tensions concerning issues ranging from the migration crisis to the primacy of European law and to the undermining of the rule of law. The conviction defended by this issue of the RED is that any reflection on the idea of *European power*, no longer reducible to a French vision of European destiny, is intimately linked to the question of European identity. The latter is inseparable from the legal culture which has bestowed on Europe its institutions and its means of action. Europe as a power, both internally and externally, is above all a normative power.

Take the internal aspects first. The EU's founding fathers wisely chose to integrate Europe through the internal market, which is a primarily legal construct: without the guarantee of freedom of movement, regulation to ensure fair competition, and harmonization of certain commercial rules, there would be no common market. But the Union is not only a market: the European project proves that free trade can be reconciled with a commitment to social protection. It is also through the law that sovereign political actions can be taken at the Union level, be it to tackle the climate emergency, the common responses to financial crises, or the regulation of the digital economy. As the Union's scope of sovereign power increases, the question of the legitimacy of European governance arises with a renewed urgency. Of course, this is not the time to revise the treaties again, although there are multiple voices in favor of shifting to majoritarian decision-making rules. However, the way that power is exercised in Europe continues to subtly evolve: on the one hand, it is shaped by actions dictated by necessity in times of crisis (which best reveal where true decision-making power lies: think of the new role of the ECB); on the other hand, it is influenced by participatory democracy efforts (such as the recent Conference on the Future of Europe) which portend a new popular impetus. The circumspect

rulings of the Karlsruhe Court illustrate this permanent negotiation of the forms of governance, which can only be conducted in a legal language.

Regarding the rest of the world, European power depends even more on its legal embodiment. The purpose is to endow the Union with the means of *strategic autonomy* and enabling it to pursue its own interests (assuming that they can be clearly defined). In the absence of military objectives, Europe has mostly economic interests directed to the defense of a certain political and social model. One of the ways to actualize this power is through the now familiar "Brussels effect": access to the European market has been since its inception subject to the requirement to respect strict standards; where it is warranted by internal cost management, companies tend to align even their global production of goods and services with these higher standards. However, the relative size of the common market is declining; in any case, on the most important global issues, Europe is no longer the only one to set the trend: consultation amongst regulators is no longer always possible and alternative models are emerging. In this new state of the world, Europe can only retain its normative power if its governance model wins the support of minds and hearts abroad.

The two embodiments of European power are therefore intimately linked: Europe's external discourse will struggle to persuade if Europe does not manage to be impeccable itself. It is for this reason that the identity crisis that Europe faces is so decisive: if sovereignty is to find a European expression, it is above all necessary that a consensus on what unites the people of Europe is established. Yet, the challenges to the principles of the rule of law, particularly in Poland and Hungary, are forcing us to take a step back. Certainly, the most valuable asset of European legal culture, which has structured its societies for millennia, is the ability to ensure the *concordance of discordant* canons—this is the very principle of European construction through the law. But what does it mean when the very conditions of possibility of this plurality in unity are undermined: are these contextual difficulties, or should we rather understand that the hypothesis of a family resemblance between political and constitutional cultures, beyond national peculiarities, has become simply unsustainable?

If we accept that the identity capable of founding the expression of a powerful Europe, both internally and externally, can only be legal, reestablishing (or creating) this coherence becomes a primordial, even existential, question for the Union. The contributors to this issue of the *Revue Européenne du Droit* attempt to determine the possible ways forward.

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## The Groundwork for European Power

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How can we understand Europe's uncertain relationship with power? Is power, which Valéry Giscard d'Estaing opposed as early as 1974 to the concept of 'space', which was not sufficient in his eyes to account for the nature of the European project and its ambitions, doomed to remain the chimerical horizon of its ultimate goals? How are the relations of forces and powers expressed in today's world, which is harsh, competitive and rarely spontaneously cooperative? What 'paths' does power now take to make itself felt, promote its interests or defend its achievements? Does the European Union have the competences to follow these paths in their diversity? Does its institutional framework provide it with the means to do so, or do these institutions hinder the kind of exercise of power that it would like to have?

In short, for Europe, the quest for power, as well as the related assertion of sovereignty, is uncertain, forcing it to ask many questions which would benefit from a multitude of different views. This is precisely the purpose of this volume of the *Revue européenne du droit*.

It is well known that the European Community was not born out of a desire for power. Quite the opposite: its founders wanted to contain it and limit the risks of its re-emergence in Europe. The *de facto* solidarities, then the economic integration, were the levers of this 'repression of the logic of power'. The priority given to the creation of the Common Market, then to the Single Market and the abolition of internal borders, has long limited the scope of Europe's external action to the quest for open markets and actions taken in solidarity with the developing world, but never any geostrategic assertion. The choice of the vast majority of Member States to rely on another alliance for the purpose of their defense meant that common security couldn't easily become an area of common European assertion.

The deliberate blurring of the external border, which has been displaced by successive enlargements, has thwarted the emergence of a collective identity. Finally, Brussels has long upheld the belief in the universal advent of liberal democracy twinned with a market economy and the ineluctable (because highly desirable) development of multilateral regulation, a natural extension of the European approach of law-based regulation.

All of them are deliberate and partly outdated choices, and gave rise to many disillusiones, the logic of cooperation finally giving way to that of power. This calls today for a real 'paradigm shift', all the more difficult to carry out as reality seems to undermine the very foundations of European construction.

In their diversity, the 'paths' investigated in this issue illustrate the various *forms of power* in today's world. They are all areas of competition, confrontation or sometimes cooperation between nations and regional groups: technical standards, competition rules, legal obligations for the protection of the environment or the climate, principles related to the protection of individual rights and public freedoms. They are also the levers through which the European Union can hope to act and impose its will: the international projection of its standards, partnership agreements, instruments for the protection of the access to its internal market.

In all cases, the main question is that of determining the conditions for, and the manner in which Europe may be 'sovereign', i.e., decide for itself and in its own interest, in the areas it deems to be essential for its identity, its prosperity, its security and the well-being of its citizens.

But, as clearly illustrated by the contributions to this issue, Europe's 'sovereignty' cannot be abstract and general, if only because its very existence proceeds from the choice of the States that make it up to confer competences on it, which they determine by the common agreement of their combined sovereignties. It is important, for the credibility of the idea of a 'sovereign Europe', as well as for its acceptability to those who entertain a nostalgia for, or on the contrary a certain mistrust in the old federal hopes, to qualify and specify what we mean by sovereignty. It can be (and would undoubtedly receive the support of the greatest number by being thought of in this way), technological, digital, monetary, energetic, climatic, normative...

It is more difficult to assert itself and impose its will in the areas of the movement of people (as the migration crisis of 2015 had clearly shown), protection, security and especially defense. But it would be regrettable if the confusion maintained by some or the reduction of the concept of power to sheer military force led us to completely abandon the search for power: a consensus can be reached on this concept only if it is targeted, characterized and delimited.



Not being a political Union yet, let alone a defense Union, Europe remains a *regulatory Union*. The capacity to produce legal norms and to assert itself through law remains its eminent vocation. A period of restraint, or even disengagement, may have been necessary and welcome after the years of normative and harmonizing bulimia required by the completion of the internal market. But new fields are now calling for common rules and organization, from the digital economy to the industrial and societal issues related to climate policies.

While being necessary for Europe itself, these new regulations are also an opportunity to project power through the export and dissemination of European standards abroad. Several contributions in this issue illustrate the fruitfulness of this process. But some of them also underline the growing difficulties that Europe could face in pursuing this path. I will mention three in particular.

It is naturally easier for the economically dominant power in a market to impose its standards. Europe created and imposed the GSM standard at a time when it dominated the global telecommunications industry, or at least was on a par with the United States. Without enjoying a comparable position in the world of the Internet, it was able to be a pioneer with the regulation on the protection of personal data (RGPD), conceived a little more than ten years ago, and thus ensure that its principles were widely disseminated internationally. Today, Europe is no longer the forerunner or the only one in many standardization activities, including in the digital economy, where China and Korea are also asserting themselves as standard-setters. Competition in this respect can only exacerbate as Europe's share of the global economy erodes.

The external projection of European standards has traditionally taken two main paths: their extension via multilateral agreements on the one hand, and their inclusion in trade or partnership agreements concluded by the EU with third countries on the other. The first suffers from the erosion, discredit or ineffectiveness of the multilateral system, due to the withdrawal or reduced commitment of its main players. The second falls victim to the growing and largely irrational reluctance of national parliaments and the European Parliament to enter into new trade and free trade agreements, even though these had become, above all, effective instruments for exporting European standards.

Making the production of standards an instrument of power implies a willingness to adapt these rules to European interests and to promote them. However, many exercises in European standardization are based today on values rather than interests. It is not necessarily a question of pitting one against the other, but if we can claim to be exemplary through the values we embody and defend, we can only build power based on interests.

As a regulatory union, and above all as a legal construction, the Union has erected, after a brief period of approximation, the *primacy of European law* over na-

tional law as the cornerstone of its edifice. And it is not disputable that the integrity of the single market depends on the unity of interpretation and implementation of European law, including by national courts, under the supervision of a single jurisdiction, the Court of Justice of the European Union. The contributions in this issue recall the moments of tension to which has given rise the articulation between European law and national law, and the relationship between the CJEU and the supreme courts of the Member States. New episodes were abundant over the past years, involving both founding states (Germany and the Karlsruhe Court, the *Conseil d'Etat* in France) and more recent members (Hungary, Poland). As these articles rightly point out, it is important to distinguish between the various cases, particularly according to whether or not they are part of a deliberate policy of challenging the European legal order. Nevertheless, these cases justify some convergent remarks.

As necessary as it is for the very functioning of the Union, the integrity of its market and its credibility as a 'normative power', the primacy of European law is not self-evident in an entity that is not and does not claim to be a federal State, and within which the 'masters of the Treaty', according to the expression favored by the Karlsruhe Court, remain the Member States alone. The relationship of European law with the internal order of the States is especially sensitive when it affects constitutional norms, or brings into play the relations between the CJEU and the national supreme courts. This requires balance, a sense of compromise and dialogue, including between the involved judges, otherwise uncontrollable reactions will be provoked. This is particularly necessary when the interventions of the CJEU lead it to move into the field of security and defense, where the Union does not have indisputable competence, and would have much to lose by being identified above all as a power to prevent States from acting in these areas.

The concept of rule of law runs through today's debates over the very nature of the European Union legal order, the primacy of European law and the requests made of each of the Member States. It cannot but be consubstantial with an entity founded on the respect for its laws and rules. However, its definition remains uncertain, although the concept is deemed to be one of the foundations of the Union, according to the terms of Article 2 of the Treaty on European Union. In fact, reading this article, one understands that the rule of law is one of the 'values' of the Union, 'common to the Member States', but that it is not confused with democracy or respect for human rights. Expectations in this area are therefore partly subjective, evolving according to the times and circumstances, while today they are an absolute priority.

At the same time, another concept, the principle of subsidiarity, which was introduced with the Maastricht Treaty in 1992, and which dominated the political discourse on the Union, not only among its opponents, has

practically disappeared from the debate. However, political choices or national collective preferences, in the area of family law for example, which were considered only 20 years ago to be clearly within the scope of subsidiarity, tend to be understood today as essential parts of the common constitutional pact, at the cost of tensions with those Member States or political majorities that tend to diverge.

Similarly, the division, which must absolutely be established, between the independence of the judiciary, which is an essential principle of the EU legal order, and the recognition of the full competence of each State in the organization of its justice system, would benefit from being clarified by the principle of subsidiarity, which, according to the Treaty, is binding on all EU institutions, including the Court of Justice. In other words, the necessary respect for the rule of law does not preclude dialogue or nuance.

The contributions collected in this issue seldom address the institutional framework of the Union, with the exception of the Court of Justice. And rightly so: the experience of treaty revisions, at least after the Maastricht

Treaty, has shown that there is little to be gained, in terms of efficiency and readability, from reworking the institutional organization of the Union, at the cost of reforms that are increasingly difficult to negotiate and ratify, rarely necessary for the content of European policies and at best questionable in their outcome.

However, it must be remembered that it was the aforementioned repression of the discourse of power that inspired the drafters of the Treaty of Rome in their desire to ensure an institutional balance, an equality between Member States and the rejection of any concentration of power. The resulting lack of an embodied authority, or even of an European identity, is undoubtedly one of the difficulties encountered in the emergence of a more assertive, if not more 'sovereign' Union. But one should be careful not to use this as a pretext for a new reform of the institutions and their reciprocal relations, since there is sometimes a great distance, in this area, between the initial ambition and the result, as illustrated by the idea, born of the Lisbon Treaty, of 'stable presidencies' of the European Council or the Council of Ministers.



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## Citizen Power Europe

On the same weekend in December 2021, two simultaneous events spoke radically differently on the conundrum of our age. Both were engineered by ‘the West’, one by Biden’s United States, the other by the European Union (the ‘EU’). Both were framed as ‘kicking off’ a process of democratic renewal at home and abroad, a response to the profound democratic fatigue experienced throughout the world. The first, ‘The Summit for Democracy’ gathered over 100 states to launch ‘a year of action ...to make democracies more responsive and resilient, and to build a broader community of partners committed to global democratic renewal.’ The other, the Conference on the Future of Europe (the ‘COFOE’), convened in Florence 200 randomly selected EU citizens to produce a list of recommendations addressed to EU political leaders on how to improve European democracy.<sup>1</sup> While the former, state-centric event took place within the traditional Westphalian paradigm, the latter sought to flip that paradigm by putting citizens at the centre of cross-border relations. Yet, while the US-led Summit was abundantly covered by the media, the EU citizen-led assembly – despite its transformational, original nature – passed without a bang. To be sure, the first was full of the kind of political drama news agencies love to cover, above all about who should be out but was invited (Brazil), who was out but should have been in (Singapore), who was out but expected to be in (Hungary), or China’s claim that it was unfairly excluded despite being a democracy ‘that works’. And it may yet herald the kind of renewal that is so dearly needed for democracy in America.<sup>2</sup>

Nevertheless, we believe that the European – not the US-led – event is the one that could stay in the history

books as the beginning of a process that values the creation of democratic citizen-centric ecosystems, inhabited by participatory processes increasing participants’ sense of efficacy in politics while addressing the most intractable issues of our times.

We admit our bias here: we found the deliberative energy in the European Citizens’ Panel in Florence contagious and inspiring. The EU has never truly succeeded in mobilising such a non-expert audience across borders to discuss its own future. Previous institutional reforms were the preserve of national governments, and past citizens dialogues were more akin to exercises in public relations than deliberation, with speeches by EU commissioners preaching to the converted. When measured against this backdrop, the citizen-centric Conference on the Future of Europe emerged as a healthy, and somehow counterintuitive development, especially at a time of global democratic erosion affecting also the Union from within.<sup>3</sup> Indeed, if embraced, many of the citizen recommendations that are already emerging from the conference could potentially be game changers for the EU’s democratic quality, calling for developments that are prefigured but not entrenched in current EU practices: making the disbursement of EU funding conditional upon the respect of media pluralism and the rule of law by its Member States, making the EU Parliament elections more ‘European’ through the creation of a pan-EU electoral competition – instead of 27 parallel ones, mandating public broadcasters to better cover EU developments and holding EU-wide referendums.<sup>4</sup> Even if this initial batch of citizens’ recommendations was generally not crafted in kosher legal language and still needs to be refined through deliberation by the plenary of the COFOE – which unprecedentedly mixes random citizens and political representatives –, they add up a clear and urgent message: let’s tap into our collective intelligence and democratic imagination to construct a pan-European public sphere by enhancing mutual connections, knowledge and empowerment between citizens across borders.

To be sure, there has been plenty of pitfalls to this process, many of which are familiar to the world of deliberative assemblies and mini publics. For one, the panels failed to be as inclusive as one would have hoped of marginalised groups across Europe, from residents without EU passports to racial and ethnic communities.<sup>5</sup> And

1. A. Alemanno, J. Mackay, N. Milanese, and K. Nicolaidis, ‘What’s in an Experiment? Opportunities and Risks for the Conference on the Future of Europe’, EUI, STG Policy Papers ISSUE 2021/16 September 2021.

2. For a bold recent agenda setter, see A.M. Slaughter, *Renewal: From Crisis to Transformation in Our Lives, Work, and Politics* (Vol. 26) (Princeton University Press 2021).

3. See, eg, R. D. Kelemen and M. Blauburger, ‘Introducing the debate: European Union safeguards against member states’ democratic backsliding’ (2017) 24(3) *Journal of European Public Policy*, 317–320; <https://www.theguardian.com/us-news/2021/nov/22/us-list-backsliding-democracies-civil-liberties-international>

4. Recommendations of the Citizens’ Panel on the Democracy, Rule of law and security, available at [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_21\\_6840](https://ec.europa.eu/commission/presscorner/detail/en/IP_21_6840)

5. As argued by Niccolò Milanese, writing on behalf of dozens of civil society organisations, ‘including EU citizens and residents who are representative of its population’s diversity is the first and necessary step towards a public dialogue that not only resonates with the majority but also helps (re-)connect the population with its EU institutions.’ See, ‘Open letter to Executive Board: civil society organisations call for Conference to include marginalised communities’, 18 June 2021, led by Citizens Take Over Europe and co-signed by other 62 civil society organisations. See <https://citizenstakeover.eu/>



there might be a pro-EU bias on the part of those saying 'yes' to a phone call requesting your participation in an EU-led exercise. The methodology for random selection can therefore be improved to take not only socio-economic but also ideological factors into account. Observers have also noted the unequal deliberative quality of the discussions within and across the Citizens' panel, the lack of contradictory debate or laying out of difficult trade-offs, and the fact that the whole COFOE process has been less than transparent including on how these ideas will be treated.<sup>6</sup> Moreover, some fundamental relationships are not clarified in this process – to what extent are EU institutions and politicians right to seek to tightly manage these citizens-led processes? What is a healthy non deferential relationship between citizens and so-called experts? And for that matter, the relationship between officials and experts in helping manage these debates.<sup>7</sup>

These are all important questions, many of which are familiar to citizens' assemblies held and scrutinised around the world for many years now. Nevertheless, we are entering new territory with this transnational pan-continental multilingual exercise. This may be an EU-sponsored event, yet the core methodology used by the consortium of experienced facilitators running it responds to well-established participatory deliberative practices.<sup>8</sup> As we have been arguing since the beginning of this process, the 'COFOE moment' must be appreciated and lived through as a macro experiment, and, as such, it will offer lessons from its imperfections as well as from its strengths. In fact, this is an experiment to the power three – a citizens assembly experiment, within the wider COFOE experiment, within the broader experiment that is the European Union.

Arguably, the recommendations that will emerge from the Conference by next Spring will be more the by-product of the genuine transnational experience gained by the Conference's participants than the inevitable result of a supposedly pro-EU biased initiative. Already, those emerging from the panel on democracy and the rule of law show that once offered the opportunity to reflect upon their personal experience of the EU project together with their European peers, the randomly selected citizens didn't shy away from acknowledging the Union's imper-

fect nature and ask instead for a more intelligible, responsive, and accountable Europe.<sup>9</sup> Ultimately, asking to be better informed about what and how national leaders decide in Brussels, or calling for greater, pan-EU public debates are not the exclusive prerogative of pro-European voices, but rather a pre-requisite to contribute to the Union's democratic life, or that of any other democratic community worth of this name. As such, the conference's citizens panels carry the potential to liberate the European project from its deeply engrained so called affective polarization between the pro-EU and the anti-EU voices, by eventually giving voice to the silent majority of EU citizens not belonging to any of these two camps.<sup>10</sup> Indeed, deep analysis of public opinion in the EU shows that even among self-described 'Eurosceptics' many are more concerned about reforming the EU than being bent on their country's exit.<sup>11</sup> In other words, they are transformative rather than existential Eurosceptics.<sup>12</sup> More generally, a plurality of European citizens seem to want both more EU when considering what the EU does or ought to do, and less EU when considering how it does it, namely hoping for more decentralized approach to managing our interdependence.<sup>13</sup> To simplify, many Europeans are integrationist on the first count and sovereigntist on the second. And this may be because, if we scratch below the surface, we might find that most of us, before we fall under the seductive power of so-called 'affective polarization' tend to be ambivalent about the politics of shared sovereignty.<sup>14</sup> Europeans, like citizens around the world, value both cooperation with their neighbors and control over their lives. And in fact, one of the great virtues of deliberative assemblies is that they have the potential to draw citizens out of their polarized bubbles and political tribes into a space where it is possible and even valued to tap into this underlying ambivalence – although this impact is highly context-driven, especially given the importance of presence for democratic politics.<sup>15</sup> The citizens who met in Florence were no exception to this story.

From this perspective, the Conference on the Future

6. For an example of possible difficult questions involving conflicted views and interests that the COFE ought to address, see 'EUI Democracy Forum: some difficult questions for deliberation', available at <https://docs.google.com/document/d/1f7Vq3nGbCzYj9Gp2AgYB6xiE-AND22Yo42X3j9Za3EA/edit>. See also L. Galante and K. Nicolaidis, 'Whatever it takes? Ten principles to bring the Conference on the Future of Europe closer to its citizens', EUI transnational democracy blog, November 11<sup>th</sup>, 2021, available at <https://blogs.eui.eu/transnational-democracy/whatever-it-takes-ten-principles-to-bring-the-conference-on-the-future-of-europe-closer-to-its-citizens/>
7. Disclaimer: the authors have acted as experts on the occasion of the 2<sup>nd</sup> session of the European Citizens' Panel and expert observers during the 3<sup>rd</sup> and last session.
8. The literature on the spread of mini publics in contemporary policy and governance is abundant. See, eg, N. Curato, J.S. Dryzek, S.A. Ercan, C.M. Hendriks and S. Niemeyer 'Twelve key findings in deliberative democracy research' (2017) *Daedalus*, 146(3), 28–38; S. Elstub and O. Escobar, 'A Typology of Democratic Innovations' in S. Elstub and O. Escobar (eds.), *Handbook of Democratic Innovation and Governance* (Edward Elgar Publishing 2019).

9. Recommendations of the Citizens' Panel on the Democracy, Rule of law and security, available at [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_21\\_6840](https://ec.europa.eu/commission/presscorner/detail/en/IP_21_6840)
10. There is a vast analysis of polarisation, including affective polarisation in Europe and beyond. See *inter alia*, M. Lindell, A. Bächtiger, K. Grönlund, K. Herne, M. Setälä and D. Wyss 'What drives the polarisation and moderation of opinions? Evidence from a Finnish citizen deliberation experiment on immigration', (2017) *European Journal of Political Research*, 56(1), 23–45.
11. For an extensive analysis of public opinion about the EU arguing that attitudes tend to be benchmarked on assessments of one's country 'go it alone' option, see C. DeVries, *Euroscepticism and the European Union* (Oxford University Press 2018).
12. K. Nicolaidis, *Exodus, Reckoning, Sacrifice: Three Meanings of Brexit* (Unbound 2019): <https://kalypsonicolaidis.com/unbound/>
13. K. Nicolaidis, 'In praise of ambivalence-another Brexit story' (2020) *Journal of European integration*, 42(4), 465–488.
14. *Ibid.*
15. For the original claim on opinion convergence through deliberation see J.S. Fishkin, *When the people speak: Deliberative democracy and public consultation* (Oxford: Oxford University Press 2009); M. Lindell, A. Bächtiger, K. Grönlund, K. Herne, M. Setälä, and D. Wyss 'What drives the polarisation and moderation of opinions? Evidence from a Finnish citizen deliberation experiment on immigration' (2017) *European Journal of Political Research*, 56(1), 23–45.

of Europe can be seen as the ultimate testing ground for Habermas's normative concept of deliberative democracy in a transnational context.<sup>16</sup> The German philosopher has over the last decades insisted on the necessity for the construction of a transnational space for deliberation to bring the idea of EU supranational democracy to the next level.<sup>17</sup> Admittedly, he may have over-emphasized both what deliberation can achieve in our agonistic politics, and what deliberation must achieve in contexts where conflict is right and proper and needs to be managed rather than overcome. After all, the power of debate, dialogue and persuasion cannot always transcend deep differences in interests and relative power between parties in presence. It can even be absorbed, and therefore annulled, by the consensual operation of 'politics as usual'. Indeed, the risk of an 'illusory dialogue', as an instrument that fore-stalls rather than fosters articulations of dissents that lead to political change can't be ruled out.<sup>18</sup> Yet, deliberation has a critical role to play as a central pillar of a democratic eco-system in Europe.

Such a statement can appear trivial to national and European representatives who reflect both on their daily practice and on past exercises in Treaty reform. Indeed, the last similarly ambitious convention held twenty years ago which led to the Treaty of Lisbon clearly exemplified the dynamics of bargaining under the shadow of rhetoric.<sup>19</sup> But these representatives and the governments they support or oppose do recognise that the exercise was notorious for its failure to genuinely bring deliberation all the way down, a failure that was redeemed through the failed 2005 French and Dutch referenda. In some ways, today's COFOE can be seen as a much delayed, post Euro-crisis, democratic atonement.<sup>20</sup>

This is what this Conference strives to offer. Its participatory architecture establishes, albeit on an ad-hoc basis, a transnational space for deliberation without which neither its citizens nor elected representatives would be exposed - and pay attention - to the viewpoints that are expressed in other parts of the Union. It can therefore be seen as providing a new, experimental democratic eco-

system that might enable - through the creation of a temporary opportunity structure - both institutional actors and citizens to gain an entirely unprecedented, and thus enriching, exposure to transnational, bottom-up preferences<sup>21</sup>. Even if media and wider public awareness is still wanting, the ensuing citizen-to-citizen pan-EU discourse could potentially make them aware of the histories, contributions, anxieties, aspirations of others, deepening understandings that are so critical to developing a sense of self-direction. This alone might alter the political dynamics of interstate bargaining through new methods and that may in turn reconfigure the political, and more broadly, public debate across the Union.<sup>22</sup> As Hauke Brunkhorst argues in his critical theory of legal revolutions, once democratic procedures are set up, even if they come from the top, they can 'strike back' because citizens can invoke them to demand change.<sup>23</sup>

While much of the incipient academic discussion around the Conference focuses on the relationship between the institutions responsible for running it and the individual citizen, the initiatives that civil society organisations - from trade unions to women's organisations, people with disabilities, religious or cultural communities, other minorities, grassroots movements or associations, think tanks and academia - might develop around the Conference could reveal to be equally, or even more important to the consolidation of a democratic eco-system on the European continent.<sup>24</sup> These might consist of journeying to the far corners of the continent to facilitate - possibly amplify - public debate, engage into 'constitutional pedagogy' by illustrating the intricacies and significance of the process, aggregate and mobilise public opinion, host meetings and conferences, do research, disseminate ideas, advocate and lobby for them, all of this in multiple languages. This civil society's activation and ensuing parallel media attention are key to attaining the level of public attention necessary for the kind of broad deliberation needed to generate the kind of legitimacy sought by the Conference and make its results stick.<sup>25</sup>

To illustrate this hope and our argument, we turn to three big ideas (Participation beyond voting; A Transnational, inclusive public space; A Democratic Panopticon for greater accountability) we believe to be at the heart of the renewed EU ecosystem that we are calling for. Promisingly enough, these ideas already find reflection in the first batch of the citizens 'recommendations emerging

16. J. Habermas, 'Democracy in Europe: Why the Development of the European Union into a Transnational Democracy is Necessary and How it is Possible', ARE-NA Working Paper 13/2014, 3.

17. J. Habermas, *The Postnational Constellation* (MIT Press 1998).

18. For a recent critique of dialogue as a practice that reinforces the consensus that dictates the permissible and impermissible behaviours in a community, see J. Meneses, *Resisting Dialogue* (Minnesota University Press 2019).

19. P. Magnette and K. Nicolaïdis (2004) 'The European Convention: bargaining in the shadow of rhetoric', *West European Politics*, 27(3), 381-404; See A. Maurer (2003) 'Less Bargaining-More Deliberation The Convention Method for Enhancing EU Democracy', *Internationale Politik und Gesellschaft*, (1), 167-191; P.C. Schmitter (2003) 'Making sense of the EU: Democracy in Europe and Europe's democratization', *Journal of Democracy*, 14(4), 71-85.

20. K. Nicolaïdis, 'Our Democratic Atonement: Why we Need an Agora Europe', in *The People's Project? New European Treaty and the Prospects for Future Negotiations* (Brussels, European Policy Centre, December 2007). For an attempt at framing the Conference of the Future of Europe as an expression of 'a delayed, yet incipient, form of democratic atonement', A. Alemanno, 'Unboxing the Conference on the Future of Europe and its Democratic Raison-d'être', *European Law Journal*, forthcoming.

21. A. Alemanno, 'Unboxing the Conference on the Future of Europe and its Democratic Raison-d'être', *op. cit.*

22. M. Desomer and K. Lenaerts, 'New Models of Constitution-Making in Europe: The Quest for Legitimacy' (2002) 39(6) *Common Market Law Review*, 1217.

23. H. Brunkhorst, *Critical Theory of Legal Revolutions: Evolutionary Perspectives* (Bloomsbury 2014), 42.

24. See, eg, L. Cooper et al., 'The Rise of Insurgent Europeanism. Mapping Civil Society Visions of Europe 2018-2020', LSE Ideas, 2021.

25. J. Matsuoka, *Let the People Rule: How Direct Democracy Can Meet the Populist Challenge* (Princeton University Press 2020).

from the Conference.<sup>26</sup>

### 1. Participation beyond voting: the case for a European Citizens' Assembly

'We recommend that the European Union holds Citizens' Assemblies. We strongly recommend that they are developed through a legally binding and compulsory law or regulation. The citizens' assemblies should be held every 12-18 months. Participation of the citizens should not be mandatory but *incentivized*, while organized on the basis of *limited* mandates. Participants should be selected *randomly*, with *representativity* criteria, also *not representing* any organization of any kind, not being called to participate because of their professional role when being assembly members. If needed there will be support if experts so that assembly members have enough information for *deliberation*. Decision making will be in the hands of citizens. The EU must ensure the *commitment* of politicians to citizens' decisions taken in Citizens' Assemblies. In case citizens' proposals are ignored or explicitly rejected, EU institutions must be *accountable* for it, justifying the reasons why this decision was made.' (Recommendation 42, ECP2, COFOE)<sup>27</sup>

Is it by chance that the most important proposal among the total 42 initial recommendations which in our view emerged from the Citizens panel bore the number 42 (!), the 'Answer to the Ultimate Question of Life, the Universe, and Everything,' offered by Douglas Adams in his *Hitchhiker's Guide to the Galaxy*? We do like to think that there was some magic in the air on that day. And, as observers in loco, we both felt it.<sup>28</sup> It may be that in this very place, the lessons still echoed from the Republic of Florence's travails, which, over three hundred years until the 1500s, conducted one of the greatest experiments in popular sovereignty in Europe's history. Here, the governing councils reintroduced on and off the kind of random selection (by lot, *la tratta*) that had taken place in ancient Athens for nearly all government offices two thousand years earlier, heeding Aristotle's judgement that 'it is considered democratic that offices should be filled by lot, and oligarchic that they should be elective.'<sup>29</sup> To be sure, if they had followed the advice on radical democracy offered by their city's most illustrious diplomat, Niccolò Machiavelli, Florentines would have more thoroughly institutionalized their distrust for their leaders and extended the control of popular assemblies over all of their public affairs, thoroughly constraining the behavior of political and economic elites through a range of non-electoral means, in order to confront them with the

injustices often caused by their decisions.<sup>30</sup>

But of course, the citizens present in the room in 21<sup>st</sup> century Florence did not need to go back to the Renaissance when they could draw from an even more inspiring source: their own admittedly limited experience, from which they increasingly came to draw over the proceedings. In doing so, they became the authors of their deliberative story, entitling themselves to commission an on-going follow-up, to eventually embed deliberative mini-public in the day-to-day EU decision-making. For what is democracy if not first and foremost a state of mind, where ordinary people assume away the authority of princes, popes, or experts, to imagine themselves as the authors of their own shared destiny?<sup>31</sup>

Clearly, proposition 42 reflects the assembled citizens fundamental intuition that 'representation' is not only achieved through electoral ballots.<sup>32</sup> Assemblies selected through the drawing of lots can often mirror the larger society more accurately than most parliamentary assemblies these days. In effect, sortition inverts the parliamentary representation equation: individual parliamentarians indeed represent the constituency which elects them, but gather in very imperfectly representative parliaments, while individuals drawn by lot 'only represent' themselves but gather in overall more representative assemblies. We do not need to adjudicate as to which bundle of individual/collective representative logic is more democratically legitimate, but simply acknowledge the different representative legitimacies in presence.

To be sure, the ancients did not have the concept of 'statistically representative sample,' nor did they need it as theirs was an idea deployed on a much smaller scale where each citizen had a high chance of alternating between the status of 'ruled' and 'ruler' over their lifetime. But with the advent of national and, in Europe, transnational scale, it is this statistical notion of representation that we must contend with.<sup>33</sup>

In such a perspective, issues of inclusivity as discussed earlier are key and require not only a set of economic, gender or educational criteria - as this assembly itself was designed - but special attention paid to the kind of *incentives* or resources offered to potential participants to ensure that individuals from the most marginalized groups in society find themselves able to participate - a kinder-

26. Recommendations of the Citizens' Panel on the Democracy, Rule of law and security, available at [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_21\\_6840](https://ec.europa.eu/commission/presscorner/detail/en/IP_21_6840)

27. We use here the initial numbering that served as the basis of the vote at EUI, December 13, 2021.

28. For an ethnographic perspective of deliberative mini publics, see J. Boswell, 'Seeing Like a Citizen: How Being a Participant in a Citizens' Assembly Changed Everything I Thought I Knew about Deliberative Minipublics' (2021) *Journal of Deliberative Democracy* 17(2).

29. Aristotle, *The Politics*, IV: 9, 1294-b (Harmondsworth: Penguin, 1962) 168 (translation modified).

30. J. Bernard, 'Why Machiavelli Matters: A Guide to Citizenship in a Democracy' (2008) ABC-CLIO; J.P. McCormick, *Machiavellian democracy* (Cambridge University Press 2012); J.P. McCormick 'Machiavellian democracy: controlling elites with ferocious populism' (2001) *American Political Science Review*, 95(2), 297-313.

31. On democracy and imagination, see C. Castoriadis, *The imaginary institution of society*. (MIT Press 1997); Y. Ezrahi, *Imagined democracies: Necessary political fictions* (Cambridge University Press 2012).

32. For an initial reconstruction and assessment of the EU participatory toolbox and its democratic value, A. Alemanno, 'Europe's Democracy Challenge: Citizen Participation in and Beyond Elections', (2020) 21(1) *German Law Journal*, 35.

33. For a historical overview and defence of sortition see inter alia, Y. Sintomer 'From deliberative to radical democracy? Sortition and politics in the twenty-first century' (2018) *Politics & Society*, 46(3), 337-357.



garten for single mothers, paid leave for employees. This was an obvious requisite for the so called ‘ordinary’ citizens who authored proposition 42.

It is also noteworthy that they found it important to insist on *limited mandates*. After all, sortition today, as in other times, is about freeing citizens from the kind of arbitrary rule that too often accompanies professional office holders, or what Machiavelli feared as the intoxicating influence of power. Even while ‘Princes’ or ‘elites’ (political, economic, bureaucratic) are key for the functioning of the polity, thought Machiavelli, they risk becoming a different social class with different interests from those of the people and thus no longer capable of serving the public interest.<sup>34</sup> In short, if citizens’ assemblies are to remain in tune with the societies they are meant to reflect, their members better not become ‘politicians’.

In calling for politicians’ commitment to be accountable, citizens wisely invoke ‘the right to justification’ dear to democratic theorists. They are not foolish enough to believe that these propositions will or even should be taken wholesale by governments and the state apparatus. But at least they should be taken seriously, debated, and honoured with arguments for and against.

Proposition 42 may not arrive in a vacuum but nor is its ambition a standard fare. While deliberative processes are spreading in what has recently been defined a ‘deliberative wave’,<sup>35</sup> they tend to be temporary in nature – being predominantly ad hoc exercises and typically ‘one-shot’ experiences – that do not stick.<sup>36</sup> When compared with other democratic innovations, such as participatory budgeting,<sup>37</sup> institutionalization of deliberative mini-publics is the exception, not the norm.<sup>38</sup> As a result, the question whether they should be institutionalized – and how that might be done – remains not only under-theorized but also practically unaddressed, despite the mounting number of calls towards this objective, all the more so in the EU context.<sup>39</sup> Yet, shifting from *ad hoc* projects to a legal-

ly-constituted and legally-available structure is a widely consequential move.<sup>40</sup> In particular, the incorporation of sortition, which is inherent to any model of deliberative mini-public, be it citizens’ assembly or a jury, is set to alter the architecture of the EU system of representative democracy, by forcing a reflection on the role and nature of representation and its relationship with deliberative processes, outcomes, and actors.<sup>41</sup> This appears all the more true and complex in the transnational, multilevel and multilingual EU governance context, where institutionalization raises a series of context-specific questions related to the EU’s underlying constitutional and institutional legal framework, as well as its overall model of democracy. Questions range from the impact of mini-public’s output on the EU legal principle of institutional balance (governing the relations among EU institutions) to its relationship with existing participatory channels, such as the right of petition or the European Citizen Initiative (ECI), a mechanism by which (1 million) citizens can petition the EU Commission to propose new laws.<sup>42</sup> We can worry in particular that European elites would turn to Citizens Assembly as a less unsettling alternative to direct democracy, entertaining the hope that concessions made to deliberative democracy might stave off calls for more direct democracy, ECIs or national referenda in the EU context.

Much of the answer to these questions depends on the chosen model of mini-public, which is in turn defined by a great variety of variables, notably its scope (general purpose versus specific purpose), tasks (agenda-setting versus scrutiny), the point in the policy cycle where this is embedded (preparatory, co-decision, evaluation), its composition (citizen-only or hybrid) and ultimate authority (advisory vs decision-making). Inevitably, the recurrent question which arises when the prospect of institutionalization arises is whether deliberative processes would replace old institutions or merely add new institutions and procedures. Based on past experiences, the ‘add on’ method appears the most likely. Since no institutionalization experience at the local or national level has led to the suppression of existing institutions to leave room for

34. Discourses on Livy Machiavelli 1513; J.P. McCormick, ‘Machiavellian democracy: controlling elites with ferocious populism’ (2021) *American Political Science Review*, 95(2), 297-313.

35. See, OECD, *Innovative Citizen Participation and New Democratic Institutions, Catching the Deliberative Wave*, June 2021.

36. Only 14 out of the 289 examples mapped by the 2021 OECD report relate to cases of institutionalised practices. See, OECD, *Innovative Citizen Participation and New Democratic Institutions, Catching the Deliberative Wave*, June 2021.

37. For an analysis of the reasons for and ongoing effort at turning temporary democratic innovations into sustainable long-term institutions, see, OECD, ‘Innovative Citizen Participation and New Democratic Institutions, Catching the Deliberative Wave’ (OECD Publishing June 2020), and D. Courant, ‘Deliberative Democracy, Legitimacy, and Institutionalisation. The Irish Citizens’ Assemblies’ (ECPR General Conference 2018 and APSA Annual Meeting 2018), where he discusses the move towards institutionalising representative deliberative processes.

38. A. Alemanno, ‘The challenges of Institutionalizing Citizens Assemblies in the EU’, Expert report for Bertelsmann Foundation, Programme ‘Democracy and Participation in Europe’, forthcoming.

39. This is at least what the European Parliament seems to expect from the Conference on the Future of Europe when it stated that this ‘will bring an important contribution in the further development of citizens’ participation in the EU policy-making process and pave the way for the establishment of new permanent mechanisms for citizens’ participation’. See European Parliament resolution s.63.

40. For a recent set of proposals of an EU citizens’ assembly, see the website of European Alternatives (<https://euroalter.com/>); See also G. Smith, ‘The European Citizens’ Assembly’, in A. Alemanno and J. Organ, *Citizen Participation in Democratic Europe. What’s Next for the EU?* (ECPR Press / Rowman & Littlefield 2021); and G. de Burca, ‘An EU citizens’ assembly on refugee law and policy’ (2020) 21 (1) *German Law Journal* 23. For a less detailed call for permanent citizen participation in EU process see eg. A. Kavrakova, ‘Participation of European citizens in the EU legislative procedure’ (2021) *ERA Forum* 22, 295-310 and L. Cooper *et al.*, ‘The Rise of Insurgent Europeanism. Mapping Civil Society Visions of Europe 2018-2020’, LSE Ideas 2021.

41. For some early reflections, M.E. Warren, ‘Institutionalizing deliberative democracy’ in S.W. Rosenberg, *Deliberation, participation and democracy: can the people govern?* (Palgrave Macmillan 2007). See also S. Niemeyer and J. Jennstal, ‘Scaling up Deliberative Effects – Applying lessons of Mini-Publics’ in A. Bächtiger, J. S. Dryzek, J. Mansbridge and M. Warren (eds), *The Oxford Handbook of Deliberative Democracy* (Oxford University Press 2018); and U. Liebert and A. Gattig, *Democratising the EU from below?: citizenship, civil society and the public sphere* (Routledge 2016).

42. <https://blogs.eui.eu/transnational-democracy/on-european-citizens-initiatives-and-trains/>; C. Berg and P. Glogowski (2016). ‘Heavy Stones in the Road: The ECI in Practice’ in M. Conrad, A. Knaut and K. Böttger (eds), *Bridging the Gap? Opportunities and Constraints of the European Citizens’ Initiative* (Nomos 2016), 219-222.

deliberative formats, there is no reason why this should not be true for the EU.<sup>43</sup> Yet the add-on approach does not rule scenarios where mini-publics may replace the kind of 'elite-publics' which populate national second chambers, be it a Senate or a House of Lords. What would be the equivalent in the EU context remains to be seen, given its unique two-headed legislative (Council and EP) and executive (Council and Commission) structure. One could imagine for instance a European citizens' assembly picking up some of the agenda-setting or even legislative functions of either chambers, while leaving intact an institutional structure that has served the EU well since its inception.

At a broader, conceptual level, the institutionalization of public involvement through deliberative formats is favoured by some and feared by others. Those who support institutionalisation argue that the permanent involvement of citizens in this way can enhance the qualitative standards of participatory processes and expand opportunities to exert some actual influence on decision-making, thus rendering the political system more responsive and effective.<sup>44</sup> In the EU context, proponents maintain that such a new EU democratic tool would reduce the distance from the 'EU bubble' felt by EU citizens, and help leverage the collective intelligence of formal and informal civil society in foreseeing emerging issues and addressing difficult trade-offs between winners and losers, the short and long term or rural and urban concerns.<sup>45</sup> Such dynamics, if they are visible and widely owned, might serve as 'democratic pedagogy' to push back against the idea that there exist easy answers 'out there', thus challenging the populist playbook. Opponents of such institutionalization instead are afraid that citizens' panels might usurp what should be the proper function of elected representative governments and parliaments. This risk does not seem to be immediately relevant to the EU insofar as it does not have the kind of general accepted, legitimate, representative, and democratic system of government that democratic states do have, or at least approximate.<sup>46</sup> Opponents are also concerned about the risk they might suffocate societal spontaneity at best and silence dissent at worst, by offering opportunities to manipulate participants, processes and outcomes.<sup>47</sup> They fear those who hope to use citizens' assemblies and participatory processes for more

instrumental reasons, politicians who cherry pick their pet reform while ticking the 'citizens box.' Yet institutionalisation might be 'a necessary condition for reducing the arbitrary of politicians' manoeuvres to implement participatory devices only when it suits them', and ultimately contribute to making deliberative values a 'normal' component of citizens' ordinary political life, as elections are.<sup>48</sup> Ultimately, the question as to whether institutionalisation of deliberative formats leads to enhancement or sterilization of participation remains open and empirical in nature.

## 2. A Transnational and inclusive public space

While praising the mainstreaming of the deliberative wave into the EU, it would be naïve political solutionism to expect that this *ad-hoc* initiative, even if institutionalised, could alone magically address the EU democratic malaise. There are no silver bullets for the EU's democratic deficit. No democratic innovation - and citizens' assemblies are no exception - will bear fruit if not embedded in a broader eco-system upstream, which empowers citizens as the authors of their destiny. It may be no surprise but is nevertheless noteworthy that the citizens' recommendations - as highlighted above - provide color and contour to what these conditions of possibility may be, falling in broadly three categories.

First, there are of course important conversations to be had which refer to what happens at the center, in the traditional arena situated at the supranational level. While this is where citizens are most easily prodded by experts and politicians, they did see the need for europeanisation of electoral political competition for the European Parliament recommending to 'harmonize electoral conditions (voting age, election date, requirements for electoral districts, candidates, political parties and their financing)' and 'the right to vote for different European Union level parties that each consist of candidates from multiple Member States...' (18). In the same pan-European spirit, they can see the need for 'an EU-wide referendum in exceptional cases on extremely important matters to all European citizens...' (20). When it comes to the decision-making procedures between their states, they issue a vaguely worded recommendation that the voting system should be reassessed 'focussing on the issue of unanimous voting' ...but with voting weight 'calculated fairly, so that small countries' interests be protected' (22) Here, we find the eternal need to balance the one and the many in a federal union like the EU.

Second, we find that citizens seemed much more interested in what we may think of as the conditions for creating a deeper European *democratic habitus* across Europe, through greater intelligibility, access to and education about the Union's democratic life. In effect, citizens naturally gravitate towards the old chestnut of a truly trans-

43. It has been demonstrated that, even with the establishment of a citizens' assembly, the decision-making institutions of states continue to operate exactly as they do now, including the legislature, the executive (cabinet), the courts, the civil service, the police, and the military.

44. See, eg, M. Warren, 'Participatory Deliberative Democracy in Complex Mass Societies' (2020) *Journal of Deliberative Democracy* 16(2), 81-88.

45. See, eg, L. Cooper, R. Dunin-Wąsowicz, M. Kaldor, N. Milanese and I. Rangelov, 'The Rise of the Insurgent Europeanism, Mapping Civil Society Visions of Europe 2018-2020', LSE Ideas, 2021, 36.

46. G. de Burca, 'An EU citizens' assembly on refugee law and policy' (2020) 21 (1) *German Law Journal* 23.

47. For some critical perspectives, see eg, M. Hammond, 'Democratic innovations after the postdemocratic turn: between activation and empowerment' (2021) *Crit. Pol. Stud.* 15(2), 174-191; C. Lafont, 'Deliberation, participation, and democratic legitimacy: should deliberative minipublics shape public policy?' (2015) *J. Polit. Philos.* 23 (1), 40-63.

48. R. Lewanski, 'The Challenges of Institutionalizing Deliberative Democracy: The "Tuscany Laboratory"' (August 20, 2011). Available at <https://ssrn.com/abstract=2011693>, p. 8.



national, pan-European public sphere, while displaying a sense of tradeoffs and balancing concerns.<sup>49</sup> Thus, they want greater, plain-speaking, multilingual information to cover European affairs, while respecting ‘freedom and independence of the media’ (recommendation 33), data protection for minors and user-friendly privacy policies (9 and 10) and pursuing ‘media competence’ for citizens (5 and 33). They call on the ‘use a more accessible language’ while ‘avoid using bureaucratic terms in their communications,’ and while, at the same time, ‘maintaining the quality and expertise of the given information...’ (35). They want ‘education on democracy in the European Union ... to achieve a minimum standard of knowledge across all Member States,’ ... but ‘enriched by a set of differing concepts ... which should be engaging and age appropriate’ (26).

We also note the importance for these citizens of horizontal links between themselves across borders, even as they interact with the EU, recommending that the EU ‘creates a special fund for online and offline interactions (i.e., exchanges programmes, panels, meetings ... (29), ‘increase the frequency of online and offline interactions between the EU and its citizens’ (31), ‘creates and advertise multilingual online forums and offline meetings where citizens themselves ‘can launch discussions’ (34) or ‘a multifunctional digital platform where citizens can vote on online elections and polls’ while sharing ‘their reasoning behind their vote’ (21). And crucially, they say, ‘existing and emerging translation technologies such as artificial intelligence are further developed, improved and made more accessible so as to reduce language barriers and strengthen common identity and democracy in the European Union’ (27). It is indeed time for the EU to put more resources behind its essence as a ‘community of translation,’ just as the technological infrastructure powering the COFE, its citizens’ panels and its digital platform are starting to demonstrate. This is the horizontal ambition befit for a ‘democracy.’

Third, in keeping with the old Tocquevillian insight that the convergence of socio-economic conditions and economic justice is a fundamental ‘condition of possibility’ of democracy, citizens expressed an underlying concern for an inclusive social-economic system, recommending ‘that the EU provides criteria on anti-discrimination in the labor market (quotas for youth, elders, women, minorities). If companies fulfil the criteria, they get subsidies or tax breaks’ (1). Or they wish for the EU to provide ‘a set of economic indicators and indicators on quality of life, for all Member States, with the same opportunities and with everyone being at the same level to reach a common economic structure’ (24). This call for inclusivity extends to all-encompassing concerns for the long term, including intergenerational equity (41) biodiversity losses and the protection of animal rights (4,6 and 7).

The common thread between these citizens’ recommendations seems to us to lie in the expectation that the EU move beyond a formal understanding of the principle of political equality,<sup>50</sup> by embracing instead a more substantive interpretation demanding for the design and practice of participatory policies capable of mitigating power disparities.<sup>51</sup> While formal equality focuses exclusively on the equality of individuals, being passive and static *vis-à-vis* the context in which they act,<sup>52</sup> substantive equality assesses that context to redress existing disadvantages, enhance voice or accommodate differences and ultimately achieve structural societal change.<sup>53</sup> The linkage between political, or even economic equality and democracy is well established in political theory, with participation developing out of the ‘logic of equality’.<sup>54</sup> Indeed, economic and political inclusivity cannot be separated in the age of digital capitalism.<sup>55</sup> In order to be fully democratic, political decisions ought to be the result of a procedure in which every citizen enjoys an equal chance to have a say,<sup>56</sup> be it through the electoral process (through elected representatives), the policy process, other non-electoral input such as public consultations, but also corporate structures of power.<sup>57</sup> Sure, this line of recommendation may sound like so many *vœux pieux*, but if debated across borders these calls may come close to an imperative mandate for EU legislators. In fact, unlike their political leaders, citizens don’t seem afraid of the prospect to re-open ‘the discussion ... a constitution informed by the citizens of the EU’ which ‘in order to avoid conflict with the member states should prioritize the inclusion of human rights and democracy values’ (38). But most of what can be accomplished to strengthen the EU democratic ecosystem can be accomplished without treaty change.

### 3. A democratic panopticon for greater accountability

The third democratic building block in the tryptic that we propose can be thought of both as an input to and as an expression of citizens’ participatory power, namely the idea that democratic self-determination starts with holding power accountable. This third foundation of democratic renewal in the EU is in fact an old idea, repurpo-

49. For a seminal discussion, see T. Risse (ed.), *European public spheres* (Cambridge University Press 2015).

50. According to Article 9(1) TEU, ‘in all its activities, the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies...’.

51. For a first attempt at theorising the normative value of the principle of political equality under EU law, see A. Alemanno, ‘Leveling the EU Participatory Playing Field: A Legal and Policy Analysis of the Commission’s Public Consultations in Light of the Principle of Political Equality’ (2020) 26 (1-2) *European Law Journal*, 114.

52. R. Dworkin, *Sovereign Virtue* (Harvard University Press 2000) at 191.

53. S. Fredman, ‘Substantive equality revisited’ (2016) *International Journal of Constitutional Law*, 14(3), 712-738.

54. R.A. Dahl, *Democracy and its Critics* (Yale University Press 2008), 10.

55. N. Gardels and N. Berggruen, *Renovating democracy: Governing in the age of globalization and digital capitalism* (Vol. 1) (University of California Press 2019).

56. Ch. Beitz, *Political Equality: An Essay in Democratic Theory* (Princeton University Press, 1990); P. Pansardi, ‘Democracy, Domination and the Distribution of Power’, *Revue Internationale de Philosophie*, mars 2016.

57. R. Post, ‘Democracy and Equality’ (2006) *Annals of the American Academy of Political and Social Sciences* 603, 24-36.

sed for the digital age, namely, what democratic theorists Keane and Rosanvallon refer to respectively as 'monitory' or 'counter-' democracy reflecting the Republican concern with civic education and the public sphere as the space where such education can be deployed.<sup>58</sup> Simply put, this is the struggle for 'the right to know' and 'the right to know how to know.' Citizens' assemblies clearly make more sense as both the outcome and the trigger for much wider instruments of popular vigilance, a panoply of ways of mobilising collective intelligence beyond traditional elites.

To convey the force of this old idea, let's invoke and subvert Bentham's panopticon, the 19<sup>th</sup> century philosopher's imaginary building where a single guard standing in the middle of circular cells may not be able to observe all of them at once but nevertheless controls them all, for the inmates cannot know when they are being watched.<sup>59</sup> What if, let us ask, we were able to imagine the collective power of citizens in place of the single guard? After all, who can be better guardians of our democratic freedoms than ourselves? By turning the connotation of the panopticon on its head, we can better convey the subversive power of transparency and accountability that the citizens in Florence seemed so keen on.

'We recommend that independent citizen observers should be present during all EU decision making processes. There should be a forum or permanent body of citizens representatives in order to carry out the function of broadcasting relevant and important information to all EU citizens as defined EU citizens. Those citizens would engage with all other European citizens in the spirit of top-down / bottom-up connection, which would further develop the dialogue between citizens and the institutions of the EU' (34).

These randomly selected citizens - and their recommendation - in effect embody the tension between the two logics that make up the democratic panopticon. The logic of permanence insists that the consent of the governed is about more than periodic elections or referenda - it's about ongoing monitoring and engagement. The logic of intermittence, on the other hand, simply reflects the common sense that neither civil society organizations nor individual citizens have the capacity to exercise such scrutiny on a permanent basis. Reconciling these two logics requires those in power to trust in a social *épistémè*, whereby knowledge is not only shared but is known to be shared, creating an ecosystem that feeds the capacity and desire to take part. At the same time, they must learn to live with the radical uncertainty of the democratic gaze. In short, the idea of democratic panopticon delivers on both sides of the participatory conundrum. Our new democratic era calls for permanent citizens' participation, yes, but only by some people, some of the time, on some of the issues. Permanent in its effect, inter-

mittent in its practice. Amending our democratic script calls for crafting ways to make participation a civic habitus: a culture of citizens engaging with the forms of political power that pervade our lives.<sup>60</sup>

For Bentham, the beauty of his vision was the fear, not the fact, that you might be watched. For the democratic panopticon, decision-makers, like Bentham inmates, are effectively compelled to regulate their own behavior under the assumption that citizens might be watching, their power both visible and unverifiable. Those who govern never know whether they are being watched; that keeps them on their toes, motivated to act as if they were being watched all the time. Publicity takes the place of surveillance, a way to guard the guardians, and social control becomes control by society, not of society. Forget la révolution permanente, long live *la participation permanente*. This mindset was often conveyed throughout the call by the citizens' panels to exploit the power of the internet and internet platforms to exercise such scrutiny, calling for platform to fact check (19), voting on online polls (21), while at the same time calling on institutions to adapt its communication to the age of digital media (21). Most importantly, their discussion engaged with the question of the democratic power of budget control, as we move from 'no taxation without representation' to 'no taxation without participation'. Hence, citizens supplemented their call for investment in Europeans' quality of life with ideas of radical accountability for budget spending, noting 'the need to ensure supervision, transparency and effective communication towards citizens in the implementation of public investment (on the part of the EU)' and 'to allow citizens to track the entire process of investment'.<sup>61</sup> At a time when the NextGeneration fund channels billions of EU moneys to individual member states, setting up a more systematic accountability system not only for outcomes but for actual monetary disbursements would benefit the EU's ambition for a renewed democratic ecosystem.

## Conclusion

The EU stands out in the landscape of democratic experiments not by being more advanced in its participatory methods, but because it is hoping to scale them up from the subnational or national to the transnational level and spread them within and across the Union. As the foremost laboratory for transnational governance, it has found its democratic credentials questioned, especially since the end of the Cold War, and, more recently the Euro-crisis.<sup>62</sup> In response, it has dipped its bureaucratic toes in various forms of engagement, from informal citizens' dialogues to the European Citizens' Initiative. But none have dented its reputa-

58. J. Keane, *The future of representative democracy* (Cambridge University Press 2011); P. Rosanvallon and A. Goldhammer, *Counter-democracy: Politics in an age of distrust* (Cambridge University Press 2008).

59. K. Nicolaïdis, 'The Democratic Panopticon' (July 6, 2021) Noema.

60. A. Alemanno, *Lobbying for Change: Find Your Voice to Create a Better Society* (Iconbooks 2017), at 273-274 ('At a time of growing disenchantment with the democratic system, we have no choice but to transform mounting distrust into active democratic virtue').

61. Recommendation 23.

62. V.A. Schmidt, *Europe's crisis of legitimacy: Governing by rules and ruling by numbers in the eurozone* (Oxford University Press 2020).

tion for bureaucratic opaqueness. The Brexit vote was but one expression of the popular dissatisfaction that ensues.<sup>63</sup>

If EU political classes and bureaucratic apparatus were to rise to the challenge, they could claim to offer a response to the message delivered by President Biden on the other side of the Atlantic, that the democratic model developed in the West for the last 200 years appears broken, that it urgently needs tender loving care, that citizens have been bewitched by democratic disenchantment, a sense that the electoral system is rigged, manipulated by money, elites, corporations lobbies or outsiders, and that in between elections, they have no access, no influence and no ownership of public decision making.

Yet, contrary to President Biden's opening speech to the Summit, the story is not that of a beauty contest between democratic and autocratic systems, as crude geopolitics of democracy would have us believe. To the extent that citizens care not only about democratic outcomes but also about procedural fairness, especially when they do not get their way and risk channelling their frustrations outside the system if they are not addressed, we need to address these issues of democratic fairness with great urgency.<sup>64</sup> As vividly illustrated by the European Citizens' Panel, the fact that citizens are dissatisfied with actual existing democracies does not mean that they have lost their appetite for democratic processes. As Aristotle warned a long time ago, democracies suffer from self-inflicted destructive tendencies.<sup>65</sup> This is true as much in Europe as elsewhere, and EU-level democracy magnifies these pathologies. At the same time Europe has the potential to overcome them precisely because it is not wedded to the traditional representative models. None of this implies that the EU should be considered as a model for democracy beyond the state.

Indeed, it has much to learn by reversing the democratic gaze and engaging in mutual democratic learning with the rest of the world.<sup>66</sup>

Nor have we argued that the citizens' panels that are being organised under the COFE provide a model in and of themselves. Much could be improved starting with the topic overload and the lack of time to address such an excessively broad range of issues. But we adhere to a reality principle: in essence, there is no doubt that this process would not have been possible without the go-ahead and over-engineering by the three EU institutions. Indeed, we may be bemoaning the paradoxical coexistence between the kind of 'democratic risk' which these institutions have taken in allowing for such a democratic leap forward, and the kind of tight control they have sought to exercise over the said process. We may be wary of the unavoidable instrumentalization of the whole thing by those who will cherry pick and interpret the recommendations.

But these pitfalls, we believe, are part and parcel of the radical uncertainty that democratic progress may breathe into the European project, an uncertainty that is the very essence of democracy and which the EU bubble must learn to live with. If the EU is to recover its dented popularity among European publics, we need to build a European democratic ecosystem to nurture, scale and ultimately accommodate the daily competing claims of Europe's citizens. The time has come for the EU Member States and European institutions to return to citizens some of the constituent power that has traditionally been exercised on their behalf.<sup>67</sup> The lesson from the incipient transnational Citizen Assemblies that will continue to gather this spring under the EU umbrella, is that under the right conditions, citizens are ready to reclaim such a power and, in the process, ground a new Citizens Power Europe on the global scene.

63. K. Nicolaidis, *Exodus, Reckoning, Sacrifice: Three Meanings of Brexit* (Unbound 2019).

64. E. Suhay, B. Grofman, and A.H. Trechsel, 'How and Why the Populist Radical Right Persuades Citizens' in E. Suhay, B. Grofman and A. H. Trechsel (eds), *The Oxford Handbook of Electoral Persuasion* (Oxford University Press 2019).

65. Globally, the share of individuals who say they are 'dissatisfied' with democracy has jumped from 47.9% in the mid-1990s to 57.5%, see R.S. Foa, A. Klassen, M. Slade, A. Rand and R. Collins, 'The Global Satisfaction with Democracy Report 2020' (2020 Cambridge, United Kingdom: Centre for the Future of Democracy).

66. See K. Nicolaidis and R. Youngs, 'Reversing the Democratic Gaze' (Carnegie Foundation Democracy Hub, November 2021).

67. For a normative and future-oriented understanding of constituent power in the EU, see M. Patberg, *Constituent Power in the European Union* (Oxford University Press 2020), where he argues that EU integration builds upon a usurpation of constituent power.

# The Purpose(s) of EU Governance





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## Primacy, Identity and *ultra vires*: forging the Union through the law without foregoing the rule of law

“Should the application of EU law be ruled out on the grounds that the CJEU has disregarded the division of powers between the Member States and the European Union, as it results in particular from Articles 4 and 5 of the Treaty on European Union (so-called “*ultra vires*” control) (...)?”<sup>1</sup> This was the question the French *Conseil d’Etat* (Council of State hereinafter) faced in the *French Data Network* case. The French government put forward a plea concerning the *ultra vires* nature of the interpretation of the provisions of EU data protection law by the Court of Justice. The question was considered sufficiently important for the highest French administrative court to meet in a full general meeting (*formation d’Assemblée*), even if it did not finally carry out an ‘*ultra vires*’ review. To carry out such a control would have been unprecedented, because the French legal order currently recognises only one limit to the integration of EU law into the national order. Indeed, this limit was recently recalled by the Constitutional council in its decision dated 15 October 2021, stating that, as the law stands now, the application of a provision of EU law can only be rejected if it contradicts a principle that is inherent to the French constitutional identity.<sup>2</sup>

It is therefore necessary to qualify the ardour of those who see in the *ultra vires* the new authoritative argument to be relied upon whenever some EU law provisions that trouble them (and *only* these provisions) need to be neutralized. Is this the sign of a “Karlsruhe effect”?<sup>3</sup> In a 5 May 2020 ruling, the German Constitutional Court ruled that by not reviewing in sufficient depth the proportionality of an ECB decision to buy government bonds on the secondary market, the Court of Justice rendered an *ultra vires* judgment.<sup>4</sup> The same reasoning was implicitly taken

up by the Polish Constitutional Tribunal in its decision of 7 October 2021, in which it declared that the value of the rule of law and the principle of effective judicial protection, as interpreted by the Court of Justice, violated the Polish Constitution.<sup>5</sup>

Some seized this opportunity to start chanting the old tune of questioning the primacy of EU law and the pre-eminence of the European Convention on Human Rights. The case law of German, French and Polish judges is quickly mixed up - even though they have little in common. A cursory analysis could certainly lead one to think of a Calhounian moment in the Union, according to the idea expressed in an editorial in *The Economist*, in which an analogy was drawn between Calhoun’s theory - according to which the American federal states had a right to “nullify” the acts of the federal government<sup>6</sup> - and the so-called “resistance” of the national jurisdictions fanned by the German judgment of 5 May 2020<sup>7</sup>. As pointed out by Jean Paul Jacqué, the comparison with Calhoun’s arguments is tempting, but proves to be somewhat reductive - and anachronistic - in relation to the “complexity”<sup>8</sup> of the constitutionally integrated system formed by the European Union and its Member States. This complexity leads to subtleties that are not easily dealt with in certain political diatribes that make European law - both of the Union and of the ECHR - a convenient scapegoat.

National caselaw are far from being identical and one should beware of constitutional “copycats”; one should certainly not confuse the German Constitutional Court - “the best ally” of the Court of Justice according to President Lenaerts<sup>9</sup> - with the Polish Constitutional Tribunal, which breaks with the judicial dialogue. Judicial dialogue - this magical trick relieving us of all the jurisdictional troubles stemming from European integration. Bruno Genevois coined this term: in his words, in the relations between the Court of Justice of the European Communities and the national judges, there was no place “either for the government of judges or for the war of judges, but only for judicial dialogue”.<sup>10</sup> The quote is as hackneyed as it is enlightening. And yet, it was coined by Bruno Genevois in the context of the *Cohn Bendit* case, resulting in a ruling that is one of the most frontal oppositions to EU law; not only had the Council of State not asked a preliminary question, but it had adopted an interpretation of the letter of the EEC treaty in flagrant contradiction with the case law of the Court of Justice. It is apparent that

1. CE, ‘Séance publique du 16 avril 2021 à 16 h, N°s 393099, 394922, 397844, 397851, 424717, 424718’, press release (free translation).

2. Cons. const., Decision No. 2021-940 QPC of 15 October 2021, *Société Air France*.

3. The phrase is borrowed from Alan Hervé who used it in a tweet.

4. BVerfG, 5 May 2020, PSPP, 2 BvR 859/153, ECLI:DE:BVerfG:2020:rs20200505.2bvrr85915.

5. Trybunał Konstytucyjny, Assessment of the conformity to the Polish Constitution of selected provisions of the Treaty on European Union, 7 October 2021, K 3/21.

6. Ph. Feldman, *La bataille américaine du fédéralisme*, John C. Calhoun et la nullification, Paris, PUF, Collection : ‘Léviathan’, 2004.

7. ‘Charlemagne, The EU’s Calhounian moment’, *The Economist*, 17<sup>th</sup> April 2021.

8. J.-P. Jacqué, ‘L’instabilité des rapports de système entre ordres juridiques’, *Revue française de droit constitutionnel*, 2007/1, n° 69, p. 3.

9. K. Lenaerts: ‘L’UE ne peut fonctionner que si le droit national cède le pas au droit commun européen’, *Les Echos*, 28 October 2021.

10. CJEU, Plenary Session, 18 December 2014, Opinion 2/13, ECLI:EU:C:2014:2454, paragraph 176.



conflicts between national courts and the Court of Justice are as old as the integration process itself and that, by generating creative tensions, they have actually catalysed its progress.

The *ultra vires* argument, as applied by the German Constitutional Court, is only the latest manifestation of theories which, among others, and including the theory of identity, raise constitutional barriers to EU law. In a maximalist or, more simply put, outdated reading of the integration process, based as it is on a hierarchical vision of normative interactions, these limits can be seen as challenges to the primacy of EU law. In a more constructive reading of the relationship between legal systems, these limits are consolidated and allow for a renewed form of integration, induced by constitutional equivalence.

### 1. The strengthening of constitutional limits

#### *A long-standing resistance to the principle of primacy*

Tensions with national constitutional courts arose in tandem with the development by the Court of Justice of its own “constitutional doctrine”. This is perfectly summarised in opinion 2/13, which refers to the “iterative case law” since the *van Gend & Loos* and *Costa*<sup>11</sup> judgments: “the founding treaties of the EU, unlike ordinary international treaties, established a new legal order, possessing its own institutions, for the benefit of which the Member States thereof have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only those States but also their nationals.”<sup>12</sup>

It was precisely as a reaction to the *Costa* judgment’s enshrinement of the principle of primacy that the German and Italian constitutional courts drew up the first reservations of constitutionality in the integrated legal order. As long as (*Solange*) EU law did not guarantee the protection of rights that are fundamental in Germany<sup>13</sup> or if it infringed supreme constitutional principles and inviolable personal rights (*contro-limiti*) in Italy,<sup>14</sup> domestic courts reserved the right to review the compliance of secondary legislation with the national constitution. The Court of Justice was receptive to this national case law, enshrining the existence of fundamental rights as general principles of EU law,<sup>15</sup> long before the Union adopted a Charter of Fundamental Rights. As a result, the German and Italian courts have suspended their reservations on constitutionality,<sup>16</sup> although tensions have intermittently arisen, fuelling the process of constitutional integration.

In the relations with the Italian Constitutional Court, the principle of primacy formed the basis of the *Simmenthal* case law, in which the Court of Justice affirmed the power of the national court to disapply a legislative provision that is contrary to EU law.<sup>17</sup> The difficulty lay in the fact that in Italy only the Constitutional Court could declare a law to be unconstitutional on referral from an ordinary court; and since, until that moment, a law that was incompatible with EU law was considered to be unconstitutional, only the Constitutional Court had jurisdiction to rule it as such. Since then, the Italian constitutional order has recognised the specificity of the EU legal system; whereas for a breach of international law, including the ECHR, ordinary courts must refer to the Constitutional Court to find a violation of Article 11 of the Constitution, they do have the authority to reject the application of any norm that is contrary to EU law. This being said, in 2017, faced with a law infringing fundamental rights, the Constitutional Court still considered that the ordinary court should first refer to the Constitutional Court the examination of the constitutionality of the law, before refusing to apply it – or referring a preliminary question to the Court of Justice – based on an infringement of the EU Charter of Fundamental Rights.<sup>18</sup> This solution, which was criticised by some in the academia as amounting to breach of EU law, was subsequently abandoned by the Italian Constitutional Court.<sup>19</sup> And yet, these recurring tensions have nevertheless had the effect of anchoring EU law and its specific characteristics in the Italian constitutional order.

#### *Ultra vires, or exceeding the conferred powers*

After the “*Solange*” ruling, the German Constitutional Court has also developed new constitutional reservations, relating more directly to the issue of conferred powers, especially since the “*Lisbon*” decision.<sup>20</sup> Article 23 of the Fundamental Law only permits the transfer of powers to the EU within the limits of Article 79(3) of the Fundamental Law, i.e., in compliance with that which is inherent in the German constitutional identity, the core of which is human dignity, the principles of democracy, the rule of law and the social and federal State.<sup>21</sup> In addition to respecting the fundamental rights and principles enshrined in Articles 1 and 20 of the Fundamental Law, the German Court checks whether the secondary legislation does not disregard the democratic foundations induced by the constitutional functions attributed to the Parliament, for example in budgetary matters.<sup>22</sup> In France, the concept of constitutional identity is also relied upon to draw the limits of European

11. CJEU, 5 February 1963, *Van Gend & Loos*, 26/62, EU:C:1963:1; CJEU, 15 July 1964, *Costa*, 6/64, EU:C:1964:66.

12. CJEU, Plenary Session, 18 December 2014, Opinion 2/13, paragraph 157.

13. BVerfG, 29 May 1974, 2 BVL 52/71.

14. Court of Cassation, 27 December 1973, Frontini, No. 183; 8 June 1984, *Granital*, No. 170.

15. CJEU, 17 December 1970, *Internationale Handelsgesellschaft mbH*, 11-70, ECLI:EU:C:1970:114.

16. BVerfG, 22 October 1986, 2 BvR 197/83.

17. CJEU, 9 March 1978, *Simmenthal*, 106/77, ECLI:EU:C:1978:49.

18. Corte costituzionale, 7 November 2017, Sentenza no. 269, ECLI:IT:COST:2017:269.

19. Corte costituzionale, 30 July 2020, Sentenza no. 182/2020, ECLI:IT:COST:2020:182.

20. BVerfG, 30 June 2009, 2 BvE 2/08, ECLI:DE:BVerfG:2009:es20090630.2bve000208.

21. *Ibid.*

22. BVerfG, 7 September 2011, MES, 2 BvR 987/10, ECLI:DE:BVerfG:2011:rs20110907.2bvr098710. BVerfG, 14 January 2014, OMT, 2 BvR 2728/13, ECLI:DE:BVerfG:2016:rs20160621.2bvr272813.

integration. As early as 2004, the *Conseil constitutionnel* raised the constitutional reservation that “the transposition of a directive or the amendment of domestic law to reflect the requirements of a regulation cannot disrespect a rule or a principle inherent to the constitutional identity of France, except with the consent of the constituent power”. The first such principle inherent to the constitutional identity of France was discovered by the court on 15 October 2021, namely the prohibition on delegating to private persons general administrative police powers inherent in the exercise of the “public force” necessary for the safeguard of substantive rights.<sup>23</sup>

While the German Constitutional Court has not yet concluded to any infringement of German’s constitutional identity, it has at the same time derived from the *Honeywell* judgment a so-called *ultra vires* review of the democratic principle.<sup>24</sup> In this respect, the German Court reserves the right to declare inapplicable in the national legal order a provision of EU law that does not respect the principle of conferral of powers, insofar as this provision is not covered by the law ratifying the treaty. It stresses that the preservation of the foundations on which the allocation of powers within the European Union is based is of paramount importance for the guarantee of the principle of democracy. However, the *ultra vires* review is intended to remain exceptional, so that the Union’s failure to respect the division of powers must be manifest, since the contested secondary legislation is of significant importance, having regard to the principle of conferral and the obligation, arising from the principle of the rule of law, to respect the conditions of legality. In any event, before any finding of *ultra vires* is made, a question must be referred to the Court of Justice for a preliminary ruling.

The *Bundesverfassungsgericht*’s judgment of 5 May 2020 was an example of judicial dialogue. An appeal had been filed to the court against the ECB’s decision regarding the public sector purchase programme (PSPP) adopted as a tool of quantitative easing. The applicants considered, *inter alia*, that the ECB had exceeded the powers conferred on it by the Treaty in the field of monetary policy, since the purchase programme constituted an important element of the ECB’s policy. The German court had doubts as to the validity of that programme and referred a question to the Court of Justice for a preliminary ruling. In its judgment in *Weiss*, the Court held that the programme fell within the competence of monetary policy and that the ECB had not infringed the principle of proportionality.<sup>25</sup> It is on this last point that the German Constitutional Court manifestly disagreed with the Court of Justice, considering that the latter had ruled *ultra vires* by not checking in sufficient depth the respect of the

proportionality criterion, which required that all the interests involved be appropriately weighed. But, the court noted, “the combined effect of, on the one hand, a broad discretion of the institution whose act is being reviewed and, on the other hand, a limitation on the scope of the judicial review carried out by the Court of Justice of the European Union, clearly does not take sufficient account of the scope of the principle of conferral and opens the way to a continuous erosion of the powers of the Member States”.<sup>26</sup> Thus, on 5 May 2020, the German Constitutional Court ordered the German authorities, the *Bundestag* and the *Bundesbank*, not to implement the ECB’s PSPP programme if, within three months, the ECB had not ensured that the programme complied with the principle of proportionality.

Contrary to what has been claimed, the judgment of the Polish Constitutional Tribunal declaring Articles 2 and 19 TEU, as interpreted by the Court of Justice of the European Union, to be incompatible with the Polish Constitution, cannot in any way be compared with national case law that gave rise to these theories of constitutional limitations. The idea that the decision of 7 October 2021 is merely a challenge to the principle of the primacy of EU law should also be firmly rejected. Of course, it is a violation of the principle of primacy to voluntarily disrespect the interpretation of EU law given by the Court of Justice on the grounds that this would be contrary to the national constitution; but this is not the point. It is true that the Polish Constitutional Tribunal draws on the theory of *ultra vires* to criticise the Court of Justice for having found that reforms of the Polish judicial system violated Article 19 TEU by disregarding the principle of the independence of the courts.<sup>27</sup> The tribunal considers that the interpretation of Article 19 TEU infringes the Polish Constitution in that it extends the jurisdiction of the Court of Justice to questions relating to the system and organisation of justice, which fall within the sovereign powers of Poland. This not only ignores the fact that Poland, like Hungary, is currently targeted by proceedings alleging the violation of rule of law principles, but also the conciliatory logic that underlies the theories of constitutional limits.

## 2. The advent of the constitutional equivalence technique

### *The aporia of primacy in a hierarchical vision of system relations*

When the political debate takes up the issue of primacy, political shortcuts are quickly taken. The reactions to the ruling of the Polish Constitutional Tribunal by some of the potential candidates to the French presidential elec-

23. Cons. const., Decision No. 2021-940 QPC of 15 October 2021, *Société Air France*.

24. BVerfG, 6 July 2010, *Honeywell*, 2 BvR 2661/06, ECLI:DE:BVerfG:2010:rs20100706.2bvr266106.

25. CJEU, Grand Chamber, 11 December 2018, *Weiss and Others*, C-493/17, ECLI:EU:C:2018:1000.

26. BVerfG, PSPP, 2 BvR 859/153, cited above, paragraph 156.

27. CJEU, Grand Chamber, 24 June 2019, *Commission / Poland, known as ‘independence of the Supreme Court’*, C-619/18, ECLI:EU:C:2019:531; CJEU, Grand Chamber, 5 November 2019, *Commission v Poland, known as ‘independence of the ordinary courts’*, C-192/18, ECLI:EU:C:2019:924; CJEU, Grand Chamber, 15 July 2021, *Commission v Poland, known as ‘disciplinary regime of judges’*, C-791/19, ECLI:EU:C:2021:596.

tion reveal three types of opposition to primacy<sup>28</sup>.

The first is a selective primacy, on the pretext of regaining legal sovereignty. This amounts to not applying the provisions of EU law when these would prevent certain political decisions, but only in certain areas such as immigration. In other words, what is promoted is a European Union *à la carte*, which the British were so fond of and which they did not manage to secure (which explains the Brexit vote). It is a somewhat delicious turn of events that this would be the path favoured by Michel Barnier... A second path is that of a generalised end of primacy. EU law would continue to exist, but would be discarded as soon as it conflicted with any national law provision. This vision is the one put forward by a far-right candidate who believes that it is “time to give French law back its primacy over European law”. Arnaud Montebourg believes that national laws should take precedence not only over European law, but also over international law, suggesting a *step back in* legal history. This would amount to a fundamental denial of the character of EU law, which, “because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as community law and without the legal basis of the community itself being called into question.” The third way would be to exclude the application of EU law only when it contradicts the national constitution, so that France would “not need to opt out” of the treaties, as argued by Marine Le Pen. Xavier Bertrand proposes to introduce into the Constitution “a mechanism aiming to safeguard the higher interests of France”. Perhaps it would be good to recall that such a mechanism has already been created by the Constitutional Council, without any need to modify the text of the Constitution.

If one wishes to stick to a trivial logic, it is clear that national case law and the case law of the Court of Justice are irreconcilable. Primacy as defined by the Court of Justice is absolute: it implies that a normative conflict must be resolved in favour of all provisions of EU law – whatever they may be – in relation to all national provisions – whatever they may be. In the *Internationale Handelsgesellschaft* ruling, the Court of Justice held that “the validity of a community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure”.<sup>29</sup> More than forty years later, it stressed that national courts remain free to apply “national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised.”<sup>30</sup>

Most national courts have taken the view that the national Constitution is the highest ranking norm in their national legal order. In France, both the Court of Cassation and the Council of State have affirmed that the supremacy conferred on international commitments does not apply in the domestic order to provisions of constitutional value,<sup>31</sup> although these rulings were grounded on Article 55 of the Constitution, according to which treaties have a higher value than laws. In the *French Data Network* judgment, the Council of State considers that “while enshrining the existence of a European Union legal order integrated into the internal legal order (...) Article 88-1 confirms the place of the Constitution at the top of the latter”. The fact that the national judge considers the Constitution as the supreme norm of its legal order is hardly shocking. It is even less so when this same Constitution enshrines the participation of the State in the European Union, which implies the need for compliance with the treaties. Thus, after citing Article 88-1 of the Constitution, the Council of State refers to Article 4(3) TEU, which enshrines the principle of loyal cooperation by virtue of which “the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties”. The conclusion is that compliance with EU law is an obligation both under the Treaties governing the Union and under Article 88(1) of the Constitution. This circularity is the mark of the constitutional integration that characterises the system formed by the European Union and its Member States.

#### *Overcoming normative conflict in a constitutionally integrated system*

Pursuant to their constitutions, the Member States conclude treaties conferring on the Union its specific characteristics, which “include those relating to the constitutional structure of the EU, which is seen in the principle of conferral of powers referred to in Articles 4(1) and 5(1) and (2) TEU, and in the institutional framework established in Articles 13 TEU to 19 TEU”.<sup>32</sup> On the one hand, by authorising the State’s participation in the European Union, the national constitution provides a basis for EU law and its specific characteristics. Thus, compliance with EU law as interpreted by the Court of Justice of the European Union is as much a European requirement as a national one. On the other hand, the primary law of the Union provides the basis for a status of Member State of the Union which also includes rights such as those set out in Article 4(2) TEU. Thus, respecting the national identity and the essential functions of the State is a European as well as a national requirement.

Constitutional integration is based on the fundamental premise of a substantial equivalence between national constitutions and EU treaties. Indeed, as long as the treaties have been ratified in accordance with the national

28. A. Renaut, ‘Cinq candidats à l’Élysée contestent la primauté du droit européen’, *Afp*, 8 octobre 2021.

29. CJEU, *Internationale Handelsgesellschaft mbH*, 11-70, cited above, paragraph 3.

30. CJEU, Grand Chamber, 26 February 2013, *Melloni*, C-399/11, ECLI:EU:C:2013:107, paragraph 60.

31. Cass, plenary session. 2 June 2000, *Fraisie*, 99-60.274. CE, Ass. 30 October 1998, *Sarran and Levacher*, 200286, 200287.

32. CJEU, Opinion 2/13, cited above, paragraph 165.



constitutions, the compatibility between the treaties and the constitutions can be presumed. In many countries, including France, the treaties have been subject to a preventive constitutionality review. It was the Council of State that set out the procedure to be followed in its *Arcelor* case, based on the conclusions of Mattias Guyomar<sup>33</sup>, of which the *French Data Network* judgment is a further development. In the context of the review of the constitutionality of national measures implementing provisions of secondary EU law, it is up to the national court, “seized of a plea alleging disregard of a provision or principle of constitutional value, to investigate whether there is a general rule or principle of EU law which, having regard to its nature and scope, as interpreted in the current state of the case law of the European courts, guarantees by its application the effectiveness of compliance with the constitutional provision or principle invoked”.<sup>34</sup> If so, the court must, in order to ascertain the constitutionality of the contested national measure, “ascertain whether the directive which that act transposes or the regulation to which that act adapts domestic law complies with that rule or general principle of EU law. If there is no serious difficulty, it shall dismiss the plea or, if there is, refer a preliminary question to the Court of Justice of the European Union for a preliminary ruling under the conditions laid down in Article [267 TFEU]. On the other hand, if there is no general rule or principle of EU law guaranteeing effective compliance with the constitutional provision or principle relied upon, it is for the court (...) to examine directly the constitutionality of the contested regulatory provisions.”

This logic of equivalence makes it possible to resolve a number of potential normative conflicts, without having to decide the delicate question of primacy. In the vast majority of cases, it is not difficult to identify a principle or rule in EU law that is equivalent in substance to a principle or constitutional rule of a Member State. This is particularly true of fundamental rights, the range of which has become extensive, especially since the entry into force of the Charter. If equivalence is established, all that remains to be done is to untie the procedural knot; only the Court of Justice has jurisdiction to assess the validity of an act of EU law, so that all national courts are obliged to refer a question for a preliminary ruling pursuant to Article 267 TFEU.<sup>35</sup> It is up to the Court of Justice to declare the invalidity of the provision of EU law – a regulation or a directive, for example – considering the principle or rule enshrined in the primary law of the Union whose substance is equivalent to a constitutional principle or rule. Let us recall that “the judicial system as thus conceived has as its keystone the preliminary ruling procedure provided for in Article 267 TFEU, which, by setting up a dialogue between one court and another, specifically between the Court of Justice and the courts and tribunals of the Member States,

has the object of securing uniform interpretation of EU law (...), thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties (...)”.<sup>36</sup>

Following the conclusions of its *rapporteur*, the Council of State extended the constitutional equivalence in the *French Data Network* judgment beyond the sole question of fundamental rights. It affirms that the constitutional requirements corresponding to “objectives of constitutional value of safeguarding the fundamental interests of the Nation, preventing breaches of public order and tracking down the perpetrators of criminal offences and combating terrorism”, “which apply to areas falling exclusively or essentially within the competence of the Member States by virtue of the treaties constituting the Union, cannot be regarded as benefiting, in EU law, from a protection equivalent to that guaranteed by the Constitution”.<sup>37</sup> One can see a relative ambivalence in this; on the one hand, this amounts to admitting that the Union can pursue objectives of constitutional value; on the other hand, it leads to the constitutional limit being triggered more easily, since such equivalence will be more difficult to establish.

The theory of *ultra vires* leads to a certain extent to reasoning according to a logic of equivalence. In the view of the German Constitutional Court, the *ultra vires* review is triggered when European institutions adopt an act that clearly exceeds the powers attributed to the Union. Not only is it intended to remain exceptional, according to the Court, but it can only be exercised after a preliminary reference to the Court of Justice. In this way, the judicial dialogue is preserved just as much as the primacy of EU law, since an act that does not respect the principle of conferral of powers is in principle invalid.

The theory of constitutional identity can also be linked to a logic of reverse equivalence, in the sense that it is up to the EU to fully reflect the national constitutional requirements, in accordance with Article 4(2) TEU. The decision of 15 October 2021 illustrates this, because while the solution of the Constitutional Council has been interpreted by some as an attack on the primacy principle, we see it as the reflection of a certain harmony. The *Conseil constitutionnel* drew the conclusion from Article 12 of the Declaration of 1789 that the prohibition on delegating to private persons the general administrative police powers inherent in the exercise of the “public force” necessary to guarantee rights constitutes a principle inherent in the constitutional identity of France.<sup>38</sup> This principle inherent in the French constitutional identity is in no way in contradiction with EU law. On the one hand, the Union respects the essential functions of the State, in particular those aimed at ensuring its territorial integrity, maintain-

33. CE, Ass., February 8, 2007, *Arcelor*, N° 287110, ECLI:FR:CEASS:2007:287110.20070208.

34. CE, *French Data Network*, cited above, paragraph 6.

35. CJEU, 22 October 1987, *Foto-Frost*, 314/85, ECLI:EU:C:1987:452.

36. CJEU, Opinion 2/13, cited above, paragraph 176.

37. CE, *French Data Network*, cited above, paragraph 10.

38. Cons. cont., Decision No. 2021-940 QPC, supra, point 15.

ning law and order and safeguarding national security.<sup>39</sup> On the other hand, the Court of Justice has implicitly accepted that the Member State may prohibit the delegation of police powers to private persons. It ruled out the possibility of private security services being attached to the public authorities; as they are provided by private individuals, they cannot be assimilated to tasks falling within the remit of the public security services.<sup>40</sup>

However, the technique of equivalence has two sets of limits. The first is substantive, since it is possible in principle that there be no equivalent in EU law to a rule or principle of national constitutional law and that a provision of EU law disregard national constitutional identity. The second is institutional, since, as in the case of the ECB's PSPP programme, the national court may consider that the Court of Justice has not sufficiently reviewed the act of EU law referral for a preliminary ruling. In both these cases, the primacy of EU law is overridden by the rule or principle of national constitutional law or to the case law of the national constitutional court. One can react by arguing that the limit, this time of the integrated legal order of the Union, has been reached. But it is also possible to envisage a way of deepening constitutional integration.

It should first be pointed out that the principle of primacy is still based on case law. While it was expressly enshrined in Article I-6 of the draft Treaty establishing a Constitution for Europe, primacy is only the subject of Declaration No 17 in the EU Treaty, which refers to the case law of the Court of Justice. However, the Court of Justice already fully integrates the requirements of national identity into its case law to determine the extent to which a Member State may derogate from EU law. For example, the Court of Justice has held that the protection of the national official language, which is inherent to national identity (within the meaning of Article 4(2) TEU), constitutes a legitimate objective for justifying restrictions on the rights of EU citizens.<sup>41</sup> The way forward should be a judicial reconciliation of national and European constitutional requirements.

This is the path that the Council of State took in the *French Data Network* case since, according to its official communication, it “reconciles respect for EU law with the effectiveness of the fight against terrorism and crime”,<sup>42</sup> without giving precedence to French law in this case or resorting to the theory of *ultra vires*. It should be remembered that the Court had to settle the delicate problem raised by the answer given by the Court of Justice to a preliminary question that it had referred. In this case,

the question was whether the French provisions providing for the generalized retention of connection data were compatible with EU law. The Court of Justice interpreted Directive 2002/58, known as the “Privacy and Electronic Communications Directive”, and the General Data Protection Regulation (GDPR), in light of the Charter of Fundamental Rights, as opposing the generalized and undifferentiated retention of connection data,<sup>43</sup> a solution which was perceived as creating the risk of jeopardizing the public order and public security missions assumed by the French authorities and jurisdictions, which explains why the Council of State attenuated its scope.

The PSPP case, on the other hand, shows the limits of the judicial conciliation exercise, while opening the way for a political dialogue. While the focus is on the decision of 5 May 2021, the judgment of 29 April 2021 is completely overlooked, although the German Constitutional Court dismisses two appeals alleging the ECB's failure to comply with the PSPP's reasoning requirement.<sup>44</sup> Indeed, not only did the ECB provide explanations for assessing the proportionality of its programme, but these were discussed in the *Bundestag*, both with the Federal Government and with the *Bundesbank*. The *Bundestag* has come to the conclusion that the ECB has met the requirements of the decision of 5 May 2021. One may deplore the return of the Member States, a sign of intergovernmentalism, or, on the contrary, it may be seen as a sign of further integration, since the ECB, as an independent EU institution, is accountable to a national parliament that is just as democratically legitimate as the European Parliament. It is only logical that in a monetary area as integrated as the eurozone, the democratic principle should be applied from both a top-down and a bottom-up perspective. This also shows that the Union of law is linked to democracy.

Far from undermining it, the tensions caused by the constitutional limits set by the national constitutional courts feed the constitutionally integrated system formed by the European Union and its Member States. This system holds as long as the fundamental premise on which it is based is not challenged by the national courts. According to Opinion 2/13 of the Court of Justice, this premise implies that “each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected.”<sup>45</sup>

#### *Mutual trust broken by Poland*

The decision of the Polish Constitutional Tribunal of 7 October 2021 breaks the mutual trust between the

39. Article 4(2) TEU.

40. CJEU, 13 December 2007, *Commission / Italian Republic*, C-465/05, ECLI:EU:C:2007:781.

41. CJEU, 12 May 2011, *Runevic-Vardyn*, C-391/09, ECLI:EU:C:2011:291.

42. CE, ‘Données de connexion : le Conseil d’État concilie le respect du droit de l’Union européenne et l’efficacité de la lutte contre le terrorisme et la criminalité’, Press release, 21 April 2021.

43. CJEU, Grand Chamber., 6 October 2020, *La quadrature du net and others*, C-623/17, C-511/18, C-512/18, C-520/18, ECLI:EU:C:2020:790.

44. BVerfG, 29 April 2021, PSPP, 2 BvR 1651/15, 2 BvR 2006/15.

45. CJEU, Opinion 2/13, cited above, paragraph 168.



Member States because it calls into question the recognition of the values of the Union and the Member States set out in Article 2 TEU. It declares the incompatibility with the Polish Constitution of the value of the rule of law enshrined in Article 2 TEU and the principle of effective judicial protection guaranteed by Article 19 TEU, as interpreted by the Court of Justice of the European Union. This incompatibility is noted insofar as European integration has entered “a new phase” in which “a) the institutions of the European Union act outside the scope of the powers conferred on them by the Republic of Poland in the Treaties; b) the Constitution is not the supreme law of the Republic of Poland (...) c) the Republic of Poland cannot function as a sovereign and democratic State”.<sup>46</sup> For the time being, only the operative part of the decision has been made public; pending the publication of the reasons, it is clear that the *Trybuna Konstytucyjny* is engaged in a recovery, if not a misappropriation, of the German theory of *ultra vires*, as the Polish government did not hide its enthusiasm following the judgment of 5 May 2020.<sup>47</sup> One reading would be to say that the Polish Constitutional Tribunal can just as legitimately deploy its own theory of limits to integration; another is to use this decision to castigate the principle of primacy and the interference of the Court of Justice in the internal affairs of States. It is a totally overused practice of *ultra vires* that the Polish judges have adopted. It must be emphasised that the German Constitutional Court only exceptionally applies the *ultra vires* review when an act of secondary legislation of the Union leads to a structural overstepping of the power attributed to the Union; the consequence is at most the non-application of the act of secondary legislation in the national legal order, and there are means to avoid such a situation. In all cases, a preliminary question must be referred to the Court of Justice beforehand. However, the Polish Constitutional Tribunal confines itself to stating unequivocally that the values shared by the Member States that founded the European Union are incompatible with the national constitution.

A legal expert draws the conclusion from the operative part alone that “the interpretation of Article 19(1) TEU given by the CJEU is deemed to be contrary to the Polish Constitution, because it leads to the extension of the power of the bodies of the Union over questions relating to the ‘system and organisation’ of justice in Poland, which are part of the sovereign powers of the Member States”.<sup>48</sup> Additionally, “this reasoning contains an implicit premise which seems difficult to avoid: by extending the application of Article 19 TEU to disputes concerning the organisation of justice, which do not directly call into

question ‘the rights and freedoms guaranteed by EU law’, the CJEU disregarded the general scheme of the Treaties, which leave to the Member States a competence of principle and limit that of the Union to the fields of conferred power. Basically, the Polish Court questions not only the constitutionality, but also the conventionality of the interpretation adopted by the CJEU.”<sup>49</sup> However, in order to reach this conclusion, the author has no other choice than to refer to the content of the appeal lodged by the Polish government before this court, since the decision of 7 October 2021 is limited to setting out a ruling of unconstitutionality, without providing, at this stage, the reasons, which should be published later.

In so doing, it is precisely highlighting the heart of the problem pointed out by the CJEU, since the *ultra vires* interpretation of which the latter is guilty corresponds to the provisions and grounds of three judgments in which it was found that Poland had infringed the requirement of independence of national courts derived from Article 19 TEU by carrying out a series of reforms of the Polish judicial system. In essence, these reforms consisted of changes to the rules on the retirement of judges<sup>50</sup> and the disciplinary system in the courts.<sup>51</sup> The second subparagraph of Article 19(1) of the Union Treaty gives concrete expression to the value of the rule of law as set out in Article 2 of the Union Treaty,<sup>52</sup> and enshrines the requirement of independence of national courts, which “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.”<sup>53</sup> It is hardly interfering in the jurisdictional organization of the State to note that some courts do not meet this requirement of independence. As ordinary judges of EU law, the national courts maintain a dialogue with the Court of Justice by means of preliminary rulings. They thus perform a function of EU law, by virtue of both Article 19 TEU and Article 267 TFEU, which implies that they are necessarily independent. Independence has gone from being a functional requirement – enabling the national court to perform its function as an ordinary court of EU law – to a structural requirement – ensuring that the Member State is indeed a State governed by the rule of law.

49. Ibid.

50. CJEU, *Commission v Poland*, ‘Independence of the Supreme Court’, C-619/18; *Commission v Poland*, ‘Independence of the ordinary courts’, C-192/18, cited above.

51. CJEU, *Commission v Poland*, so-called ‘disciplinary regime for judges’, C-791/19, cited above.

52. CJEU, GC, 27 February 2018, *Associação Sindical dos Juizes Portugueses*, C-64/16, ECLI:EU:C:2018:117, paragraph 32.

53. Ibid; CJEU 7 February 2019, *Vindel*, C-49/18, ECLI:EU:C:2019:106; see also CJEU, GC, 25 July 2018, *Minister for Justice and Equality, so called ‘Failures of the Judicial System’*, C-216/18 PPU, EU:C:2018:586.

46. Trybunał Konstytucyjny, Assessment of the conformity to the Polish Constitution of selected provisions of the Treaty on European Union, 7 October 2021, K 3/21.

47. ‘Polen lobt Karlsruher Urteil zu Europäischer Zentralbank’, FAZ, 10 May 2020.

48. W. Zagorski, ‘When the Polish Constitutional Tribunal refutes the case law of the CJEU. Observations under the judgment of 7 October 2021’, 21 October 2021, Jus Politicum Blog.

## Conclusion

The principle of primacy is one of the essential characteristics of EU law which, according to the Court of Justice, “have given rise to a structured network of principles, rules and mutually interdependent legal relations linking the EU and its Member States, and its Member States with each other, which are now engaged, as is recalled in the second paragraph of Article 1 TEU, in a ‘process of creating an ever closer union among the peoples of Europe’”.<sup>54</sup> Primacy no longer exhausts the way in which relations between the European Union and the Member States can be viewed. These are nourished by convergences but also by divergences - rarer - which equally nourish the constitutional system formed by the EU and its Member States.

Rather than being signs of conflict, national case law, from the concept of constitutional identity to *ultra vires* arguments, brings life into the system through the tensions it gives rise to; in any case, resistance remains very rare and almost never produces concrete effects. The decision of the Polish court is not part of this constructive logic but is part of a resolutely destructive project that will not only weaken Poland’s participation in the European Union, but will also eliminate the principles of the rule of law. As Stephan Harbarth, President of the German Constitutional Court, has said, “the independence of the judiciary in Poland exists at best only on paper”.<sup>55</sup>

54. CJEU, Opinion 2/13, cited above, paragraph 167.

55. ‘Präsident des Bundesverfassungsgerichts kritisiert Polen’, BR24 NACHRICHTEN, 13.11.2021.



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## The French Constitution and EU law: An Approach through the Complexity of Legal Power Relations

*“The Pathology of the idea is in idealism, where the idea obscures the reality it is intended to translate and takes itself as the only reality. The disease of the theory is in doctrinism and dogmatism, which close the theory onto itself and petrify it. The pathology of reason is the rationalization which accounts for reality in a coherent but partial and unilateral system of ideas, and which knows neither that a part of reality is irrationalizable, nor that rationality’s mission is to dialogue with the irrational”<sup>1</sup>*

### Introduction<sup>2</sup>

Subject to ample commentary, the crisis between the European Union (hereafter “the Union”) and Poland,<sup>3</sup> in connection with a radical conception of the legal sovereignty of the Member States leading to the questioning of the primacy effect of European law over national constitutions, calls for clarifying France’s position on the same issue. Each of the Member States has a specific doctrine on systemic relationships between internal legal orders and that of the Union, which, in certain situations, can generate crises inherent in the institutional structure of the latter,<sup>4</sup> according to the postures of legal influence adopted by certain national courts and the fluctuation of political influences within them.

It is well known that the doctrine of the CJEU is the preeminence of the law of the Union over the national law, including constitutional law, of the Member states. It was fixed from the outset by the *van Gend & Loos* decision

of February 5, 1963<sup>5</sup> and above all by *Costa v E.N.E.L.* the following year<sup>6</sup> whose central motivation is so rational in its institutional analysis, confident in its pedagogy and coherent in its solution that it deserves to be fully cited:

*By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply.*

*By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.*

*The integration into the laws of each Member State of provisions which derive from the Community, and more generally the terms and the spirit of the Treaty, make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. Such a measure cannot therefore be inconsistent with that legal system.*

*The executive force of Community law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty set out in Article 5 (2) and giving rise to the discrimination prohibited by Article 7.*

*The obligations undertaken under the Treaty establishing the Community would not be unconditional, but merely contingent, if they could be called in question by subsequent legislative acts of the signatories.*

*Wherever the Treaty grants the States the right to act unilaterally, it does this by clear and precise provisions (for example Articles 15, 93 (3), 223, 224 and 225).*

*Applications, by Member States for authority to derogate from the Treaty are subject to a special authorization procedure (for example Articles 8 (4), 17 (4), 25, 26, 73, the third subparagraph of Article 93 (2), and 226) which would lose their purpose if the Member States could renounce their obligations by means of an ordinary law.*

*The precedence of Community law is confirmed by Article 189, whereby a regulation ‘shall be binding’ and ‘directly applicable in all Member States’.*

*This provision, which is subject to no reservation, would be quite meaningless if a State could unilaterally nullify its effects by means of a legislative measure which could prevail over Community law.*

1. E. Morin, *Introduction to complex thinking*, Le Seuil, 2005

2. A french revised version of this article will be published in the *Mélanges* offered to Vassilios Skouris.

3. The origin of which is a serious attack on the independence of the courts.

4. O. Pfersmann, ‘La primauté: double, partiellement directe, organiquement indéterminée’; in *Cahiers du Conseil constitutionnel*, n° 18 (dossier: Constitution et Europe) - July 2005; Opinion of advocate general Miguel Poiares Maduro, Case C-127/07, *Société Arcelor Atlantique et Lorraine* e.a., pt 15: ‘Those concurrent claims to legal sovereignty are the very manifestation of the legal pluralism that makes the European integration process unique.’

5. CJEC, 5 February 1963, *van Gend & Loos*, Case 26-62; B. Bonnet, ‘Les rapports entre droit constitutionnel et droit de l’Union européenne, de l’art de l’accommodement raisonnable’, Conseil constitutionnel | Titre VII, 2019/1 N° 2 | pp 11-21.

6. CJEC, 15 July 1964, *Costa v E.N.E.L.*, Case 6-64.

*It follows from all these observations that the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.*

*The transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail. Consequently Article 177 is to be applied regardless of any domestic law, whenever questions relating to the interpretation of the Treaty arise.*

Clarified and reinforced by the court decisions that followed,<sup>7</sup> this rationale, since then constantly reasserted, has been maintained, with certain nuances,<sup>8</sup> following the evolution of the treaties,<sup>9</sup> subjecting to strict and closely monitored conditions<sup>10</sup> the invocation by the Member States, on the one hand, of a level of protection of fundamental rights by the national Constitution higher than that of the Union as they result specifically from the Charter of Fundamental Rights (CFR),<sup>11</sup> on the other hand, the protection of the national identity of Member States inherent in their fundamental political and constitutional structures.<sup>12</sup> To ensure the Member States comply with these requirements, the Union can use the infringement procedure and its accessory sanctions,<sup>13</sup> which are considered applicable even when the breach comes from a national court.<sup>14</sup> To this dogma of pre-eminence, several high courts in the Member States have put up a more or less reasoned and nuanced resistance<sup>15</sup> but none, until now, has placed itself in a deliberate rupture with the foundations of the Union, as was theatrically the case with the judgment rendered on October 7, 2021 by the Polish Constitutional Court.<sup>16</sup>

7. CJEC, 13 February 1969, *Walt Wilhelm*, Case 14-68, 17 December 1970, *Interlazionale Handelsgesellschaft*, Case 11-70.

8. CJEU, 5 April 2016, *Aranyosi and Caldaru*, Joined Cases C-404/15 and C-659-15.

9. D. Blanc, "Assurer le caractère commun du droit de l'Union: de l'uniformité d'application à l'homogénéisation? Une main tendue au bout du bras de fer," in *Réseau des normes, réseau des juridictions* (ed. H. Gaudin), LGDJ, 2021.

10. J.-P. Jacqué, "La CJUE de l'Union européenne et la théorie des 'contre limites,'" 2005.

11. Article 53 CFR; CJEU, 26 February 2013, *Melloni*, Case C-399; 23 February 2013, *Fransson*, Case C-617/10; 24 June 2019, *Poplawski*, Case C573/17.

12. Article 4, §2 of the Treaty on European Union ("TEU"); CJEU, 8 September 2017, *M.A.S. and M.B.*, Case C-42/17.

13. Article 258 of the Treaty on the Functioning of the European Union ("TFEU").

14. CJEU, 12 November 2009, *Commission v Spain*, Case C-154/08.

15. See for Italy, Germany and Spain: X. Magon, "Le juge constitutionnel et le droit européen," *Annuaire de Droit européen*, 2004, Vol. II, 2006, pp. 119-147. Regarding Germany specifically: C. Langenfeld, "La jurisprudence récente de la Cour constitutionnelle allemande relative au droit de l'Union européenne," Titre VII, n° 2, April 2019 and, most recently, the German Federal Constitutional Court's decision regarding the PSPP purchases of the European Central Bank, dated 5 May 2020.

16. Polish Constitutional Tribunal, Judgment in the name of the Republic of Poland, Warsaw, 7 October 2021, Assessment of the conformity to the Polish Constitution of selected provisions of the Treaty on European Union, Ref. No. K 3/21.

Although less disruptive, the doctrine of the French Constitutional Council is nevertheless situated in an imperfect dialectical relationship between the Constitution and Union law (1), whereas in the area of competence which is allotted to it, the Council of State has engaged in a sophisticated dialogue with the CJEU (2).

## 1. From imperfect dialectics

At first hesitant about its role in the systemic relations between the national legal order and that of the Union (A), the Constitutional Council's position leads to equivocal solutions which also raise the question of their practicability (B).

### 1.A. Hesitations

In the French republican tradition, judicial review of the conformity of statutory law with the Constitution only appeared with the Constitution of October 4, 1958, which created the Council.<sup>17</sup> But it was not until 1971<sup>18</sup> that the Council granted itself the power to exercise judicial review with regard to the declarations of rights referred to in the Preamble to the Constitution.<sup>19</sup>

Since then, in the national legal space, the constitutionality block thus constituted has been in competition with the international commitments ratified by France, in particular with the law resulting from the European treaties, according to a hierarchy provided for, first, by article 55 of the Constitution, which confers on treaties, under the conditions they define, an authority superior to that of statutory law, and second, by paragraphs 14 and 15 of the Preamble of the Constitution of 1946.<sup>20</sup> Restricting itself strictly to the powers it derives from the Constitution,<sup>21</sup> the Council nevertheless had to rule on the inevitable interference between the fundamental law of the Republic and the European treaties.

#### 1 - From compartmentalization

To settle conflicts between national and supranational norms, the Council first ruled, in a 1975 decision,<sup>22</sup> that it is not responsible, when appealed to review the constitutionality of a statute, to examine compliance with the provisions of a treaty or an international agreement. In doing so, the Constitutional Council implicitly distributed competences on that matter, on the one

17. Articles 56 to 63 of the Constitution.

18. Cons. Council, 16 July 1971, n° 71-44 DC, Loi complétant les dispositions des articles 5 et 7 de la loi du 1er juillet 1901 relative au contrat d'association.

19. "The French people solemnly proclaim their attachment to the Rights of Man and the principles of national sovereignty as defined by the Declaration of 1789, confirmed and complemented by the Preamble to the Constitution of 1946, and to the rights and duties as defined in the Charter for the Environment of 2004."

20. AL 14 "The French Republic, faithful to its traditions, shall respect the rules of public international law. It shall undertake no war aimed at conquest, nor shall it ever employ force against the freedom of any people."

21. Cons. Council, 15 January 1975, n° 74-54 DC, Loi relative à l'interruption volontaire de la grossesse.

22. *Ibid*, recitals 1 to 7.



hand, by reserving to itself the review of statutory law with regard to the Constitution, and on the other hand, by referring the examination of its compatibility with the conventional provisions of direct effect to the ordinary, judicial and administrative courts<sup>23</sup> which, sooner<sup>24</sup> or later,<sup>25</sup> assumed the responsibility to fully exercise the so-called function of “ordinary court applying EU law.”<sup>26</sup> It follows that the relationship of European law with the Constitution is to be examined as much in the case law of the Constitutional Council as in that of the Council of State and, more incidentally, of the Court of Cassation, according to their respective areas of jurisdiction.

## 2 - To interference

This position of principle of the Constitutional Council on the narrowness of the power conferred on it by article 61 of the Constitution leaves aside three questions: that of the examination of the contradiction of an international treaty before ratification or approval with the Constitution in application of its article 54, that of the constitutionality of a law transposing a European directive, and finally that of the articulation of checks on constitutionality and conventionality, since the introduction, by the constitutional reform of 2008,<sup>27</sup> of an article 61-1 in the Constitution establishing what the organic law adopted for its application<sup>28</sup> entitles “priority preliminary ruling on the issue of constitutionality.”

In the legal order of the Union, the Constitutional Council is, according to the case law of the CJEU in principle, bound by the cooperation obligations imposed on any court of a Member State.<sup>29</sup> Although it freed itself on its own authority by its aforementioned decision of 1975,<sup>30</sup> it could not avoid being confronted with the articulation of Union law with the Constitution.

In the first place, this compartmentalization of legal orders can only be practiced in the constitutionality review of statutory law. It cannot obviously be raised during the preliminary assessment of conflicts with the Constitution of the treaties in the course of ratification, in application

of article 54.<sup>31</sup> In this case, in order to authorize the ratification without amending the Constitution, the Constitutional Council ensures that the treaty does not contain “a clause contrary” to it or that it “does not affect the essential conditions of exercise of national sovereignty,”<sup>32</sup> and since 2004, the criteria for review widened to whether the treaty challenges “constitutionally guaranteed rights and freedoms.”<sup>33</sup>

Thus, when appealed to review the primacy of Union law over the Constitution during the ratification process of the Treaty establishing a Constitution for Europe<sup>34</sup> and then of the Treaty of Lisbon,<sup>35</sup> the Council had to rule on the normative rank of the Constitution relative to the European treaties. It did so under new conditions since the constitutional statute of June 26, 1992,<sup>36</sup> introduced an important modification by creating an article 88-1 constitutionalizing the participation of France in the Union.<sup>37</sup> While confirming, by the aforementioned decision of December 20, 2007, that “these constitutional provisions allow France to participate in the creation and development of a permanent European organization, endowed with legal personality and vested with decision-making powers resulting from “transfers of powers granted by the Member States,”<sup>38</sup> the Council distanced itself from the general and absolute conception of the prevalence of EU law over all norms of the Member States resulting from the aforementioned decision of the CJEU, by posing as an intangible principle that, “the Constitution is placed at the top of the internal legal order.”<sup>39</sup> From which it follows that under national law, the supremacy conferred on international conventions does not apply to provisions of constitutional value. No French court could therefore leave unapplied a provision of constitutional value by judging it incompatible with a treaty.

23. Cons. Council, 3 September 1986, n° 86-216 DC, *Loi relative aux conditions d'entrée et de séjour des étrangers en France*; Cons. Council, 29 December 1989, n° 89-268 DC, *Loi de finances pour 1990*.

24. Court of Cass., mix. cham., 24 May 1975, n° 73-13.556, *Jacques Vabre*: Bull. civ., n° 4.

25. Council of State, Ass. 20 October 1989, n° 108243, *Nicolo*.

26. CJEU, 9 March 1978, *Simmenthal* (see above); G. Canivet, “Le droit communautaire et l'office du juge national,” *Droit et Société*, 1992 n°20-21, pp. 133-141.

27. Constitutional statute n° 2008-724 of 23 July 2008 on the modernization of the institutions of the Fifth Republic, art. 29.

28. Organic statute n° 2009-1523 of 10 December 2009 relating to the application of article 61-1 of the Constitution.

29. See, in particular, CJEU decisions of 9 March 1978 *Simmenthal* (above) pts 21 and 24; of 20 March 2003, *Kutz-Bauer*, C-187/00, Rec. p. I-2741, p 73; of 3 May 2005, *Berlusconi e.a.* C-387/02, C-391/02 and C-403/02, Rec. p. I-3565, pt 72, of 19 November 2009, *Filipiak*, C-314/08, pt 81.

30. It was reminded of its obligations by the CJEU decision *Aziz Melki and Sélim Abdeli* of 22 June 2010, Joined Cases C-188/10 and C-189/10, pt 56.

31. “If the Constitutional Council, on a referral from the President of the Republic, from the Prime Minister, from the President of one or the other Houses, or from sixty Members of the National Assembly or sixty Senators, has held that an international undertaking contains a clause contrary to the Constitution, authorization to ratify or approve the international undertaking involved may be given only after amending the Constitution.”

32. Cons. Council, 9 April 1992, n° 92-308 DC, *Traité sur l'Union européenne (Maastricht I, II, III)*, recital 14; Cons. Council, 31 December 1997, n° 97-394 DC, *Traité d'Amsterdam*, recital 7.

33. Cons. Council, 19 November 2004, n° 2004-505 DC, *Traité établissant une Constitution pour l'Europe*, recital 7.

34. Article I-6 of the Treaty, Decision 19 November 2004, n° 2004-505 DC (above), recital 13.

35. Cons. Council, 20 December 2007, decision n° 2007-560 DC, *Traité de Lisbonne modifiant le traité sur l'Union européenne et le traité instituant la Communauté européenne*.

36. Constitutional statute n° 92-554 of 25 June 1992 adding to the Constitution the title “On the European Communities and the European Union.”

37. Art. 88-1 (resulting from the constitutional statute n° 2008-103 of 4 February 2008 modifying title XV of the Constitution), “The Republic shall participate in the European Union constituted by States which have freely chosen to exercise some of their powers in common by virtue of the Treaty on European Union and of the Treaty on the Functioning of the European Union, as they result from the treaty signed in Lisbon on 13 December, 2007.”

38. Cons. Council, 20 December 2007, n° 2007-560 DC (above), recital 7.

39. Ibid, recital 10; expression reiterated by Cons. Council, 9 August 2012, n°2012-653 DC, *Traité sur la stabilité, la coordination et la gouvernance au sein de l'Union économique et monétaire*, recital 9.



With reference to this principle, in its decision of 2004,<sup>40</sup> the Council examined the scope given to religious freedom by article 10.1 of the Charter of Fundamental Rights of the European Union (“CFR”)<sup>41</sup> and by article 9 of the European Convention on Human Rights (“ECHR”) with regard to the case law of the ECtHR leaving States a wide margin of appreciation to reconcile freedom of worship with the principle of secularism.<sup>42</sup> It proceeded with the same reasoning<sup>43</sup> for the assessment of conflict with the Constitution of article 47 of the CFR, which builds on the procedural guarantees of article 6 of the ECHR, imposing the publicity of the judicial debates, with national provisions which restrict this requirement.

Secondly, in the context of the constitutionality review of statutory law, the Constitutional Council cannot avoid assessing the conformity with the Constitution of those statutes which transpose Union directives.<sup>44</sup> This raises two questions, on the one hand, the conformity of the statute with the directive, that is to say the accuracy of the transposition, and on the other hand, the conformity of this statute with the Constitution, which, when the statute transposes an unconditional and precise provision of a directive, leads to examining the contradiction of this same directive with the Constitution. This control has been inevitable since the introduction into the Constitution in 1992 of provisions relating to the Union, and in particular Article 88-1. It is therefore on this constitutional basis, and not on principles drawn from the legal order of the Union, that the Constitutional Council, since 2004, sets the principle and the limits of its control under the terms of evolving case-law, today fixed in the following principles.<sup>45</sup> First, it follows from Article 88-1 of the Constitution that “the transposition into domestic law of an EU directive [or the adaptation into domestic law of an EU regulation] results from a constitutional requirement.” In the second place, however, the Council reserves the power to obstruct it when this transposition [or adaptation] “goes against a principle inherent in the constitutional idea of France, unless the constituent power has consented to it.” Thirdly, “In the absence of a challenge to such a rule or principle, the Constitutional Council is not competent to review the conformity with the Constitution of legislative provisions which are limited to drawing the

necessary consequences of unconditional and precise provisions of a directive or of the provisions of a regulation of the European Union.” Fourth, in the latter hypothesis “it is the exclusive prerogative of the courts of the European Union, appealed to if necessary for a preliminary ruling, to monitor compliance by this directive or this regulation with the fundamental rights guaranteed by the [law of] the European Union.” Fifth, this appeal to the CJEU for a preliminary ruling could only be decided by the ordinary court, judicial or administrative; the Constitutional Council does not consider itself bound to implement the preliminary ruling mechanism provided for by Article 267 of the TFEU<sup>46</sup> for contingent reasons arising from the time limits within which it must issue a decision.<sup>47</sup> Within this limit, it can nevertheless declare non-compliant with article 88-1 of the Constitution a legislative provision manifestly incompatible with the directive which it aims to transpose.”<sup>48</sup>

The keystone of this construction is that the Constitutional Council claims for itself the power to rule that a directive is contrary to a principle inherent in the constitutional identity of France. However, it refrained from giving a definition of this phrase, casting doubt as to the scope of its review. It is only in a recent decision,<sup>49</sup> that, without giving criteria, the Council distinguished what is governed by such a principle<sup>50</sup> from what is foreign to it.<sup>51</sup>

By delegating the review of the compatibility of national law with EU law to the judicial and administrative courts, the Council has given them discretion to exclude the application of national law, even when it has been declared compatible with the Constitution,<sup>52</sup> which they have done in many cases. To prevent the surge of an uncontrolled transformation of domestic law caused by fundamental rights from European sources, the constitutional reform of July 23, 2008<sup>53</sup> established a system

40. Decision n° 2004-505 (above), recital 18.

41. Article 10.1 of the CFR: ‘Freedom of thought, conscience and religion. Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.’

42. Decision n° 2004-505 (above), recital 18.

43. Decision n° 2004-505 (above), recital 19.

44. G. Canivet, ‘Le contrôle du Conseil constitutionnel sur les lois de transposition des directives communautaires, Principes fondamentaux et transposition des directives communautaires,’ conference in Budapest, 1-3 October 2009: <<https://www.conseil-constitutionnel.fr/les-membres/le-controle-du-conseil-constitutionnel-sur-les-lois-de-transposition-des-directives-communautaires>>.

45. Cons. Council, 15 October 2021, n° 2021-940 QPC, *Société Air France* [Obligation for air carriers to re-route foreigners who are refused entry into France], recital 9.

46. Cons. Council, 27 July 2006, n° 2006-540 DC, *Loi relative au droit d’auteur et aux droits voisins dans la société de l’information*, recital 19.

47. In the cases provided for by article 61 of the Constitution ‘the Constitutional Council must rule within one month. However, at the request of the Government, if there is an emergency, this period is reduced to eight days.’ In matters of priority questions of constitutionality, if article 61-1 of the Constitution requires the Council to rule ‘within a certain time,’ it is the organic statute of 10 December 2009 taken for its application which provides that it decides within three months (article 23-10 Ordinance n° 58-1067 of 7 November 1958 establishing organic statute on the Constitutional Council)

48. Cons. Council, 27 July 2006, n° 2006-540 DC (above), recital 20.

49. Cons. Council, 15 October 2021, n° 2021-940 QPC, *Société Air France* [Obligation for air carriers to re-route foreigners who are refused entry into France].

50. “The prohibition on delegating to private persons general administrative police powers inherent in the exercise of ‘public force’ necessary to the guarantee of rights,” recital 15.

51. “The right to safety, the principle of personal responsibility and equality before public charges, which are protected by European Union law,” recital 14.

52. Cons. Council, 12 May 2010, n° 2010-605 DC, *Loi relative à l’ouverture à la concurrence et à la régulation du secteur des jeux d’argent et de hasard en ligne*, recital 13. “Firstly, the authority attached to the decision of the Constitutional Council under Article 62 of the Constitution does not restrict the jurisdiction of Courts of law and Administrative Courts to ensure that such commitments shall prevail over a statutory provision which is incompatible with the same, even when the said provision has been held to be constitutional.”

53. Article 29 of the constitutional statute n° 2008-724 of 23 July 2008 on the modernization of the institutions of the Fifth Republic.

of control of the compliance of the law with rights and freedoms guaranteed under the Constitution, when the question is raised during a judicial proceeding; this control being exercised by the Constitutional Council upon appeal from the Council of State or the Court of Cassation. Further, the organic statute setting the procedural modalities of this appeal<sup>54</sup> intended to compel the Council of State and the Court of Cassation to appeal to the Constitutional Council before deciding on the arguments contesting the conformity of the provision under review with the international commitments of France and in particular Union law.<sup>55</sup> The Court of Cassation having appealed to the CJEU on the matter for a preliminary ruling on the interpretation of the treaties with regard to this text,<sup>56</sup> the Constitutional Council immediately gave a reading compatible with the obligations of national courts drawn from article 267 of the TFEU, thus ruling out the “priority” nature of the preliminary ruling on the issue of constitutionality.<sup>57</sup> This did not prevent the CJEU from reasserting the primacy of Article 267 of the TFEU over any national law provision that would, in the words of advocate general M. J. Mazák, “require courts to rule as a matter of priority on whether to submit to the *Conseil constitutionnel* the question on constitutionality referred to them, inasmuch as that question relates to whether domestic legislation, because it is contrary to EU law, is in breach of the Constitution of the French Republic.”<sup>58</sup> In passing, the advocate general insisted on the existential nature for the Union of the principle of primacy<sup>59</sup> and the obligations it imposes on any national court, “including a constitutional court.”<sup>60</sup>

The Council immediately introduced a limit to this new procedure, ruling that compliance with the constitutional requirement to transpose directives does not fall within the “rights and freedoms guaranteed under the Constitution” and cannot therefore be invoked in the context of a priority preliminary ruling on the issue of constitutionality.<sup>61</sup>

However, in the specific case of reviewing compliance with the Constitution of the statute laying down the rules relating to the European arrest warrant in application of

the Council Framework Decision of 13 June 2002,<sup>62</sup> the Council rejected these limitations.<sup>63</sup> This application had required a modification of the Constitution<sup>64</sup> by the insertion of an article 88-2, which in its current version, provides “Statutes shall determine the rules relating to the European arrest warrant pursuant to acts adopted by the institutions on the European Union.” When reviewing a priority preliminary ruling on the conformity with the Constitution of article 695-46 of the Code of Criminal Procedure relating to the European arrest warrant, which excludes any appeal against the decision to extend the effects of the warrant to other offenses than those which were initially targeted,<sup>65</sup> the Constitutional Council, for the first time, authorized itself, on the specific basis of article 88-2 of the Constitution, to appeal to the CJEU for a preliminary ruling in order to verify whether the exclusion of any appeal procedure was imposed by the directive. By this decision, the Council therefore, in this hypothesis at least, considered itself bound by the obligation incumbent upon any court of a Member State for the application of EU law. In its preliminary ruling, the CJEU regarded it as such.<sup>66</sup>

In addition to being generally excluded in the review of the constitutionality of the law, the obligations of the Constitutional Council towards the Union are therefore, by exception, variable and resting on different constitutional bases depending on the categories of secondary legislation of the Union that need be introduced into the internal legal order: flexible but incomplete with regard to the statutes transposing regulations and directives (art. 81-1) but complete with regard to those which lay down the rules for applying the European arrest warrant (art. 81-2), in which case the time limits imposed on the Council to give a ruling would be unenforceable. In the Constitutional Council’s case law, the primacy of Article 267 of the TFEU can be eclipsed.<sup>67</sup>

### 1.B. Ambiguity

This review of the case law of the French Constitutional Council on the extent to which the Constitution takes into account the primacy of Union law raises two questions of systemic consistency: the first relates to the ability of the Council to promote, in the internal order, a uniformity of interpretation of fundamental rights from a constitutional source with those guaranteed by the CFR,

54. Statute n° 2010-830 of 22 July 2010 on the application of article 65 of the Constitution.

55. Article 23-5, point 2 of the Ordinance n° 58-1067 of 7 November 1958 establishing an organic law on the Constitutional Council.

56. Court of Cass, 16 April 2010, Aziz Melki (n° 10-40001) and Sélim Abdeli (n° 10-40002).

57. Cons. Council, 12 May 2010, n° 2010-605 DC (above), recital 13 to 15.

58. Opinion of advocate general M. J. Mazák, 7 June 2010, Joined Case C-188/10 and C-189/10, *Aziz Melki and Sélim Abdeli*, pt 77.

59. Pt 73: “the principle of primacy (...) is the cornerstone of EU law. (...) That principle was recalled again, recently, in the declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon signed on 13 December 2007.”

60. D. Simon, A. Rigaux, “La priorité de la QPC: harmonie(s) et dissonance(s) des monologues juridictionnels croisés,” *Nouveaux cahiers du Conseil constitutionnel*, n°29, October 2010.

61. Cons. Council, 12 May 2010, n° 2010-605 DC (above), recital 19.

62. Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA).

63. Cons. Council, 4 April 2013, n° 2013-314P QPC, *M. Jeremy F.* [Absence of appeal in the event of an extension of the effects of the European arrest warrant - preliminary question to the CJEU].

64. Constitutional statute n° 2003-267 of 25 March 2003 relating to European arrest warrant.

65. Article 685-46 §4 of the Code of Criminal Procedure (article 17 of the statute n°2004-204 of 9 March 2004).

66. CJEU, 30 May 2013, C-168/13 PPU, *Jeremy F.*

67. X. Magnon, “La révolution continue: le Conseil constitutionnel est une juridiction... au sens de l’article 267 du Traité sur le fonctionnement de l’Union européenne,” *Revue française de droit constitutionnel*, 2013.

the second is about the sustainability of these positions in the legal order of the Union.

### 1 - On the harmonization of fundamental rights

Although it is consistent with the prerogatives conferred on it by the constituent power,<sup>68</sup> the Constitutional Council's position with regard to the legal order of the Union is not conducive to a harmonized application in the internal order of rights and freedoms from a constitutional source with those from a conventional source. By separating the functions of interpretation, between itself, for the rights and freedoms guaranteed by the Constitution and the judicial or administrative courts, for those protected by the ECHR and the CFR, under the control of one or the other European courts, the Constitutional Council favors divergent visions of fundamental rights with identical content, which is not compatible with the legal certainty essential to the rule of law even if, ultimately, the case law of the two European courts prevails. The procedure of the priority preliminary ruling on the issue of constitutionality which was intended to coordinate the two categories of reviews failed to achieve this goal; so that it is not uncommon that in the essential field of the protection of freedoms, a statute declared in conformity with the Constitution by the Council is then judged incompatible with the law of the Union and excluded in its application by a judicial or administrative court,<sup>69</sup> which, even if the inconsistency is clearly assumed,<sup>70</sup> ultimately affects both the authority of the constitutional court and the citizen's feeling of attachment to the historical republican pact.

### 2 - On the integration of legal orders

Ineffective in the internal order, the Constitutional Council's position is on several points at odds with the legal order of the Union. This could lead, in certain circumstances, to the initiation of an infringement action against France.<sup>71</sup> The crux of this hiatus is ultimately the Constitutional Council's refusal to recognize the primacy of Union law over the Constitution. From this, it deduces that the basis of its jurisdiction remains strictly constitu-

tional, that, therefore, except as otherwise provided in the Constitution, it is not subject to the cooperation obligations to which any national court is bound in the legal order of the Union, as they were reasserted in the Melki decision;<sup>72</sup> that it is not competent to review the conformity of a statute with the law of the Union; finally, that it has the duty to rule out a statute transposing a Union directive that would be contrary to France's constitutional identity.

Until now, this dogmatic posture has, however, had no effect likely to provoke an institutional crisis with the Union since, in accordance with the autonomy of judicial procedure recognized to the Member States,<sup>73</sup> it is ultimately on the judicial or administrative court that rests the implementation of the primacy of Union law and the duty of cooperation that it imposes; eventually it is this judicial or administrative court which, in the various cases, decides the compatibility of a provision of constitutional value with Union law. In addition, while giving itself the power to do so, the Constitutional Council has so far refrained from declaring a statute transposing an unconditional and precise provision of a directive or a regulation contrary to a principle inherent in the constitutional identity of France.

In practice, in order to avoid contradictions in the interpretation of fundamental rights from constitutional and European sources, in the preparatory work for its decisions, the Constitutional Council uses the technique of interpretation in conformity. Although this technique does not appear in decisions, it has nevertheless, in several cases, yielded concrete results,<sup>74</sup> in particular the integration of the principle "*ne bis in idem*" in the guarantees drawn from article 8 of the Declaration of 1789.<sup>75</sup>

This desire for convergence is complemented by repeated doctrinal initiatives inviting academic jurists and specialized practitioners to analyze the Council's case law on the question, to theorize it and to compare it with that of the constitutional courts of the other Member States.<sup>76</sup> In addition, the Council's decisions and those of the CJEU relating to this subject are widely commented and the general theme of the relationship between the Constitution and European law gives rise to innumerable publications. In addition, there is a sustained policy of judicial diplomacy within organizations bringing together the high courts of the Member States or by participating in regular wor-

68. A. Levade, 'Constitution et Europe ou le juge constitutionnel au cœur des rapports de système,' Cahiers du Conseil constitutionnel, n° 18, July 2005; 'Le Conseil constitutionnel et l'Union européenne,' Cahiers du Conseil constitutionnel, Hors-série - colloque du cinquantenaire, 3 November 2009; 'La construction européenne et son incidence sur les compétences étatiques et la hiérarchie des normes,' Revue française de droit constitutionnel, 2015/2 (n° 102).

69. For examples of these cases, see G. Canivet, 'L'incontournable question de l'application du droit européen par le juge constitutionnel français,' Conference organized by the Academy of European Law on the protection of fundamental rights in the European Union, Trier, 18-19 June 2015: <<https://www.conseil-constitutionnel.fr/les-membres/l-incontournable-question-de-l-application-du-droit-europeen-par-le-juge-constitutionnel-francais>>.

70. Cons. Council, 15 January 1975, n° 74-54 DC (above), recital 5 'A statute that is inconsistent with a treaty is not ipso facto unconstitutional,' n° 2010-605 DC (above), recital 13 'Firstly, the authority attached to the decision of the Constitutional Council under Article 62 of the Constitution does not restrict the jurisdiction of Courts of law and Administrative Courts to ensure that such commitments shall prevail over a statutory provision which is incompatible with the same, even when the said provision has been held to be constitutional.'

71. Articles 258 to 261 of the TFEU.

72. CJEU, 22 June 2010 (above), recitals 40 to 45.

73. CJEC, 16 December 1976, Case 33-76, pt 6.

74. G. Canivet, 'L'incontournable question de l'application du droit européen par le juge constitutionnel français,' (above); see for instance, Cons. Council, 28 May 2010, n° 2010-1 QPC, *Cristallisation des pensions*.

75. Cons. Council, 18 March 2015, n° 2014-453/454 QPC et 2015-462 QPC, *M. John L. et autres* [Cumulation of two insider trading prosecutions: misfeasance (*manquement d'initié*) and intentional tort (*délit d'initié*)].

76. See most recently: "De l'intégration des ordres juridiques: droit constitutionnel et droit de l'Union européenne", Titre VII, 2019/1 (N° 2)."



king sessions with the CJEU.<sup>77</sup> While taking an active part in these integration policies,<sup>78</sup> the Council of State has, for its part, recently taken the path of judicial cooperation with the CJEU.

## 2. Towards dialogical sophistication

Equally fluctuating has been the Council of State's case law on the application of the principle of primacy of treaties over the Constitution. Long reluctant to acknowledge the impact of Union law in the internal order (A), the administrative jurisdiction has, conversely, for a few years, engaged in close cooperation with the CJEU by fully using the resources offered by preliminary rulings (B).<sup>79</sup>

### 2.A. Reluctance

Respectful of a democratic legitimacy involving the sovereignty of Parliament and therefore of legislation in the internal order, the Council of State, while admitting without difficulty, in application of article 55 of the Constitution, the primacy of international conventions over prior statutes,<sup>80</sup> refused for a long time to acknowledge primacy over later statutes<sup>81</sup> by seeking refuge in a singular position compared to the Court of Cassation,<sup>82</sup> or compared to that of the Member States courts<sup>83</sup> and breaking with European case law.<sup>84</sup> It was not until 1989<sup>85</sup> that it acknowledged the primacy effect of international treaties, especially European ones, on all internal laws, including later ones, thus assuming the competence the Council delegated to it in its 1975 decision.<sup>86</sup> Since then, it has developed case law drawing multiple consequences in its role as ordinary court applying EU law.<sup>87</sup>

Nevertheless, conforming to the doctrine of the Constitutional Council, the Council of State excluded the Constitution from its conventionality review by stating in prin-

ciple that “while article 55 of the Constitution provides that ‘Treaties or agreements duly ratified or approved shall, upon publication, prevail over statutory law [...],’ the supremacy thus conferred on international agreements does not apply, in the internal order, to provisions of a constitutional nature.”<sup>88</sup> To justify this assertion, the authorized commentary on this decision specifies that the Constitution “is the supreme text from which all the authorities of the State, and in particular its judicial bodies, derive their power,”<sup>89</sup> while in several public speeches, the Council of State's Vice-President considered that it is a necessary consequence of article 54 of the Constitution.<sup>90</sup> This decision was later confirmed in later case law: in a decision dated March 5, 1999,<sup>91</sup> then, more specifically on EU law, in a decision dated December 3, 2001.<sup>92</sup>

Significantly different is the position of the Court of Cassation. When reviewing the primacy of the law of the Union on the same provision of constitutional value,<sup>93</sup> it resorted to the same argumentation as the Council of State regarding the generality of international agreements, but avoided ruling on the European treaties, not concerned in the case at hand,<sup>94</sup> to take into account “their original specific nature.”<sup>95</sup> Then, in its 2010 decision,<sup>96</sup> it did not hesitate to appeal to the CJEU to review the compatibility with article 267 of the TFEU of a provision of the organic statute adopted for the application of article 61-1 of the Constitution.

### 2.B. Followed by commitment

The position thus adopted by the Council of State led it to follow and deepen the case law of the Constitutional Council on the control of statutes transposing Union directives. It first did so in a decision dated February 8, 2007.<sup>97</sup> After citing the main argument of the Constitutional Council, the Council of State adds, with regard to its own competence that “the constitutional review of regulatory acts directly ensuring this transposition must be exercised according to particular modalities in the event that precise and unconditional provisions are being transposed;” it then completed the review methodology established by the Constitutional Council by detailing several phases. First of all, “...it is up to the administrative court,

77. Cons. Council, international activities: <<https://www.conseil-constitutionnel.fr/le-conseil-constitutionnel/activites-internationales>>.

78. Council of State, 2020 report, Third part, Etudes, ‘Débats, partenariats, coopération européenne et internationale,’ p. 380.

79. J.-M. Sauvé, ‘Le CE et le droit européen et international,’ speech delivered at the University of Tokyo on Wednesday October 26, 2016: <<https://www.conseil-etat.fr/actualites/discours-et-interventions/le-conseil-d-etat-et-le-droit-europeen-et-international>>; ‘L'autorité du droit de l'Union européenne: le point de vue des juridictions constitutionnelles et suprêmes,’ Address by Jean-Marc Sauvé at the Congress of the 25<sup>th</sup> anniversary of the Academy of European Law at Trier on 19 October 2017: <<https://www.conseil-etat.fr/actualites/discours-et-interventions/l-autorite-du-droit-de-l-union-europeenne-le-point-de-vue-des-juridictions-constitutionnelles-et-supremes>>.

80. Council of State, 1 March 1968, *Syndicat des fabricants de semoule*, recital 149.

81. Council of State, 1 March 1968 (above); 22 October 1979, *Union démocratique du travail*, n° 17541; Council of State Ass., 13 May 1983, *SA René Moline*, n° 37030.

82. Court of Cass. mix. cham., 24 May 1975 (above)

83. The Belgian Court of Cassation, the German Federal Constitutional Court and the Italian Constitutional Court had all recognized the primacy of international law over national law. See: B. Stirn and Y. Aguila, *Droit public français et européen*, Dalloz, 2014, p. 157.

84. CJEC, 9 March 1978, *Simmenthal* (above)

85. Council of State, Ass., 20 October 1989, n° 108243, *Nicolo* (above).

86. Cons. Council, 15 January 1975 (above)

87. For the detail of this case law, see Jean-Marc Sauvé, speech delivered at the University of Tokyo (above)

88. Council of State, Ass., 30 October 1998, n°200286, *Sarran and Levacher*.

89. <<https://www.conseil-etat.fr/ressources/decisions-contentieuses/les-grandes-decisions-du-conseil-d-etat/conseil-d-etat-assemblee-30-octobre-1998-sarran-et-levacher>>.

90. Jean-Marc Sauvé, speech delivered at the University of Tokyo (above)

91. Council of State, Ass., 5 March 1999, n°194658, *Rouquette and autres*.

92. Council of State, 3 December 2001, n°226514, *Syndicat national de l'industrie pharmaceutique*.

93. Article 188 of the organic statute dated 19 March 1999.

94. Court of Cass., plenary ass., 2 June 2000, 99-60.274.

95. CJEU, *Costa c/ ENEL* (above), pt 3.

96. Court of Cass., plenary ass., 16 April 2010 (above)

97. Council of State, 8 February 2007, n°2871110, *Société Arcelor Atlantique et Lorraine et autres*.



appealed to on the basis of alleged disregard of a provision or a principle of constitutional value, to determine whether there is a rule or a general principle of [European] Community law which, having regard to its nature and scope, as interpreted in the current state of the case-law of the Community courts, guarantees through its application the effectiveness of compliance with the provision or the constitutional principle invoked.” Then, “...if so, it is necessary for the administrative court, in order to ensure the constitutionality of the decree, to find out whether the directive which this decree transposes is in conformity with this rule or this general principle of community law.” An alternative then opens up. First possibility: “in the absence of serious difficulty, the administrative court must rule out the argument invoked,” and otherwise “appeal to the Court of justice of the European Communities for a preliminary ruling, under the conditions provided for by article 234 of the Treaty establishing the European Community [now 267 of the TFEU].” Second branch: “on the other hand, if there is no rule or general principle of Community law guaranteeing the effectiveness of compliance with the provision or the constitutional principle invoked, it is up to the administrative court to directly examine the constitutionality of contested regulatory provisions.” In accordance with the methodological rules thus laid down, the Council of State suspended its decision and appealed to the CJEU for a preliminary ruling on the validity of the directive in question with regard to the general principle of equality under European law, the constitutional equivalent of which resides in the article 6 of the Declaration of 1789.

This first step in the preliminary ruling dialogue was followed by others that refined the method. Thus, in a decision dated April 10, 2008,<sup>98</sup> the Council of State extended the review procedure to the case where the directive disregards, not a constitutional provision, but a guarantee of the ECHR (in this case Articles 6 and 8). In such a case, it indicated that “when an argument alleging that a statute transposing a directive is itself incompatible with a fundamental right guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and protected as a general principle of Community law is invoked before the administrative court, it is up to the administrative court to first ensure that the statute carries out an exact transposition of the provisions of the directive.” Then, if this is the case, “the argument alleging disregard of this fundamental right by the transposition statute can only be assessed according to the procedure for reviewing the directive itself.” In the present case, to avoid bringing such an action before the European court, the Council of State noted that with regard to the same provision, the CJEU had already ruled following an appeal for a preliminary ruling from another national court (the Court of Arbitration – now Constitutional Court – of Belgium) and it drew its own decision from

the preliminary ruling of the CJEU.<sup>99</sup> Thus, regarding the validity or the interpretation of a directive, the cooperative dialogue with the CJEU can extend to several jurisdictions of the Member States.

Finally, in a 2016 decision<sup>100</sup> drawing the consequences of the *Melki* decision,<sup>101</sup> the Council of State, addressing a priority preliminary ruling on the issue of constitutionality, granted to itself the power to raise *ex officio* the difficulty of interpretation of a directive, when the interpretation or assessment of its validity determines the constitutionality of the statute in question, and to appeal to the CJEU. In an unprecedented interpretation, refraining from appealing to the Constitutional Council, the Council of State enjoined the petitioner to assess, following the CJEU’s decision, whether it was necessary to request another review of the conformity of the contested provision with the Constitution. Thus, in such a hypothesis, the conventionality review takes precedence over that of constitutionality.

### Conclusion

The analysis of the French high court decisions compared to those of the CJEU reveals that the systemic relations between the legal order of the Union and the national Constitution, in addition to generating contradictory solutions, meet complex requirements, manipulating malleable criteria such as, generally, the national identity, inherent in the fundamental political and constitutional structures of the Member States,<sup>102</sup> and specifically, the principles inherent in the constitutional identity of France,<sup>103</sup> whose content and application can promote convergence or instead stir up oppositions.<sup>104</sup>

The implementation of these rules is, moreover, guided by ethical principles governing the attitude of both jurisdictional orders: on the part of the Union and its court, respect for identities national, on both sides, loyal cooperation, respect and mutual assistance for the accomplishment of the missions arising from the treaties;<sup>105</sup> all subjective principles which leave the various jurisdictions the latitude conducive to strategies of power or submission, domination or resistance, integration or separation.

In the aforementioned conclusions,<sup>106</sup> Advocate General Miguel Pires Mauro, insists on the complexity of this mechanism of avoiding conflicts of fundamental norms: “...an examination of the compatibility of Community

98. Council of State, 10 April 2008, n°296845.

99. CJEU, 26 June 2007, Case C-305/05, *Ordre des barreaux francophones et germanophones e.a.*

100. Council of State, 31 May 2016, n°393881.

101. CJEU, 22 June 2010 (above).

102. Article 4, §2 of the TEU.

103. Notion derived from the case law of the Constitutional Council.

104. F. Fines, ‘La double identité, nationale et constitutionnelle, des Etats membres de l’Union,’ *Revue générale du droit*, 2021, n°57833.

105. Article 4, §3 of the TEU.

106. Opinion of advocate general Miguel Pires Maduro, 16 December 2008, Case C-127/07, pt 17.

acts with the constitutional values and principles of the Member States may be carried out only by way of Community law itself and is confined, essentially, to the fundamental values which form part of their common constitutional traditions. Community law having thus incorporated the constitutional values of the Member States, national constitutions must adjust their claims to supremacy in order to comply with the primordial requirement of the primacy of Community law within its field of application. This does not mean that the national courts have no role to play in the interpretation to be given to the general principles and fundamental rights of the Community. On the contrary, it is inherent in the very nature of the constitutional values of the Union as constitutional values common to the Member States that they must be refined and developed by the Court in a process of ongoing dialogue with the national courts, in particular those responsible for determining the authentic interpretation of the national constitutions.”

In order for this subtle irenic dynamic to reach its goal, it is also necessary that, on both sides, it be activated by judges reacting with flexibility in consideration of the foundations of the Union enumerated by Article 2 of the TEU and that they appreciate the value of the rule of law....

But the question is now out of the circle of judges; it mobilizes the political balance of power within the Union and, in some Member States, agitates the rhetoric of the tribunes of the people. Are then put in motion the ideological ingredients of simplifying irrationality.

*“Simplifying thought is incapable of conceiving the conjunction of the one and the many (unitas multiplex). Or else it unifies abstractly by canceling out diversity. Or, on the contrary, it juxtaposes diversity without conceiving of unity.”<sup>107</sup>*

107. Edgar Morin, op.cit.



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## Europe's Future: A Federal Alternative to Differentiation

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The article aims to show the negative side-effects of differentiated integration (DI) for the democratic quality of the European Union (EU), to then investigate an alternative model that, theoretically, promises to promote integration and to uphold the said democratic quality. The article's argument is that DI is the response to the resistance that the integration of policies that partake to the sovereignty of Member States (i.e., core State power – or CSP – policies) generates in some Member States. The accommodation of that resistance has required the adoption of an intergovernmental logic to manage it. The paper's research questions are thus the following: what are the institutional consequences of DI? Is there an alternative theoretical model for integrating CSP policies?

Here is the article's road map. First, I will discuss why sovereignty-induced DI has triggered the intergovernmental development of the EU, while this has not been the case with capacity-induced DI (which has mainly concerned the regulatory policies of the single market or SM). Second, I will highlight the inability of the intergovernmental regime to guarantee the accountability of its decision-makers (as well as their effectiveness). Third, I will delineate an alternative model to DI to integrate policies that are traditionally close to areas of national sovereignty, namely the federal union model (as a distinct model from the federal state) and its problematic features. Here I will discuss the theoretical model, not the strategy for implementing it (the “how to go from here to there”). The Conclusion summarises the argument developed in the article.

### Sovereignty-induced differentiation

Differentiated integration (DI) is both a theory and a practice. As a practice, it has become the official public philosophy of the EU.<sup>1</sup> National leaders and supranational actors have come to share the view that DI constitutes the

only political strategy to adapt the process of integration to an increasingly plural landscape of national conditions and preferences. Particularly with the enlargements of the 1990s and 2000s, the argument goes, the lack of homogeneity among the EU Member States has increased dramatically, to the point of requiring an adaptation of the process of integration to that plurality of national interests and preferences. Through DI, different combinations of EU Member States participate in different policy regimes, although these regimes are open to changing compositions and all Member States are expected to join later. For instance, the economic and monetary union (EMU) is constituted by 19 of the EU 27 Member States; 22 out of the 27 Member States (plus four States not members of the EU) participate to the Schengen agreement, which abolished national borders; the Permanent Structured Cooperation in security and defence policy (PESCO) registers the participation of 25 out of 27 EU Member States; the Prüm Convention on cross-border cooperation for contrasting terrorism concerns seven out of 27 EU Member States. These are all examples of legalised differentiated policy regimes. However, there are also forms of DI that have not acquired any legal distinction, such as the 2019 Malta agreement consisting in a “*Joint declaration of intent on a controlled emergency procedure – voluntary commitments by Members States for a predictable temporary solidarity convenience, for the same mechanism*”, entered into between four out of the 27 EU Member States. Undoubtedly, DI has worked quite effectively in aggregating a growing number of Member States within the EU's legal framework. It has been the political formula for combining the deepening of institutional integration and the widening of EU membership. The Brexit experience confirmed the convenience, for the same eurosceptic Member States, of using DI to protect their policy preferences, given that exiting from the EU would imply much higher costs (in social and economic terms).

The practitioners' view has been shared by scholars as well. Distinguishing between differentiation (as a generic phenomenon of all modern political systems) and DI (as a specific feature of the European integration process),<sup>2</sup> scholars have conceptualized the latter as a permanent feature of the integration process, particularly after the 1992 Maastricht Treaty.<sup>3</sup> The two mainstream theories of European integration have stressed its physiological character. For neo-functional scholars,<sup>4</sup> differentiation consists of different timing in Member State adaptation to EU laws, although all Member States are considered to share the direction of the process of integration (that is, the formation of a supranational organisation). For li-

1. See, European Council (2017) *The Rome Declaration*, 25 March, ; see also, European Commission (2017) *White Paper on the Future of Europe*, 1 March.

2. See, John Erik Fossum, ‘Democracy and Differentiation in Europe’ (2015) 22 *Journal of European Public Policy* 799.

3. See, Alexander CG Stubb, ‘A Categorization of Differentiated Integration’ (1996) 34 *Journal of Common Market Studies* 283.

4. See, Alec Stone Sweet, Neil Fligstein and Wayne Sandholtz, ‘The Institutionalization of European Space’ in Alec Stone Sweet, Neil Fligstein and Wayne Sandholtz (eds), *The Institutionalization of Europe* (Oxford University Press 2001).

beral intergovernmental scholars,<sup>5</sup> differentiation reflects the irreconcilable preferences of Member States, acting as rational actors, in dealing with the dilemmas of cooperation. If neo-functionalism scholars are motivated by a teleological view of European integration whose outcome is inevitably the formation of an encompassing and cohesive supranational organisation, liberal intergovernmentalism scholars are motivated by a realist view of European cooperation, where differentiation is the tool for solving inter-State negotiations. While for the former group of scholars, the EU is a State-in-the-making (although of a federal type, to use Lijphart's terms<sup>6</sup>), the latter view it as an international organisation based on States-as-they-are. For the former, DI is the strategy for accommodating different Member State preferences and perspectives in participating, although with different timing, in the building of a supranational State-like entity (*multi-speed Europe*).<sup>7</sup> For the latter, DI is the *ad hoc* solution to keep different national interests around the table, with the EU being interpreted as an international organisation consisting of autonomous European states (*Europe à la carte*).<sup>8</sup>

The more recent literature on DI has helped identify its various forms.<sup>9</sup> Schimmelfennig and Winzen have distinguished between instrumental differentiation and constitutional differentiation or between internal (to the EU treaties or legal order) and external (through international treaties signed by EU Member States) differentiation.<sup>10</sup> Winzen had previously conceptualised the reasons and forms taken by DI, distinguishing between a DI motivated by a Member State's lack of capacity and resources in adapting to the rules and practices that constitute the *acquis communautaire* and a DI which emerged out of the Member State's resistance to participation in a specific policy regime which might jeopardize its control over national resources.<sup>11</sup> DI induced by a lack of capacity may be detected in several policy areas and in different periods of time, but it is generally a problem that it is destined to be solved. It emerged as an effect of the enlargement process with new Member States being unable to meet some of the policy requirements of EU membership, because of domestic administrative and institutional hurdles in adapting to EU regulations. In general, having recourse to directives rather than regulations has historically helped

guarantee flexibility in the implementation of single market rules by Member States.<sup>12</sup> Quite different is the DI triggered by a Member State's defence of its claims to sovereignty. This type of DI has emerged only in the post-Maastricht period when policy fields traditionally making up CSP were brought to Brussels to be managed. Sovereignty-induced DI was further claimed during multiple crises in the 2010s and the 2020 pandemic, considering that those crises touched on areas falling under the scope of national sovereignty prerogatives.

The contribution of the more recent literature on the conceptualization of DI has been remarkable.<sup>13</sup> Particularly, the contribution by Winzen has opened a promising theoretical road for conceptualizing the peculiarity of sovereignty-induced DI.<sup>14</sup> However, the governance implications of the latter have not been sufficiently discussed. In fact, the recourse to sovereignty-induced DI has required the use of a specific intergovernmental governance regime, based on national governments' voluntary coordination rather than on legally regulated inter-institutional relations. Thus, differentiated policy regimes are correlated to differentiation in governance regimes. In the next section, I will investigate such differentiation in governance, connected to sovereignty-induced DI, to delineate its institutional features and democratic consequences.

### The governance of sovereignty-induced DI

A large part of the literature on DI assumes that differentiated policy regimes are managed by a single decision-making structure expressing a supranational logic of integration.<sup>15</sup> Certainly, it is acknowledged that inter-institutional relations might change in dealing with the different policy responsibilities of the EU, although it is assumed that those inter-institutional relations are constrained by the same logic of integration.<sup>16</sup>

However, what has come to characterise the post-Maastricht EU has been the institutionalization of distinct decision-making regimes. Heuristically, one may distinguish between two decision-making or governance regimes, one dealing with issues of low domestic political salience regarding single market regulatory policies and the other dealing with policies of high domestic political salience which entered the EU agenda after the end of the Cold War.

5. See, Andrew Moravcsik, 'What Can We Learn from the Collapse of the European Constitutional Project?' (2006) 47 *Politische Vierteljahresschrift* 219.

6. See, Arend Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries* (Yale University Press 1999).

7. See, Jean-Claude Piris, *The Future of Europe: Towards a Two-Speed EU?* (Cambridge University Press 2012).

8. See, Giandomenico Majone, *Rethinking the Union of Europe Post-Crisis: Has Integration Gone Too Far?* (Cambridge University Press 2014).

9. See, e.g., Dirk Leuffen, Berthold Rittberger and Frank Schimmelfennig, *Differentiated Integration: Explaining Variation in the European Union* (Palgrave Macmillan 2013).

10. See, Frank Schimmelfennig and Thomas Winzen, *Ever Looser Union?: Differentiated European Integration* (First edition, Oxford University Press 2020).

11. See, Thomas Winzen, 'From Capacity to Sovereignty: Legislative Politics and Differentiated Integration in the European Union: From Capacity to Sovereignty' (2016) 55 *European journal of political research* 100.

12. See, Michelle Egan, 'The Internal Market: Increasingly Differentiated?', in Ramona Coman, Amandine Crespy and Vivien A Schmidt (eds), *Governance and Politics in the Post-Crisis European Union* (Cambridge University Press 2020).

13. See, Vivien A Schmidt, 'The Future of Differentiated Integration: A "Soft-Core," Multi-Clustered Europe of Overlapping Policy Communities' (2019) 17 *Comparative European politics* (Houndmills, Basingstoke, England) 294.

14. See, Winzen (n 12).

15. See, Bruno de Witte, Andrea Ott and Ellen Vos (eds), *Between Flexibility and Disintegration: The Trajectory of Differentiation in EU Law* (Edward Elgar Publishing 2017).

16. See, Helen Wallace, 'The Institutional Setting: Five Variations on a Theme', in Helen Wallace and William Wallace (eds), *Policy-Making in the European Union* (4th ed., Oxford University Press 2000) 3-27.



The 1992 Maastricht Treaty was the turning-point for this differentiation in governance structures. Through that Treaty it was formally recognised that the EU could proceed in the integration process of domestically crucial policies (the CSP policies close to national sovereignty)<sup>17</sup> provided that the Member State governments were guaranteed an exclusive or predominant decision-making role (through the Council and European Council) over those policies.

The 2009 Lisbon Treaty constitutionalised the distinction between different decision-making regimes in relation to distinct policies. It strengthened the supranational decision-making regime for single market policies, which became the ordinary legislative procedure (based on the triangulation among Commission-Council-European Parliament (EP)), and it institutionalized an intergovernmental decision-making regime for policies traditionally partaking to areas of national sovereignty,<sup>18</sup> with the European Council as a collegial executive. According to Fossum, the (supranational) Community system and the (intergovernmental) Union system have thus come to coexist within the same political and legal order.<sup>19</sup>

The distinction between the two governance regimes is necessary in order to conceptualise the correlation between the institutionalisation of intergovernmental governance and the Europeanisation (integration but not necessarily supra-nationalisation)<sup>20</sup> of CSP policies, a correlation that is missing in DI literature. Those policies, in fact, substantiated the reality and the symbols of national sovereignty, the historical *raison d'être* of the State's existence. Theoretically, those policies too might have been managed by the supranational governance introduced in the 1957 Rome Treaties. However, the latter has a logic of integration that does not fit with the need to control, by the single Member State government, their Europeanisation. Supranational governance, in fact, has made possible the formation of the most integrated single market in the world (much more integrated than the US)<sup>21</sup> thanks to a regulatory approach that has standardised and homogenised its policies. Overloading the single market's formation of quasi-constitutional aims (the "ever closer union"), the supranational approach has administratively centralised its functioning through the transfer to the Brussels' triangle of institutions embodying the community method of most market-related policies. As the United Kingdom (UK) had to acknowledge, the four freedoms constituting

the single market (free movement of goods, capital, persons, and the freedom to establish and provide services) are not negotiable, as if they represented constitutional principles and not macro-economic criteria.

This could hardly be the case for CSP policies. Their standardisation and homogenisation would have depleted national sovereignty without compensation. Member State claims on preserving their control over national sovereignty's resources and symbols were and are structural, not contingent, because they express consolidated national preferences, views or identities. For this reason, national governmental leaders adopted a different model for governing the Europeanisation of CSP policies, different from the supranational one.<sup>22</sup> Without the formation of the intergovernmental regime, it would have been implausible to have DI of CSP policies. The most significant cases of DI in these policy regimes display an intergovernmental logic that is alien to the logic presiding over the decision-making process in single market regulatory policies. The latter are integrated through the ordinary legislative procedure, with its compulsory character, while CSP policies are integrated through voluntary coordination among national governments.

The EMU economic (and not monetary) policy, the Schengen asylum policy, the Permanent Structured Cooperation in security and defence policy (PESCO), the Prüm Convention on cross-border cooperation for contrasting terrorism, have all been made possible by the voluntary nature of the policy-making process and all have come to be organised by one form or other of intergovernmental governance, i.e., by the logic of voluntary policy coordination. Few policies started as differentiated policy regimes thanks to their intergovernmental logic, although they then evolved in a supranational direction (as in the cases of reinforced cooperation on divorce and European patents).

The voluntary basis of CSP policymaking is guaranteed by the consensual logic of the deliberation that takes place within the European Council (or those Council formations dealing with CSP policies, such as the Eurogroup of Economy and Finance ministers of the EMU or the Foreign Affairs Council). In regulatory single market policies, a Member State can have extra time to adapt the EU laws to its domestic structures, but it cannot call into question the constitutive rules (the four freedoms) that keep the single market together. On the other hand, sovereignty-induced DI consists in the institutionalisation of a distinction between a majority of Member States agreeing to manage specific CSP policies in an intergovernmental fashion in Brussels and a minority of Member States unwilling to follow suit but allowed to opt out of the process without halting it. Only a decision-making method based on voluntary coordination could make this possible, without disrupting the integration canvas. If policy differentiation on CSP and intergovernmental governance are intertwined,

17. See, Philipp Genschel and Markus Jachtenfuchs (eds), *Beyond the Regulatory Polity?: The European Integration of Core State Powers* (Oxford University Press 2014).

18. See, Uwe Puetter, *The European Council and the Council: New Intergovernmentalism and Institutional Change* (Oxford University Press 2014).

19. See, John Erik Fossum, 'EU Constitutional Models in 3D: Differentiation, Dominance and Democracy' (2021) EU3D Research Paper 15.

20. See, Sergio Fabbrini and Uwe Puetter, 'Integration without Supranationalisation: Studying the Lead Roles of the European Council and the Council in Post-Lisbon EU Politics' (2016) 38 *Journal of European Integration* 481.

21. See, Matthias Matthijs, Craig Parsons and Christina Toenshoff, 'Ever Tighter Union? Brexit, Grexit, and Frustrated Differentiation in the Single Market and Eurozone' (2019) 17 209.

22. See, Sergio Fabbrini, *Which European Union?: Europe after the Euro Crisis* (Cambridge University Press 2015).

then the understanding of the former cannot be separated from the latter.

With the multiple crises in the 2010s, as well as with the 2020 pandemic, that affected areas following in the scope of CSP policies (e.g., fiscal, migratory, security and health policies), the European Council has emerged as the unquestioned central decision-making institution of the EU. Indeed, it was the European Council that decided how to deal with the financial crisis and how to respond to the possible financial bankruptcy of Greece in the early 2010s, to strike a deal with the Turkish government for containing the flux of Syrian refugees in 2015, to sterilize the Commission's proposal to redistribute refugees in Member States according to objective criteria in 2016.

The European Council has become not only the executive centre of the EU, but it has come define the direction to be followed by national legislatures in implementing its political decisions, even to dictate how to interpret judicially the legislative measures taken through the triangulation of the Commission, the Council and the EP. In the attempt to neutralize the veto threatened by the Hungarian and Polish prime ministers to the rule of law conditionality attached to Regulation no. 2020/2092 relating to the use of EU funds, in the meeting's conclusions of 10-11 December 2020 "*the European Council underlines that the Regulation is to be applied in full respect of Article 4(2) TEU, notably the national identities of Member States inherent in their fundamental political and constitutional structures (thus stressing that, ed.) the guidelines will be finalised after the judgment of the Court of Justice so as to incorporate any relevant elements stemming from such judgment*". In instructing the Commission and the EP, but also the ECJ, on how to interpret the Regulation, the European Council overstretched again its role, according to a pattern already identified by Fossum.<sup>23</sup>

However, the European Council has also displayed structural limits from a democratic perspective. It has shown the ineffectiveness of a decision-making process which depends on unanimity but also the unaccountability of the real decision-makers. Indeed, the EP could not play a checking role on the European Council, nor was that role exercised by a collection of national Parliaments. Above all, the European Council, in claiming to be the only EU institution legitimised to manage sovereignty-based issues, ended up politicising them, thus rendering their management even more difficult.<sup>24</sup>

This raises the following question: is there an alternative model to be considered for integrating sovereignty-induced claims?

### Sovereignty in democratic federations

After the 1950s (particularly after the 1954 rejection of

the European Defence Community by the French legislature), federalism (as a theory) has gradually disappeared from the debate on European integration (notwithstanding the fact that federal principles have continued to influence "the building of Europe")<sup>25</sup>, with neo-functionalism and liberal intergovernmentalism becoming the mainstream theories for interpreting (and influencing) that process. The affirmation of the latter theories and the decline of federalism has had an impact on the conceptualisation of European integration. Contrary to federalism's predisposition to privilege the analysis of the *institutions* of integration, neo-functionalism and liberal intergovernmentalism have rather a predisposition to focus on the *process* of integration.

The absolutisation of processes over institutions has led the two mainstream theories to under-conceptualise the consequences of the various solutions or compromises agreed upon (for instance, the DI), as well as their implications for the democratic quality of the EU.<sup>26</sup> Certainly, federalism has continued to inspire politicians,<sup>27</sup> representing a sort of underlying culture of the EP's mainstream parties. The reference, for this federal political culture, has continued to be the experience of the most influential European federal state, the post-WWII Germany, also because of the highly influential role played by representatives of the German Christian Democratic Union within the main EP party, the European People's Party. Indeed, it might be argued that the German federal State's model<sup>28</sup> has inspired the logic of administrative centralisation and fusion between levels of governments pursued in the making of the single market,<sup>29</sup> if not the latter's 'over-constitutionalization'.<sup>30</sup>

However, the federal State model cannot answer the question epitomised by DI, namely the integration of sovereignty claims within the Union. The identification of a

25. See, Michael Burgess, *Federalism and European Union: The Building of Europe, 1950-2000* (Routledge 2000); David H McKay, *Designing Europe: Comparative Lessons from the Federal Experience* (Oxford University Press 2001).

26. See, R Daniel Kelemen, 'Federalism and European Integration' in Antje Wiener, Tanja A Börzel and Thomas Risse (eds), *European Integration Theory* (3<sup>rd</sup> edn, Oxford University Press 2018).

27. The post-WWII German federation is the outcome of the Allied Authorities' decision to decentralize the powers of the Third Reich's highly centralized state rather than of the autonomous decision of independent *Länder* to aggregate to form a federation. Indeed, the territorial borders of previous *Länder* were recognized in just a few cases, but many new *Länder* were formed by either aggregating or disaggregating previous *Länder* to guarantee a reasonable balance between them (in any case to prevent a *Land* having more than 30 per cent of the federation's total population).

28. See, Guy Verhofstadt, *Europe's Last Chance: Why the European States Must Form a More Perfect Union* (Basic Books 2016); Romano Prodi, *Europe as I See It* (Polity Press 2000). See also, Joschka Fischer, *From Confederacy to Federation: Thoughts on the finality of European integration*, speech given at the Humboldt University in Berlin, 12 May 2000, available at <https://ec.europa.eu/dorie/file-download.do?docId=192161&cardId=192161>.

29. See, Jan Werner Müller, 'In the Shadows of Statism: Peculiarities of the German Debates on European Integration' in Kalypso Nicolaidis and Justine Lacroix (eds), *European Stories: Intellectual Debates on Europe in National Contexts* (Oxford University Press 2010).

30. See, Dieter Grimm, 'The Democratic Costs of Constitutionalization—The European Case', *The Constitution of European Democracy* (Oxford University Press 2017).

23. See, John Erik Fossum, 'Politics versus Law: The European Council and the "Balancing European Union Style"' (2020) Arena Working Paper.

24. See, Andrew Glencross, 'The European Council and the Legitimacy Paradox of New Intergovernmentalism: Constitutional Agency Meets Politicisation' (2016) 38 *Journal of European Integration* 497.

federal alternative to DI requires a comparative investigation of the experience of democratic federations.<sup>31</sup> Since the pioneering works of Sbragia<sup>32</sup> and Stepan,<sup>33</sup> the experiences of federations have been classified according to their historical path of formation and consolidation. Sbragia distinguished between federations by aggregation and federations by disaggregation, while Stepan conceptualised the basic distinction between coming-together and holding-together federations. For both scholars, the former expresses the aggregation of previously independent territorial States and the latter the territorial disaggregation of a previously unitary State. The institutional structures of the two federal models, and their underlying *rationale*, reflected that founding logic. Coming-together federations are much less centralised than holding-together federations, because the units that activated the aggregation aimed to maintain as much power (and competence) as possible in their own hands. They even constrained the centre from within, separating its decision-making institutions. On the contrary, holding-together federations kept the territorial disaggregation under the pre-eminence of a federal centre and organised the latter according to the logic of fusion of powers. In ideal type terms, we might call the former federal unions and the latter federal States. Along the entire (democratic) federal spectrum, the United States (US) and Switzerland are closer to the federal union pole, while post-WWII Germany, Austria and Belgium are closer to the federal State pole, with Australia and Canada in between the two.<sup>34</sup> Although all federations are based on the twin principle of self-rule and shared rule,<sup>35</sup> in federal unions, self-rule and shared rule are institutionally separated (each level has its own competences and institutions for carrying them out), while in federal States the distinction between self-rule and shared rule is less compelling because competences are mainly shared between levels of government and their management implies the latter's close cooperation. In other words, multiple separation of powers keeps federal unions together, cooperation and fusion of powers keeps federal States together.

This institutional distinction between the two models epitomises different interpretations of federal sovereignty.<sup>36</sup> In holding-together federations, federal sovereignty

belongs to the central institutions of the federation. In post-WW II Germany, sovereignty is represented by the Bund, i.e., by the institutions of the parliamentary government (*Bundestag* and *Bundeskanzler*), integrated by the institution representing the *Länder*'s executives (*Bundesrat*). The *Bundestag* is the political chamber of the federation, in the sense that it is elected periodically by the German voters with the aim of forming a parliamentary majority supporting the Chancellors and their governments. The *Bundesrat* (constituted by representatives of the *Länder*'s governments) has no say in the formation of the federal/parliamentary majority. None of the *Länder*, as a single unit, can constitutionally claim to be sovereign, although it has "the constitutional right to conclude treaties" based on its "quality of State (...) in fields of exclusive *Land* competence".<sup>37</sup> The quality of State has institutional, not sovereignty's, implications. Considering both exclusive and shared competences, the federal centre handles a large part of federal policies, although the *Länder* contribute to the policy-making process in matters relevant for them through the *Bundesrat*, their representatives in the committees connecting the two levels of government, and their power to implement the policies decided centrally.<sup>38</sup> In Germany, the growing policy responsibilities of the centre have been achieved through a cooperative logic between shared rule and self-rule, although federal government has retained the final say.<sup>39</sup> This model of cooperative federalism has an internal dynamic to standardise and homogenise policies across the *Länder*, although it allows flexibility in the implementation of federal policies at the level of single *Länder* (as happened with the five eastern *Länder*, plus eastern Berlin, entering the federation in 1990).<sup>40</sup> Differentiation here was capacity-motivated, the solution being the transfer of resources to a needy *Land* to speed up its homogenisation with the other *Länder*. No *Land* has ever claimed a specific differentiated regime on behalf of its own sovereignty. This fused and centralizing system has guaranteed the accountability of the federal decision-makers. The federal governments, supported by their majority in the *Bundestag*, are responsible for governmental decisions and respond for their effects to voters in periodic parliamentary elections.

### The federal union approach to sovereignty claims

In coming-together federations, such as the US and Switzerland, instead, the place of sovereignty has continued to be a disputed issue. Since it was the States/cantons that decided to aggregate, they tried to keep as many

31. See, John Kincaid (ed), *A Research Agenda for Federalism Studies* (Edward Elgar Publishing 2019).

32. See, Alberta M Sbragia, 'Thinking about the European Future: The Uses of Comparison', in Alberta M Sbragia (ed), *Euro-Politics: Institutions and Policymaking in the 'new' European Community* (Brookings Institution 1992).

33. See, Alfred C Stepan, 'Federalism and Democracy: Beyond the U.S. Model' (1999) 10 *Journal of democracy* 19.

34. See, Arthur Benz and Jörg Broschek (eds), *Federal Dynamics: Continuity, Change, and the Varieties of Federalism* (Oxford University Press 2013); Johanne Poirier, Cheryl Saunders and John Kincaid (eds), *Intergovernmental Relations in Federal Systems: Comparative Structures and Dynamics* (Oxford University Press 2015); John Erik Fossum and Markus Jachtenfuchs, 'Federal Challenges and Challenges to Federalism. Insights from the EU and Federal States' (2017) 24 *Journal Of European Public Policy* p. 467; Kincaid (n 32).

35. See, Daniel Judah Elazar, *Exploring Federalism* (University of Alabama Press 1987).

36. See, Dieter Grimm, *Sovereignty: The Origin and Future of a Political and Legal Concept* (Columbia University Press 2015).

37. See, Roland Lhotta and Julia von Blumenthal (2015) 'Intergovernmental Relations in the Federal Republic of Germany: Complex Co-operation and Party Politics', in Poirier, Saunders and Kincaid (n 35) 226.

38. See, Arthur Benz and Jared Sonnicksen, 'Advancing Backwards: Why Institutional Reform of German Federalism Reinforced Joint Decision-Making' (2017) 48 *Publius* 134.

39. See, Fritz W Scharpf, 'The Joint-Decision Trap: Lessons from German Federalism and European Integration' (1988) 66 *Public Administration* 239.

40. See, Fritz W Scharpf, 'Community, Diversity and Autonomy: The Challenges of Reforming German Federalism' (2008) 17 *German Politics* 509.



competences as possible,<sup>41</sup> although they acknowledged the need to share the policies that could guarantee their security.<sup>42</sup> For this reason, sovereignty was divided among the federal centre and the federated States/cantons, although that distribution passed through a constitutional act that formally kept sovereignty undivided. Through the constitution, the federation's founders transferred sovereignty to the new centre only insofar as necessary to protect the federation, or to enable its economic development, keeping for the States/cantons all other policy responsibilities. In the US, federalism consisted in the shared rule (at the federal centre) of the CSP policies for guaranteeing the federation's security from external and internal threats and in the self-rule (in the federated States) of market-making policies in accordance with each States' cultural traditions and economic structures. Certainly, the federal centre could claim (as made possible, in the US, by the Commerce Clause of the 1787 Constitution) the control of market-regulating policies, when that was necessary to guarantee the federation's economic expansion and security. In the US and Swiss federations, there is not a single (State/canton or federal centre) level of government that might claim to represent federal/national sovereignty in its entirety, since the latter is represented by the States/cantons and the centre together.

At the same time, the power of the federal centre has been constrained from within, through different strategies of separation of powers aiming to guarantee the reciprocal independence of the executive and legislative institutions. Separation of powers is a recipe for preventing centralisation. In the US and Switzerland, there is no equivalent of a *Bundestkanzler* representing the federal government. Indeed, there is no government as such, because the government is constituted of "separated institutions sharing power".<sup>43</sup> The government is a process rather than an institution. In the US, the President is indirectly elected every four years (renewable once) through the Electoral college which dissolves after the election, with the two chambers of the Congress separately elected by State voters (for a six-year mandate, in the case of the Senate) and districts-within-State voters (for a two-year mandate, in the case of the House of Representatives). Horizontal separation of powers means that Congress cannot vote the President down (it can impeach the latter for constitutional, not political, reasons), nor does the president have the power to dissolve Congress, although a complex system of checks and balances incentivise (or should incentivize) those institutions to cooperate in taking decisions. In Switzerland, the executive is a collegial institution (*a directoire*, or federal council, of seven members) elected by the two chambers of the federal legislature (the Federal

Assembly being made up of the National Council, representing Swiss voters, and the Council of States, representing the cantons), but (once elected) no longer dependent on the latter's confidence.<sup>44</sup>

As is apparent from these examples, federal unions could not centralise authority, since sovereignty is a divisive issue.

Owing to the asymmetry in demographic sizes of the States/cantons and their different national/cultural identities, federal unions have set up an internally divided centre to reduce the possibility that one State/canton (or group of them) could gain control and thus impose its will on the other States/cantons. The horizontal separation of powers, combined with the limited and enumerated policies assigned to the federal centre, has reduced the incentive to seek opportunities to opt out from the centre's shared rule. Moreover, States/cantons have kept (or have tried to keep) identity issues within the realm of their sovereignty (in the US, issues connected with the 'racial identity' of the States, in Switzerland with the religious identity of the cantons). Differentiation has thus developed between the various cantons/states' self-rules, since each state/canton can pursue specific policies in the fields of its competences, according to the preferences of domestic voters or governors, in compliance with the State's/canton's constitution. If a policy is not part of the (limited) shared rule package, then a State/canton can claim to manage it, although that should be justified constitutionally (indeed, as has happened in the US with the civil rights policy, that justification might become highly disputed).

In the US, the distinction between shared rule and self-rule policies has been challenged by the growth of the country's international exposure and its internal complexity. The dramatic development of public responsibilities (since the 1930s and particularly after the Second World War) has led to the affirmation of what has been called the 'policy state',<sup>45</sup> characterised by a growing role for the centre over the States (to the point of configuring a sort of cooperative federalism),<sup>46</sup> although State sovereignty has continued to be protected by the Constitution and related practices. Indeed, States can even behave as independent actors at the international level, contradicting decisions taken by the federal authorities (as was the case with environmental policy, when California decided to participate to the 2015 Paris Agreement after the Trump administration decided to withdraw from it in 2017). Thus, the cooperation required by the implementation of federal policies could not change the internalised logic of competition and conflict between the separated levels of government

41. See, Joseph M Parent, *Uniting States: Voluntary Union in World Politics* (Oxford University Press 2011).

42. See, William H Riker, *Federalism: Origin, Operation, Significance* (Little, Brown 1964).

43. See, R.E. Neustadt, *Presidential Power and the Modern Presidents: The Politics of Leadership from Roosevelt to Reagan* (New York : Free Press ; Oxford : Maxwell Macmillan International 1991) 29.

44. See, Adrian Vatter, *Swiss Federalism: The Transformation of a Federal Model* (1<sup>st</sup> edn, Routledge 2018).

45. See, Karen Orren, *The Policy State: An American Predicament* (Harvard University Press 2017).

46. See, Robert Schuetze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (Oxford University Press 2009).



regarding 'who should do what'.<sup>47</sup>

Federal unions have further constitutionally constrained the policy capabilities of the centre through a horizontal separation of powers that institutionalises the powers of the States/cantons (in the US, through a confederal Senate consisting of two senators per State, regardless of its demographic size; in Switzerland, through the referendum power that canton citizens may use to vote on contested federal laws). Federal States, instead, have constitutionally empowered the centre by enlarging the shared power of its parliamentary government, although mitigated by the federal representation of the territorial units in the upper chamber. In both types of federalism, there is only one constitutionalised governance system for dealing with federal shared rule policies, although in federal unions the voters elect (directly or indirectly) the representatives of separate institutions, whereas in federal States they can elect a parliamentary majority.

Thus, the two types of federalism meet in different ways the accountability requirements of a democratic federation. Their single decision-making framework, for dealing with policies of federal competence, is *demos*-constraining in federal unions and *demos*-enabling in federal States.

### The EU as a federal union?

A union of highly demographically asymmetrical States, with deep-rooted distinct national identities, such as the EU, cannot be federalised according to the federal State model, so only a federal union seems possible. But experience shows that federal unions do not emerge from organic evolution, nor from the sum of the solutions to the periodic crises the union has had to face: federal unions require a preliminary constitutional choice by political elites, which separates shared rule from self-rule, supported by the consent of the citizens they represent.<sup>48</sup>

In a federal union, although Member States would have their own constitution, the values and procedures of the latter would need to be coherent with those upheld by the constitutional pact. Different national interpretations of the basic principles of individual freedoms and the rule of law could only poison a federal union (as shown by the dramatic experience of the US Civil War, 1861-65). The constitutional pact could celebrate the plurality of sovereignties of the federal union, rather than its single sovereignty character, only if there is a coherence of values among those sovereignties. Because sovereignty is the core issue, federal unions are very fragile experiments, systematically exposed to conflicts that could disrupt them, and only the existence of political elites willing to compromise have saved existing federal unions from this outcome. Here, the net distinction between shared rule and self-

rule is fundamental: a federal union is a compound polity where national units can differentiate themselves in their self-rule policies, but they should participate equally in the shared rule policies of the federal centre.<sup>49</sup>

To deal with sovereignty issues, federal unions should enlarge the number of policies under self-rule control (vertical separation of powers) and internally separate the institutions governing the enumerated policies under shared rule control (horizontal separation of powers). In the case of the EU, this model would imply the bringing of enumerated CSP policies to the federal level, but also the devolution of unnecessary supranational/regulatory policies to the control of national authorities and voters.

At the same time, at the centre, federal unions cannot centralize governmental power in the same way federal States do. The latter can set up a parliamentary government because they do not have sovereignty issues to settle. As soon as those issues emerge (as in Belgium or Canada, or in the quasi-federal Spain), parliamentary government and its drive towards fusion in levels of government are called into question. In federal unions, the centre should be organised according to a form of separation of powers. In the EU, it is unwarranted to centralize power in the European Council as well as in the EP. A constitutional truce would be necessary between the European Council and the EP to set up a unitary executive power independent from both. Indeed, the single governance regime cannot be organised according to the logic of the fusion of powers (or parliamentary government), since it would increase the fear of disavowing sovereignty-induced claims from Member States, nor can it maintain the current intergovernmental character, which has transformed those sovereignty-induced claims into incentives for increasing decision-maker unaccountability. A separation of powers would make it possible to set up an executive power independent from both national governments (as represented by the European Council) and the popular legislative chamber (the EP) and connected to both through some forms of checks and balances.

In the past, the model of the multiple separation of powers has been instrumental for establishing a political union constituted of demographically asymmetrical states with distinct national identities. However, in the case of the EU, that model should be devised in such a way as to enable the formation of popular majorities across the separate European institutions, to promote the accountability of decision-makers in areas of shared-rule policies. In any case, the viability of the federal union would require State political elites to share basic values and to be willing to compromise on interest divisions.

The latter condition is not currently guaranteed in the EU, where some Eastern European national governments (such as the Polish and Hungarian ones) explicitly contest

47. See, Donald F Kettl, *The Divided States of America: Why Federalism Doesn't Work* (Princeton University Press 2020).

48. See, Ronald L Watts, *Comparing Federal Systems* (3rd edn, McGill-Queen's University Press 2008).

49. See, Sergio Fabbrini, *Compound Democracies: Why the United States and Europe Are Becoming Similar* (Revised, Oxford University Press 2010).

the basic values enshrined in the Treaties, thus advancing an illiberal constitutional identity at odds with the liberal constitutional culture of the EU. A federal union could not survive a clash between alternative constitutional identities. For this reason, if the division on constitutional values persists, the federal union should emerge from the decoupling of the EU in order to separate the Member States aiming to build ‘an ever-closer union’ from those interested only in participating in a customs union.<sup>50</sup> New forms of economic cooperation between the two groups of States might be then devised, although the respect of the rule of law should also be guaranteed in a common market.

### Conclusion

This article has argued that, in the EU, DI has emerged due to the intergovernmentalisation of CSP policies. DI has been made possible by governance differentiation, specifically by the institutionalisation of an intergovernmental governance regime based on voluntary coordination. Whereas single market policies imply the acceptance of its legal requirements to be part of it, this is not the case for participating in CSP policies. The single market is regulated by law (directives or regulations), whereas CSP policies are rather managed through voluntary coordination. To let one or other Member State opt out from one or other CSP policy has been the strategic device to europeanise crucial sovereignty-sensitive policies. However, that device has also had unappealing consequences. It has strengthened the intergovernmental logic to the detriment of the supra-national logic, to the point of institutionalising, within the EU, an intergovernmental union, epitomized by the decision-making centrality acquired by the European Council, whose political accountability is all but inexistent.

The article has thus discussed a federal alternative to DI, able to promote integration and to uphold its democratic quality. Since DI is due to the necessity to accommodate sovereignty-induced claims, the federal alternative cannot have the features of a federal State model (where there is no sovereignty dilemma).

Instead, through the adoption of a federal union model, it is possible to integrate the sovereignty claims of the Member States, while trying to ensure an accountability at the level of the federal authorities. In federal unions, in fact, shared rule policies (generally CSP policies) are managed through a single governance regime that prevents domination, while self-rule policies are left to the control of each Member State and can be highly differentiated. Moreover, even regarding CSP policies, Member States can retain important resources under their own control. The federal union is designed to discourage centrifugal pressures from Member States fearing threats to their sovereignty prerogatives, through a federal governance organised according to a *demos*-constraining logic. A logic that, however, has displayed crucial limits, namely the difficulty not only in identifying a cross-institutional majority that is accountable to voters but also in preventing unilateral decisions by a Member State or a group of Member States to call into question the constitutional coherence of the federal union.

Federal unions institutionalise a tension between the centre and the States, as all of them contribute to the sovereignty of the union. Indeed, a federal union can be defined as a sovereign union of sovereign states,<sup>51</sup> inasmuch as the member States are sovereign on specific policies (self-rule) and the centre is sovereign on other policies (shared rule). The boundary between self-rule and shared rule will continuously shift, thus requiring a constant renegotiation between the two levels of government and a general attitude of compromise among the elites operating at the various levels and their sharing of basic constitutional values. In conclusion, the article has developed a theoretical argument on the plausibility of an alternative model to DI to integrate the sovereignty claims of the EU Member States, showing at the same time its problematic features and its systemic fragility.

50. See, S. Fabbrini, *Europe's Future: Decoupling and Reforming*, Cambridge University Press, 2019, op. cit.

51. See, Peter S. Onuf, *The Origins of the Federal Republic: Jurisdictional Controversies in the United States, 1775-1787* (University of Pennsylvania Press 1983).



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## The Promise and Peril of Europe

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Since the 1957 Treaty of Rome, the European Union has been committed to the creation of an ‘ever closer union among the peoples of Europe’. Often held out in the Eurosceptic press as an univocal commitment to further integration, this fundamental constitutional aim of the European Union is actually *ambiguous*. On the one hand, the commitment entails a clear expression of a wish for *union* on the part of the contracting parties, of the European peoples coming together in a new European polity. Yet, on the other hand, it seems that there are limits to the degree of unity that the European Union is meant to create: the union is among the *peoples of Europe*. By insisting on the plurality of peoples, the constitutional aim of the European Union insists not on dissolving the constituent states of the union, but rather on preserving them. This is also reflected in the motto of the European Union: ‘united in diversity’. The European Union, in other words, is not meant to create a new singular *unity* that makes the previous political communities redundant. As Joseph Weiler put it: ‘No matter how close the Union, it is to remain a union among distinct peoples, distinct political identities, distinct political communities’.<sup>1</sup>

The constitutional aim of the European Union is sometimes portrayed as one of the reasons why the European Union stands out from other federations. Yet the alleged difference is overstated. In fact, the commitment to the creation of an ever closer union among the peoples of Europe is an expression of what the Victorian English constitutional lawyer, Albert Venn Dicey, called the ‘peculiar sentiment’ out of which all genuine federal constitutions are born: the wish to live together, yet without being one; and, at the same time, the wish to remain autonomous,

without being completely separate from one another.<sup>2</sup> The inhabitants of the states who wish to come together in a federal union had to come together based on a desire to *unite*, Dicey reasoned. If not, there was clearly no basis for constituting a union among themselves. Yet at the same time, he argued, they could not desire *unity*. If they did, this wish would be much better attained under a unitary, rather than a federal, constitution. The peculiar sentiment that gives birth to federal unions, therefore, is a wish for *union* but not complete *unity*. ‘The sense of common interests, or common national feeling’, Dicey wrote ‘may be too strong to allow of that combination of union and separation which is the foundation of federalism’.<sup>3</sup> Federal union of states, like the European Union, therefore, always have a dual aim: the creation of an ever closer (or a ‘more perfect’) union *and* the protection of the autonomy and diversity of the Member States.<sup>4</sup>

Within EU law scholarship, this has always been understood to be the normative *promise* of the European Union. In the 1990s and the 2000s, the European Union was held up as a constitutional model that could – and should – be emulated in the rest of the world. The constitutional promise of the European Union was to temper nationalism yet without recreating its vices at a ‘higher level’ by avoiding the creation of a new ‘super state’.<sup>5</sup> In this way, the real or imagined dangers of sovereignty could be held in check: the sovereignty of the Member States was restrained by EU law without the complete transfer of sovereignty to the European level.<sup>6</sup> The European Union heralded a world beyond sovereign statehood; a Europe of ‘post sovereign’ states, as Neil MacCormick argued.<sup>7</sup>

This manifested itself in a distinct, and normatively superior, form of constitutional discipline: ‘constitutional tolerance’ in Weiler’s terms.<sup>8</sup> Whereas the people of more centralised federal states, like Canada, were told that they were *obliged* to obey federal authority, Weiler argued, the peoples of France, Italy and Germany were *invited* to obey European authority: ‘When acceptance

1. Joseph HH Weiler, ‘Federalism Without Constitutionalism: Europe’s Sonderweg’ in Kalypso Nicolaidis et Robert Howse (dir.), *Legitimacy and Levels of Governance in the United States and the European Union* (Oxford University Press 2001) 67.

2. Albert V Dicey, *Introduction to the Study of the Law of the Constitution* (Liberty Fund 1982) 75. For a broader discussion of the constitutional theory of the federation, see Olivier Beaud, *Théorie de la fédération* (Presses universitaires de France 2007); Christoph Schönberger, *Unionsbürger: Europas föderales Bürgerrecht in vergleichender Sicht* (Mohr Siebeck 2005); Signe Rehling Larsen, *The Constitutional Theory of the Federation and the European Union* (Oxford University Press 2021).

3. Dicey (n 2) 76.

4. ‘The aim of federalism’, Dicey (ibid 76) wrote ‘is to give effect as far as possible to both these sentiments’.

5. Joseph HH Weiler, ‘Europe: The Case Against the Case for Statehood’ (1998) 4 *European Law Journal* 43; Jürgen Habermas, *The Postnational Constellation: Political Essays* (Polity in association with Blackwell Publishers 2001). See also Jürgen Habermas, *The Crisis of the European Union – A Response* (Polity Press 2012).

6. In Neil MacCormick’s ‘Beyond the Sovereign State’ (1993) 56 *The Modern Law Review* 1, 16.) memorable terms, sovereignty was ‘like virginity, which can in at least some circumstances be lost to the general satisfaction without anybody else gaining it’.

7. MacCormick, ‘Beyond the Sovereign State’ (n 6); Neil MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (Oxford University Press 1999).

8. Weiler (n 1) 68ff.

and subordination is voluntary, and repeatedly so, it constitutes an act of true liberty and emancipation from constitutional fetishism: a high expression of Constitutional Tolerance'.<sup>9</sup> The European Union, it seemed, had finally proved Thomas Hobbes wrong: covenants without swords could be more than just words.

In the 1990s, of course, the highest courts of several Member States started in earnest to call into question the absolute character of the supremacy of EU law as well as the authority of the European Court of Justice to interpret the validity and scope of EU law.<sup>10</sup> The European Union was not characterised by legal monism but rather a plurality of interdependent and overlapping constitutional orders without a clear hierarchy between them.<sup>11</sup> This was captured by the theories of 'constitutional pluralism' that became a dominant position within EU law scholarship in the following decades; both as an empirical diagnosis and as a normative promise.<sup>12</sup>

The constitutional 'dialogues' between the German Constitutional Court and the European Court of Justice in the pre-Maastricht *Solange* judgements<sup>13</sup> were widely perceived as being instrumental to the constitutional protection of fundamental rights at the EU level and they were held up as inspiring examples of something akin to judicial deliberative democracy.<sup>14</sup> The conversation between lawyers and judges in Europe's courts was expected to lead to an ethically superior world where fundamental rights and the rule of law would enjoy greater projection nationally as well as transnationally.

Yet in recent years it has become clear that Europe's constitutional aim of union without unity, as well as the constitutional pluralist architecture that was understood as its embodiment, is also the European Union's *peril*. The voluntary acceptance and subordination of the Member States to EU law has come under serious strain. The contestation of EU authority in the supreme and constitutional courts of the Member States has moved away from the idealised judicial incarnation of deliberative democracy towards open conflict and crisis.

In a number of high-profile cases on the European Central Bank's response to the Eurozone crisis, the German Constitutional Court has openly contested the legality of the actions of the European Central Bank on the basis of the EU Treaties and the German Constitution as well as the authority of the European Court of Justice.<sup>15</sup>

This contestation shocked the legal establishment, yet it has been overshadowed by a recent decision of the Polish Constitutional Tribunal, where not merely an EU act but rather core provisions of the Treaties themselves as well as the supremacy of EU law were declared to be unconstitutional.<sup>16</sup> The Polish Constitutional Tribunal specifically targets Article 1 of the Treaty on European Union (TEU), through which the Member States create the European Union, as well as Article 4(3) TEU on sincere cooperation, which compels the Member States to fulfil the obligations that flow from the Treaties. By targeting Article 1 TEU, the Polish Constitutional Tribunal is contesting the most foundational constitutional aims of the European Union. This includes the commitment to taking a new step in the process of creating an ever closer union among the peoples of Europe.<sup>17</sup>

The openly hostile contestations of EU authority have been met with firm opposition by EU institutions. Neither the European Court of Justice nor the European Central Bank has made any concessions to the German Constitutional Court.<sup>18</sup> In response to the developments in Po-

9. *ibid* 68.

10. The seminal case is the Maastricht judgement by the German Constitutional Court, *Brunner v European Union Treaty* (Case 2 BvR 2134/92 and 2959/92 JZ 1993, 1100) [1994] 1 CMLR 57. The Danish Constitutional Court, however, produced a similar judgement. For a discussion, see Hjalte Rasmussen, 'Denmark's "Maastricht-Ratification" Case: The Constitutional Dimension' (1997) 32 Irish Jurist (1966-) 77; Hjalte Rasmussen, 'Denmark's Maastricht Ratification Case: Some Serious Questions about Constitutionality' (1998) 21 Journal of European Integration 1.

11. Neil McCormick, 'The Maastricht-Urteil: Sovereignty Now' (1995) 1 European Law Journal 259.

12. For an overview, see Matej Avbelj and Jan Komárek, *Constitutional Pluralism in the European Union and Beyond* (Hart Publishing Limited 2012).

13. Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125; *Re Wünsche Handelsgesellschaft* (22 October 1986) BVerfGE 73, 339.

14. For a conceptual discussion of constitutional courts in the deliberative democracy framework, see Conrado Hübner Mendes, *Constitutional Courts and Deliberative Democracy* (Oxford University Press 2013).

15. C-62/14 *Gauweiler and Others* [2015] ECLI:EU:C:2015:400; C-493/17 *Weiss and Others* [2018] ECLI:EU:C:2018:1000; BVerfG, Judgment of the Second Senate of 21 June 2016—2 BvR 2728/13; BVerfG, Judgment of the Second Senate of 05 May 2020—2 BvR 859/15. There are several other recent examples of contestations of the supremacy of EU law that raised concerns in Brussels. For instance, in the arguments submitted to the *Conseil d'Etat* in the French Data Network case, the French government requested that the *Conseil d'Etat* ignore the *La Quadrature du Net* ECJ judgment (see, C-511/18 *La Quadrature du Net and Others* [2020] ECLI:EU:C:2020:791) on ultra vires grounds; while the *Conseil d'Etat* rejected the argument, it still stated clearly the supremacy of the French Constitution over EU law and reserved the right to disregard any regulation or directive that would deprive of efficient guarantees one of the constitutionally protected rights (see, *CE French Data Network et al.* 21 April 2021, nos. 393099, 394922, 397844, 397851, 424717 and 424718). Another example is that of the decision of 8 June 2021 of the Romanian Constitutional Court, which acknowledges that national courts are competent to disregard any provision of the domestic legislation that is contrary to EU law, by virtue of Article 148 of the Romanian Constitution, but also immediately stated that the Romanian Constitution retains its supremacy, concluding that 'a national court does not have the power to analyse the conformity of a disposition of internal law, declared constitutional by virtue of Article 148 of the Constitution, with European law provisions' (see, decision no. 309 of the Romanian Constitutional Court of 8 June 2021).

16. Polish Constitutional Court, Decision of 7 October 2021, No. K 3/21.

17. It should be noted that Poland is not the first Member State to contest the constitutional aim of a 'ever closer union'. In the EU reform deal struck in order to keep the UK in the EU, but later made redundant by Brexit, David Cameron managed to secure an opt-out from the 'ever closer union', see The European Council, Conclusions from the European Council meeting, Brussels, 18–19 February 2016, EUCO 1/16, CO EUR 1, CONCL 1 <http://docs.dpaq.de/10395-0216-euco-conclusions.pdf> Now that Brexit is a reality, we will never know what this would have meant in practice and whether it, in any way, would have made a difference to the constitutional position of the UK in the EU.

18. The European Central Bank has insisted that it is 'exclusively subject to the jurisdiction of the Court of Justice of the European Union and accountable to the European Parliament', see ECB Speech, 'In the spirit of European cooperation', Introductory remarks by Yves Mersch, Member of the Executive Board of the ECB and Vice-Chair of the Supervisory Board of the ECB, at the Salzburg Global webinar (Salzburg Global webinar, 2 July 2020) <<https://www.ecb.europa.eu/press/key/date/2020/html/ecb.sp200702-87ce377373.en.html>>



land, the European Court of Justice has imposed a daily fee of one million euros until Poland complies with its obligations under EU law.<sup>19</sup> The European Commission has launched infringement proceedings against Poland to protect Polish judges from political control; reaffirmed the primacy of EU law over national law, including constitutional provisions; and stressed the binding nature of all rulings by the Court of Justice of the European Union on Member State authorities, including national courts.<sup>20</sup> The European Parliament has also condemned the contestation of the primacy of EU law; declared that the Polish Constitutional Tribunal is illegitimate and unfit to interpret the Polish Constitution; and called upon the Council and the Commission to urgently protect the people of Poland and the citizens of the European Union.<sup>21</sup>

Within academia, the consensus is clearly turning away from constitutional pluralism, which increasingly is portrayed as dangerous, and towards the affirmation of a hierarchical, monist legal order, with the European Court of Justice at its pinnacle.<sup>22</sup> In and by itself, however, the scholarly denouncement of constitutional pluralism and support for legal monism is unlikely to lead to a resolution of the current constitutional predicaments or its underlying causes.<sup>23</sup> Constitutional pluralism, after all, is not merely a 'normative dream' but also an empirical analysis of the constitutional order of the European Union.<sup>24</sup> What the constitutional pluralists can rightly be criticised for, however, is that they did not enquire adequately into the underlying foundations of 'constitutional tolerance', which arguably were already fraying at the edges when the very concept was coined.<sup>25</sup> This problem is by no means unique to the European Union. Rather it is one of the most fundamental constitutional problems of federalism. This is especially the case in relatively young federal unions of states, where federal authority tends to be contested.<sup>26</sup> Constitu-

tional tolerance is not an unconditional gift of federalism.

All federations, including the European Union, are born with an internal tension or contradiction, which arises out of its two contradictory ends.<sup>27</sup> On the one hand, the Member States have rejected the option of consolidating themselves under a new unitary constitution that would dissolve its constituent parts. In coming together in a federal union, the Member States on the contrary aim to perpetuate their own political existence and autonomy. For that reason, a federal union is always *conservative* in nature, directed towards the *past* and committed to preserving the *diversity* of its Member States. On the other hand, a federal union is created because the Member States reject the *status quo* and decide to constitute among themselves a new ever closer union (or a 'more perfect union'). Federations, including the European Union, are therefore always *creative* in nature, they are directed towards the *future* and committed to protect the *unity* of the Member States. In this way, a federation is shaped by two forces – a centrifugal and a centripetal – that always threatens to pull it apart.<sup>28</sup>

The commitment to being 'united in diversity' is therefore, simultaneously the *promise and peril of the European Union*. Somewhat paradoxically, it is the ability of federations in general, and the European Union in particular, to reflect diversity that constitutes its most significant constitutional weakness.<sup>29</sup> The commitment to genuine constitutional autonomy and diversity allows for the emergence and politicisation of conflicts within the constitutional order, which the constitutional order is not equipped to resolve in an unproblematic manner without endangering one of its core aims: either the commitment to unity or the commitment to diversity. This weakness becomes crystal clear if one (or more) of the Member States *de jure* or *de facto* amends its constitution in a manner that is hostile or in open conflict with the constitution of the Union as a whole. Can such a constitutional change be tolerated? The answer to that question is ambiguous. On the one hand, the Member States of the European Union remain constitutionally autonomous, and for that reason they have the right to decide on their own constitutional future. On the other hand, the Union cannot allow the Member States to exercise this constitutional autonomy in a way that presents a danger to the unity and autonomy of the constitutional order of the Union as a whole.

The current Polish affair is an apt illustration. The constitutional structure of the European Union allows the Polish government, on the one hand, to argue that the organisation of justice is an internal constitutional affair, which falls within the exclusive competence of

19. CJEU, 'Press Release No 192/21 Luxembourg, 27 October 2021 Order of the Vice-President of the Court in Case C-204/21 R Commission v Poland'.

20. European Commission, 'European Commission Reaffirms the Primacy of EU Law' (*European Commission - European Commission*, 7 October 2021) <[https://ec.europa.eu/commission/presscorner/detail/en/statement\\_21\\_5142](https://ec.europa.eu/commission/presscorner/detail/en/statement_21_5142)> accessed 25 October 2021.

21. European Parliament, 'Press Release: Poland: Constitutional Tribunal Is Illegitimate, Unfit to Interpret Constitution' (21 October 2021) <<https://www.europarl.europa.eu/news/en/press-room/20211015IPR15016/poland-constitutional-tribunal-is-illegitimate-unfit-to-interpret-constitution>> accessed 25 October 2021.

22. See, eg, R Daniel Kelemen and Laurent Pech, 'The Uses and Abuses of Constitutional Pluralism: Undermining the Rule of Law in the Name of Constitutional Identity in Hungary and Poland' (2019) 21 *Cambridge Yearbook of European Legal Studies* 59; Federico Fabbrini, 'After the OMT Case: The Supremacy of EU Law as the Guarantee of the Equality of the Member States The CJEU's OMT Decision' (2015) 16 *German Law Journal* 1003.

23. As the political elite in the early American Republic recognised, 'no constitutional or legalistic device could save the republic, unless the underlying real forces could be kept in equilibrium', see John Fischer, 'Prerequisites of Balance' in Arthur W MacMahon (ed), *Federalism: Mature and Emergent* (Doubleday & Company 1955) 63.

24. Neil McCormick's analysis, e.g., was first and foremost empirical. He considered and rejected legal monism in the European Union with reference to 'sociological realism', see McCormick, 'The Maastricht-Urteil' (n 11) 264.

25. Michael Wilkinson, 'Beyond the Post-Sovereign State?: The Past, Present, and Future of Constitutional Pluralism' (2019) 21 *Cambridge Yearbook of European Legal Studies* 6, 17.

26. Leslie Goldstein, *Constituting Federal Sovereignty: The European Union in Comparative Context* (Johns Hopkins University Press 2001).

27. Martin Diamond, 'The Ends of Federalism' (1973) 3 *Publius* 129.

28. Olivier Beaud (n 2) 279ff; Larsen, *The Constitutional Theory of the Federation and the European Union* (n 2) 105ff.

29. Alain-G Gagnon, 'The Political Uses of Federalism' in Michael Burgess and Alain-G Gagnon (eds), *Comparative Federalism and Federation: Competing Traditions and Future Directions* (Harvest Wheatsheaf 1993).

the Member States.<sup>30</sup> They point out that this is even reflected in Article 4(2) TEU, which compels the Union to respect the Member States' 'national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government'. On the other hand, the Court of Justice maintains, domestic constitutional reforms that undermine the rule of law and the independence of the judiciary are a direct threat to the primacy, autonomy, unity and effectiveness of EU law. For that reason, the referring Polish court, on grounds of EU law, is obliged to disapply the domestic amendments that posit such a threat 'whether they are of legislative or constitutional origin'.<sup>31</sup> In this way, constitutional reforms in the Member States have come within the scope of EU law. It is in response to the judgments of the Court of Justice that the Polish Constitutional Tribunal has ruled that fundamental provisions of the EU Treaties, as well as the doctrine of the supremacy of EU law, are incompatible with the Polish Constitution.

Open constitutional conflicts as the one we are currently witnessing are toxic for federal unions in general, and the European Union in particular, because they undermine the constitutional balance on which all genuine federal constitutions rest. To pre-empt and manage such crises, federal constitutions tend to endeavour to circumscribe and govern the constitutional identity, diversity and autonomy of its Member States. For a federation to remain stable, the Member States need to be relatively constitutionally homogenous. While the 'common interest' or 'common national feeling' might be too strong for federalism to work, as Dicey remarked, so is it the case that, when it comes to constitutional fundamentals, the Member States need to be substantially similar. With regard to the European Union, this was clearly expressed by Jan Werner-Müller who argued that the European Union 'has always been about *pluralism within common political parameters*'.<sup>32</sup> There is, in other words, a stark limitation to the diversity that can be tolerated within the European Union – and federations in general.

Federations, therefore, tend to be united around a shared constitutional project. In the case of the United States, the States were united around the project of revolutionary republicanism; in the case of the nineteenth century German federations, the *Länder* were united around a counter-revolutionary project, which aimed to reassert monarchical power in Europe in the wake of the French Revolution and the Napoleonic Wars. The common constitutional project that the EU Member States are

meant to unite around is 'value order constitutionalism' and 'constrained democracy'.<sup>33</sup> This 'post-fascist' constitutional project, which came to shape the post-WWII reconstitution of Europe, was born out of the experience of the interwar period and World War Two and it signified a new 'stage' in the historical development of constitutionalism. Its aim was to defend and protect the liberal constitutional order from the threats of the return of 'political extremism' on either the right (fascism) or the left (communism).<sup>34</sup> At a fundamental level, this constitutional project is founded on a fear of the people and fear of political power.<sup>35</sup> Its aims is not so much to stabilise the exercise of political power, but rather to permanently constrain or even repress it. It therefore empowered independent institutions, most importantly constitutional courts, but other prominent examples would be competition authorities and central banks.<sup>36</sup>

Within this constitutional project, the constitution is envisioned as an order of values, with human dignity at its pinnacle.<sup>37</sup> In the EU Treaties, this is expressed in Article 2 TEU:

*The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.*

The assumption of Article 2 TEU is that the Member States of the European Union are relatively constitutionally homogeneous. The underlying assumption is that all the Member States share the same understanding of the constitution as an order of values, and that their constitutional values are identical to or at least compatible with the constitutional values of the European Union. As argued by the European Court of Justice in *Associação Sindical Dos Juizes Portugueses*, this is the very foundation of the mutual trust and mutual recognition between the Member States, and in particular the Member State courts.<sup>38</sup> If the constitutional identities of the Member States are incompatible with Article 2 TEU, there is an open constitutional conflict in the European Union, which

30. C-487/19 *W. Ż. () and des affaires publiques de la Cour suprême – nomination* [2021] ECLI:EU:C:2021:798; C-824/18 *A.B. and Others (Nomination des juges à la Cour suprême – Recours)* [2021] ECLI:EU:C:2021:153; C-585/18 *A.K. (Independence of the Disciplinary Chamber of the Supreme Court)* [2019] ECLI:EU:C:2019:982.

31. C-824/18 *A.B. and Others* (n 30) para 150.

32. Jan-Werner Müller, 'Protecting the Rule of Law (and Democracy!) In the EU: The Idea of a Copenhagen Commission' in Carlos Closa and Dmitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016) 221, emphasis in original.

33. Jan-Werner Müller, *Contesting Democracy: Political Ideas in Twentieth-Century Europe* (Yale University Press 2011); Martin Loughlin, 'The Silences of Constitutions' (2018) 16 *International Journal of Constitutional Law* 922.

34. Signe Rehling Larsen, 'The European Union as "Militant Democracy"?' (ICourts Working Papers series 2021) <<https://papers.ssrn.com/abstract=3761791>> accessed 22 January 2021.

35. Christoph Möllers, '"We Are (Afraid of) the People": Constituent Power in German Constitutionalism' in Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press 2008); Michael A Wilkinson, *Authoritarian Liberalism and the Transformation of Modern Europe* (Oxford University Press 2021).

36. Hjalte Lokdam, 'Banking on Sovereignty: The Political Theory of Central Bank Independence and the European Central Bank' (PhD, London School of Economics and Political Science 2020).

37. Alexander Somek, *The Cosmopolitan Constitution* (Oxford University Press 2014).

38. C-64/16 *Associação Sindical Dos Juizes Portugueses* [2018] ECLI:EU:C:2018:117, para 30.

presents a fundamental threat to the persistence of constitutional tolerance.

The European Union, as is the case for other federations, cannot allow the Member States to conduct their constitutional affairs in a way that threatens or undermines the constitutional order and unity of the Union. It is therefore necessary for a federation, including the European Union, to restrict the constitutional autonomy of its Member States *de jure*, or at least ensure that it is not exercised in an unlimited manner *de facto*. At the same time, however, this limitation cannot be understood as an intrusion into the constitutional autonomy of the Member States. That would undermine the Union's commitment to the diversity and autonomy of its Member States. The constitutional autonomy of the Member States therefore presents the European Union with a conundrum: how can the Union balance the commitments to unity and diversity when what is at stake is the constitutional autonomy and identity of its Member States? How can the Union limit the constitutional autonomy of its Member States without that being perceived as an illegitimate intrusion into the internal constitutional affairs of the Member States?

An important way to square the circle is to make sure that the Union is understood as a means to the *constitutional realisation* of the Member States. In this way, the necessary limitation of the constitutional autonomy of the Member States can be understood as a means to realising their own constitutional projects, and hence not an unwarranted intrusion into their own constitutional affairs. The brilliant argument advanced by the Federalists in favour of the ratification of the 1787 Constitution of the United States was that only a 'more perfect union' would allow the States to realise republicanism and the spirit of the American Revolution.<sup>39</sup> Sovereignty, and a 'European system' of sovereign states, they argued, would undermine the republican project. For that reason, the Union would save the States from themselves by barring them from exercising sovereign power.<sup>40</sup> The Union, the Federalists argued, was a means for the realisation of the republican form of government *in the States* and hence the necessary limitation of constitutional autonomy was a means to constitutional realisation. The States could fulfil their republican destiny through the perfection of the Union.<sup>41</sup>

In the European Union, the post-fascist constitutional project of 'constrained democracy' has played a similar role. European integration was understood as a means to realising the post-WWII constitutional project at the domestic level by the creation of a new 'post-sovereign' interstate European order that could overcome the dangers and instabilities of the nation-state. European integration heralded a 'spiritual renewal' for a new genera-

tion of Europeans that would transcend the horrors of the nation-state. This is especially clear in the speeches of the first Chancellor of West Germany, Konrad Adenauer:<sup>42</sup>

*The age of national states has come to an end. Everybody must feel that a change has taken place, that an era has vanished and that a new age is dawning in which men will look beyond the borders of their own country and work in fraternal cooperation with other nations for the true aims of humanity. Whoever fails to realize this is beyond help. This very task and the construction of a Europe dedicated to this goal afford a great mission for German youth. And when this Europe, this new Europe, is built, our young people will once more find scope for active and peaceful lives. We in Europe must break ourselves of the habit of thinking in terms of national states (...) An age of peace and cooperation will dawn only when nationalist ideas are banned from politics. Here in Europe, we have made a start in that direction by building plans for European unity.*

By creating a new European interstate order that went beyond the world of the nation-state, the project of European integration could 'lock-in' liberal democratic values and fundamental rights,<sup>43</sup> as well as a competitive market economy, and thereby protect the Member States from the 'dangers' of unconstrained democratic choice. Entrenchment at the EU level, preferably in addition to entrenchment in the constitutions of the Member States, could allow for the realisation of constrained democracy and value order constitutionalism both at the domestic and at the European level. The limitation of the constitutional autonomy of the Member States by EU law was not perceived as a problem as long as it contributed to the overall constitutional project of value order constitutionalism. In the *Solange* cases, therefore, the German Constitutional Court found it constitutionally permissible for EU law to override domestic law *as long as* fundamental rights and human dignity were protected by EU law to the same standard as they were protected by the German Basic Law.<sup>44</sup>

While the constitutional project of constrained democracy has been strongly influential in many of the core Member States, most importantly Germany and Italy, as well as in the Mediterranean Member States who joined the European Union in the 1980s after the collapse of authoritarianism – Greece, Portugal and Spain –, its influence in other Member States is less clear. As I have demonstrated elsewhere, the Member States of the European Union are characterised by 'varieties of constitutionalism'.<sup>45</sup> This has to do with the Member States' diverse

39. Cathy D Matson and Peter S Onuf, *A Union of Interests: Political and Economic Thought in Revolutionary America* (University Press of Kansas 1990) 138.

40. *ibid.*

41. *ibid.* 141.

42. Konrad Adenauer, *World Indivisible – With Liberty and Justice for All* (George Allen & Unwin Ltd 1956).

43. Andrew Moravcsik, 'The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe' (2000) 54 *International Organization* 217.

44. C-11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratstelle für Getreide und Futtermittel* (1970); *Re Wünsche Handelsgesellschaft* (22 October 1986) BVerfGE 73, 339.

45. Signe Rehling Larsen, 'Varieties of Constitutionalism in the European Union' (2021) 84 *The Modern Law Review* 477. See also Bruce Ackerman, 'Three Paths to Constitutionalism – and the Crisis of the European Union' (2015) 45 *British Journal of Political Science* 705.



historical experiences in the 20<sup>th</sup> century as well as the radically different constitutional lessons drawn from the interwar breakdown, WWII and the Cold War. European constitutionalism, in other words, is not uniform; nor are the Member States constitutionally homogenous. To put it in simple terms: notwithstanding that all the Member States would describe themselves as constitutional democracies, democracy does not have a uniform constitutional meaning.

The Member States of the European Union are shaped by *at least* three ‘varieties of constitutionalism’ – ‘post-fascist constitutionalism’, ‘evolutionary constitutionalism’ and ‘post-communist constitutionalism’ – each with a different constitutional conception of democracy.<sup>46</sup> Whereas it is widely recognised that the United Kingdom – and to that I would add the Scandinavian Member States – is characterised by ‘evolutionary constitutionalism’ in which democracy is still understood in *procedural* terms, as the more or less unconstrained will of Crown-in-Parliament, constitutional scholarship has been less observant of what sets many of the post-communist Member States apart from the ‘post-fascist’ Member States like Germany, Italy and Spain. The post-fascist Member States tend to understand the rise of authoritarianism or fascism as *endogenous*: fascism was a product of the internal collapse of the constitutional order. The post-communist Member States tend to understand their experience of authoritarianism or totalitarianism as *exogenous*: totalitarianism was imposed on them by a foreign empire. To put it in simple terms: the communist were always ‘them’ and not ‘us’. In contrast to the post-fascist Member States, the post-communist regimes are for that reason not founded on a fear of their own peoples.

The constitutional project that the post-communist Member States aspired to realise through membership in the European Union therefore differs from that of the post-fascist Member States. Whereas the post-fascist Member States actively sought to overcome the dangers of sovereignty and nationalism via EU membership by means of a ‘transnational militant democracy’,<sup>47</sup> the post-communist Member States acceded to the European Union in the hope of securing their status as sovereign nation-states and to realise a constitutional project centred on the sovereign will of the nation. In other words, they aspired to realise the world that post-fascist constitutionalism aspired to overcome: a Europe of sovereign nation-states. For the post-communist states, sovereignty and nationalism were not perceived as existential threats to democracy but on the contrary vehicles for it.<sup>48</sup>

For the post-communist states, ‘returning to Europe’ meant national liberation and the return of a sovereign, national democracy.<sup>49</sup> Because of the experience of being satellite states of the Soviet Union, often propped up by façade constitutions, the post-communist states were keen to avoid a new form of imperialism by legal means. The nation, and national democracy, had to be protected from outside influence. As a rule, therefore, they did not constitute themselves as ‘open’ to international or European law.<sup>50</sup>

From the very beginning, the constitutional project that many of the post-communist Member States were seeking to realise via their membership in the European Union was therefore characterised by a fundamental contradiction. Membership in the European Union was a means to realising sovereign democracy at the national level. Yet at the same time, membership in the European Union entailed a limitation of national sovereignty in that it required the new Member States to govern themselves as constrained democracies. EU law compelled the post-communist Member States to govern themselves in accordance with post-sovereign constitutionalism by constraining the exercise of political power. In the post-communist Member States, membership in the European Union was therefore always looked upon with suspicion, as a potentially new empire, a new threat to democracy.<sup>51</sup> This is an important underlying reason for our current constitutional predicament.

In the European Union, democracy means constrained democracy. Yet this is not the case for all the Member States of the European Union. To put it bluntly, democracy is not understood as a constitutional value that can be balanced against other values by a constitutional court within all the Member States’ constitutional orders. For that reason alone, there are limits to the constitutional balancing that can be achieved by the employment of value order constitutionalism by Europe’s lawyers and judges. At a more fundamental level, however, it is unlikely that profound constitutional crises can be resolved by courts in the first place. As Clinton Rossiter put it: ‘If a situation can be dealt with judicially, it is probably not a crisis’.<sup>52</sup>

46. Signe Larsen, ‘Varieties of Constitutionalism in the European Union’ (n 45). It should be noted that the three ideal types cannot explain the constitutional developments of *all* the Member States in the EU. France, for example, cannot be understood based on either of these ideal types.

47. Ulrich Wagrandl, ‘Transnational Militant Democracy’ (2018) 7 *Global Constitutionalism* 143.

48. Wojciech Sadurski, *Constitutionalism and the Enlargement of Europe* (Oxford University Press 2012) 67ff.

49. Timothy Snyder, ‘Memory of Sovereignty and Sovereignty over Memory: Poland, Lithuania and Ukraine, 1939–1999’ in Jan-Werner Müller (ed), *Memory and Power in Post-War Europe* (Cambridge University Press 2002).

50. Many, if not most, of the Central and Eastern European countries gave themselves constitutions with a strong accentuation of both ‘internal’ and ‘external’ sovereignty of the nation after the fall of the Soviet Union, see Anneli Albi, ‘Post-modern Versus Retrospective Sovereignty: Two Different Discourses in the EU and Candidate Countries?’ in Neil Walker (ed), *Sovereignty in Transition* (Hart Publishing 2003); Cesary Mik, ‘State Sovereignty and European Integration: Public International Law, EU Law and Constitutional Law in a Polish Context’ in Neil Walker (ed), *Sovereignty in Transition* (Hart Publishing 2003).

51. Jan Zielonka, *Europe as Empire: The Nature of the Enlarged European Union* (Oxford University Press 2006).

52. Clinton Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* (Princeton University Press 1948) 9.





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## The Backlash to European Constitutionalism: why we should not embrace the identitarian counter wave

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In October 2021, the Polish judge Agnieszka Niklas-Bibik was suspended for a month only two days after the CJEU gave Poland a daily fine of €1 million. The fine was for failing to shut down the Polish Supreme Court's illegal Disciplinary Chamber which prosecutes national judges who engage with European law.<sup>1</sup> Niklas-Bibik was the eighth Polish judge forced to step back because she rejected the political court capture in Poland and insisted on her right to implement judgements from the ECtHR and CJEU. She had moreover taken the liberty to refer a preliminary question to the CJEU.<sup>2</sup> Since the Niklas-Bibik case two more judges have allegedly been suspended by the so-called 'muzzle-law' and they probably will not be the last. What does this story tell us? It tells us not only that the rule of law and independence of the courts is no longer respected in Poland but also that this could be an example of a more general 'de-constitutionalisation' phenomenon where national courts, judges and politicians increasingly retreat from the European post-war constitutional settlement.

According to the V-dem project,<sup>3</sup> an institute that monitors and tracks democracy around the world, we have since 2015 experienced a democratic backsliding that trumps the number of countries that are democratizing. This development is reflected in the European Union itself, where democracy has come under increasing pressure over the past 10 - 12 years.

In the following, I will look into the phenomena of de-constitutionalisation building on Lustig and Weiler's idea of waves. Where they see the revolt against constitutionalism and judicial review as an understandable reac-

tion, I argue for the opposite - in particular when looking at Europe. The backlash to European constitutionalism should be seen as a wakeup call, not as something to celebrate or accommodate. European democratic fragility is often overlooked and complacency - in particular when it comes to defending our European constitutional order - is currently one of our greatest challenges.

### The wave theory of constitutionalism

In their article 'Judicial review in the contemporary world - retrospective and prospective',<sup>4</sup> Lustig and Weiler classify the evolution of constitutionalism since the Second World war into three waves. The first wave was the adoption of judicial review, human rights, and strong domestic courts *at the national level* in Europe and beyond. Constitutionalism or what Lustig and Weiler refer to as the 'democratic ontology'<sup>5</sup> had one important purpose in the post-war era: to keep a check on parliaments after the heinous atrocities of the War where unlimited majorities had more or less a free hand. Constitutionalism and judicial review came to represent the very notion of what we today mean by the rule of law (and not by man).<sup>6</sup>

The second wave that Lustig & Weiler mention is closely linked and represents a growing use 'of the international norms as a higher law within national constitutional orders'.<sup>7</sup> This was in the post war era in Europe represented by not only the EU treaties and the supremacy of EU law, but also the European Convention of Human Rights and the ECtHR case law. Suddenly states (governments, national courts and citizens) started referring to these supranational legal regimes as authoritative sources of law trumping the rules and prerogatives of their own sovereign states. All of this is a well-known story but a story with severe defects as constitutionalism was much less widespread in the northern parts of Europe than what is normally contemplated by mainly American scholars of constitutional law.<sup>8</sup> European constitutionalism is however today a phenomenon which faces serious challenges. This can be seen by the Polish right wing PiS government's justice reforms<sup>9</sup> where suspension and punishment of those judges who uphold EU law and engage with the European court have become the order of the day. Lustig and Weiler define what we see in Poland and many other places these years as an example of 'the third wave' of judicial review or constitutionalism but one might more precisely call it 'the third wave of de-constitutionalisa-

1. Order of the Vice-President of the Court in Case C-204/21 R Commission v Poland, 27 October 2021, see at <https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-10/cp210192en.pdf>

2. See more at: <https://ruleoflaw.pl/judge-niklas-bibik-suspended-for-applying-eu-law-and-for-asking-preliminary-questions-to-the-cjeu/>

3. See more at: <https://www.v-dem.net/en/news/trend-mobilization-autocracy/>

4. D. Lustig and J.H.H. Weiler, 'Judicial Review in the Contemporary World - Retrospective and prospective', (2018) *International Journal of Constitutional Law*, Vol. 16 No. 2, 315-372.

5. Phrase used by Lustig and Weiler, see D. Lustig and J.H.H. Weiler, 'Judicial Review in the Contemporary World - Retrospective and prospective', 316.

6. *Ibid*, 316.

7. *Ibid*, 319.

8. R. Hirshl, 'The Nordic counternarrative: Democracy, human development, and judicial review' (2011) *International Journal of Constitutional Law*, vol. 9 No 2, 449-469.

9. W. Sadurski, *The Polish Constitutional Breakdown* (Oxford University Press 2019).

tion'. The third wave is described as a reaction to the first two and could even be described as a revolt against global constitutionalism, which in the past 30 years has been hailed by lawyers and observers in many quarters.<sup>10</sup> In the third wave national courts and governments may not reject all supranational law but what we are facing – also in Europe – are national courts and governments that increasingly question the limiting bonds of international courts and judges for instance by ignoring supranational courts, by not citing them or referring fewer and fewer cases.<sup>11</sup> We all of a sudden also see national courts exercising 'judicial review of transnational and international governance adjudication' something, which Lustig and Weiler agree represents 'a new identitarian seam in constitutional discourse'.<sup>12</sup> What does this imply more specifically? It implies that while the first two waves came to define 'the staple of constitutional law theory for decades' most prominently in Europe, we are today witnessing an anti-constitutionalist surge where domestic courts increasingly seek to take back power from international treaties and norms with reference to their own constitutions and case law. One may even call it 'constitutional identity politics' as it is often about using the constitutional culture as a political weapon against supranationalism.<sup>13</sup>

The most obvious example is the recent questioning of EU law supremacy in Poland by the Constitutional Tribunal as the CJEU declared the Polish justice reforms and the Polish Supreme Court's Disciplinary Chamber to be unlawful.<sup>14</sup> Following Lustig and Weiler, we however also see it in the German Constitutional Court case law<sup>15</sup> in well-known cases from *Solange*, over the Maastricht and Lisbon treaties, to the recent PSPP case. Other examples are less-known Hungarian cases and cases from Czech Republic and Denmark.<sup>16</sup>

The Polish Tribunal's refusal to accept significant parts of EU law primacy in 2021 was however not a 'traditional'

judicial revolt. It was 'ordered' or requested by the Polish PiS government itself, which makes it far more worrying. The PiS governments' direct attack on the EU legal order thus let the spirit out of the bottle, inspiring others far beyond the Polish borders. All of a sudden, not only right-wingers like French Marine Le Pen, Eric Zemmour and Viktor Orban but also a respected conservative like Michel Barnier as well as the contender to the French Presidential election Valerie Pécresse<sup>17</sup> started questioning the primacy of EU law. A similar questioning of the European Court's legitimacy was uttered in the Danish Folketing by the Danish minister of justice, Nick Hækkerup in November 2021<sup>18</sup> where he sneered at the CJEU and its logging case law:

*'I think we have a fundamental problem when the CJEU creates law without democratic legitimacy. They are just judges. Why should they be allowed to decide what should be the law in Denmark? Why should anyone without democratic legitimacy be allowed to decide that?'*<sup>19</sup>

This brings us to the Nordic region where constitutionalism as mentioned never prospered and where majoritarianism is still thriving.<sup>20</sup>

### The Revival of the Majoritarian question

Lustig and Weiler rightly describe the first two constitutional waves as parallel phenomena constituting the national acceptance of judicial review and a more abstract idea of a European higher law represented by both European Union law and the ECHR and ECtHR case law. The authors however neglect (except in one footnote<sup>21</sup>) how the Northern part of Europe and the UK largely stayed in the majoritarian camp when it comes to the first wave – introducing strong courts and judicial review at the national level.<sup>22</sup> Northern European countries have kept cultivating the idea of 'sovereignty in parliament' and did not introduce constitutional courts with strong review powers – in the UK not even a supreme court until 2009.<sup>23</sup> Looking at the second wave the Nordic states formally accepted European higher law but primarily because they had to in order to become members of the EU. When it comes to the ECHR, this body of law was mainly regarded as something meant to help other countries, so it was only incorporated into national (secondary) law in 1992 – and

10. See A-M. Slaughter, 'The Real New World Order' (Sep. - Oct., 1997), *Foreign Affairs*, Vol. 76, No. 5, 183-197.

11. With a co-author I demonstrate empirically how politically captured courts will stay away from making references to the CJEU. See J.A. Mayoral and M. Wind, 'Unleashed dialogue or captured by politics? The impact of judicial independence on national higher courts' cooperation with the CJEU' (2021) *Journal of European Public Policy*.

12. D. Lustig and J.H.H. Weiler, 'Judicial Review in the Contemporary World – Retrospective and prospective', 319.

13. M. Wind, *Tribalization of Europe – a defense of our liberal values* (Oxford: Polity 2020).

14. Order of the Vice-President of the Court in Case C-204/21 R Commission v Poland, 27 October 2021.

15. D. Lustig and J.H.H. Weiler, 'Judicial Review in the Contemporary World – Retrospective and prospective', 355.

16. <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2020/bvg20-032.html>; see also J. Komarek's analysis of the Czech case available at <https://verfassungsblog.de/playing-matches-czech-constitutional-courts-ultra-vires-revolution/>; on the Danish Ajoas case see M.R. Madsen, H.P. Olsen, U. Sadl 'Competing Supremacies and Clashing Institutional Rationalities: The Danish Supreme Court's Decision in the Ajos Case and the National Limits of Judicial Cooperation' (2017) *European Law Journal*, Vol. 23, No. 2, 2017, 140-150; see also K.E. Sørensen and U. Neergaard, 'Activist Infighting among Courts and Breakdown of Mutual Trust? The Danish Supreme Court, the CJEU, and the Ajos Case' (2017) *Yearbook of European Law*, vol. 36, no 1, 275-313.

17. See, 'EU court president warns European project is in danger', POLITICO (available at : <https://www.politico.eu/article/eu-court-president-koen-len-aerts-warn-european-project-danger/>).

18. <https://www.ft.dk/samling/2021/almindel/EUU/samspn/G/index.htm>

19. Free translation from Danish.

20. I here rely on R. Dworkin's distinction between majoritarian and constitutional democracy, see R. Dworkin, *Freedom's Law. The Moral Reading of the American Constitution* (Harvard University Press 1996).

21. See footnote 10 in D. Lustig and J.H.H. Weiler, 'Judicial Review in the Contemporary World – Retrospective and prospective'.

22. See J. E. Rytter and M. Wind, 'In need of Juristocracy: the silence of Denmark in the development of European legal norms' (2011) *International Journal of Constitutional Law*, Volume 9, Issue 2, 470-504; and M.Wind, 'Do Scandinavians Care about international law? A Study of Scandinavian Judges Citation Practice to International Law and Courts' (2016) *Nordic Journal of International Law* 85, 281-302.

23. <https://www.supremecourt.uk/about/history.html>

as my own research shows is rarely cited in national law.<sup>24</sup>

Constitutionalism and judicial review were never discussed in public or even mentioned by politicians as a natural consequence of joining the Union (or the ECHR) – which is reflected in the Danish justice Minister's rather clumsy attack on the CJEU's legitimacy (cited above).<sup>25</sup> Due to the inherent and continuing distaste for judicial review of national legislation, the Scandinavian courts were also reticent when it came to forwarding preliminary references to the CJEU.<sup>26</sup> The explanation was quite straightforward. As dialoguing with the CJEU via preliminary references<sup>27</sup> constituted a form of judicial review though the back door (and that by a 'foreign' court outside the bonds of the nation state), neither judges nor civil servants in the ministry of justice (or politicians for that matter) encouraged this to happen. The Scandinavians thus forwarded extremely few cases and rarely intervened in cases before the CJEU with oral or written procedure in the first 4-5 decades.<sup>28</sup> At the national level the Danish Supreme Court only once in 172 years (since Denmark got its constitution in 1849) set aside a decision taken by the Parliament;<sup>29</sup> in Finland and Sweden judicial review was directly forbidden in the national constitutions until the beginning of the 2000s. In Denmark, we still more or less explicitly teach the students in law and political science at the universities that there is 'No one over or above' the Danish Folketing.<sup>30</sup> This is very similar to the British conception of 'sovereignty in parliament', which made it very hard to accept supranational law, something Brexit is a very good example of.<sup>31</sup> It is probably also no surprise that the United Kingdom and Denmark tried to take back power from the Strasbourg court during the two countries' Presidencies in 2012 and 2018 respectively in their Copenhagen and Brighton Declarations.<sup>32</sup> Human rights

should 'be brought home' as they put it – and not left to supranational courts to decide about.<sup>33</sup>

Both Lustig and Weiler, but also Ran Hirshl,<sup>34</sup> argue that the Nordic reticence to supranationalism and supranational bodies outside the state is a very good example of how well functioning democracies may thrive without constitutionalism and judicial review.<sup>35</sup> According to Lustig and Weiler, the Scandinavians moreover have strong sense of *demos*, something that supranational entities and international regulation lacks, as also argued by the German Constitutional Court. To this, one could add an enormous emphasis on ethnicity and homogeneity in the population with very little space for diversity. For historical reasons national courts also do not consider it their role to check the actions of the state by challenging it on behalf of individual citizen. One may thus problematize the implicit idealization of majoritarianism which easily neglects the downsides and not least the interests of the minority. What is also rarely mentioned or discussed is how this anti-constitutionalist Nordic position has had severe consequences for the domestication of international law, as courts – as mentioned above – rarely cite international sources and refer very few cases to the European Court thereby providing citizens with a less solid protection than they could have had.<sup>36</sup> The question is of course if the majoritarian and anti-constitutionalist position which has existed for centuries in Scandinavia (and the UK) have inspired illiberals in Central and Eastern Europe who now also want the majority to rule without any restricting limits from courts.

### The identitarian prophesy

Despite the Scandinavian/UK outlier cases, the way in which most Europeans in the past six decades embraced higher law and norms was in many ways revolutionary.<sup>37</sup> It was however far from inevitable and may change in the future.

While Lustig and Weiler's perspective is global and not focused specifically on the European Union (having been written before the constitutional crisis in the EU peaked in 2021), they nevertheless seem to sympathize with the combined majoritarian-identitarian turn. They primarily argue that global constitutionalism by many is seen as ha-

24. J. Christoffersen and M. R. Madsen, 'The End of Virtue? Denmark and the Boomerang of the Internationalization of Human Rights'. On citation to the ECHR and ECtHR see Wind 2016 fn.24.

25. M. Wind, 'The Hesitant European? The Constitutional Foundation of Denmark's EU Membership and Its Material Reality', forthcoming in Stefan Griller, Lina Papadapoulou, Roman Puff (eds), *Member States' Constitutions and EU Integration* (Oxford: Hart forthcoming in 2022).

26. M. Wind *et al.*, 'The Uneven Legal Push for Europe' (2009) *European Union Politics*, 63-88.

27. M. Wind, 'The Nordics, the EU and the Reluctance towards supranational judicial review' (2010) *Journal of Common Market Studies*; M. Wind *et al.*, 'The Uneven Legal Push for Europe' (2009) *European Union Politics*, 63-88; S. Larsen, 'Varieties of Constitutionalism in the European Union' (2021) *The Modern Law Review*, Volume 84, Issue 3, 477-502.

28. S. Larsen, 'Varieties of Constitutionalism in the European Union'.

29. M. Wind, 'Who is afraid of European Constitutionalism', in C. Franz, F. C. Mayer and J. Neyer (eds), *Modelle des Parlamentarismus im 21. Jahrhundert. Neue Ordnungen von Recht und Politik; Recht und Politik in der Europäischen Union, Band 4* (NOMOS 2015).

30. C. Friisberg, *Ingen over eller ved siden af Folketinget I-II* (Syddansk Universitetsforlag 2007). See also H. Palmer Olsen, *Magtfordeling* (Djæf Forlag 2005).

31. M. Wind, 'Why the British Conception of Sovereignty Was the Main Reason for Brexit – And Why the British 'Leave-Vote' May End Up Saving rather than Undermining the EU' (2017) *Centro Studi sul Federalismo* Research Paper. CSF-SSSUP Working Paper Vol. 2017 No. 3

32. [https://www.echr.coe.int/Documents/2012\\_Brighton\\_FinalDeclaration\\_ENG.pdf](https://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf); [https://www.echr.coe.int/Documents/Copenhagen\\_Declaration\\_ENG.pdf](https://www.echr.coe.int/Documents/Copenhagen_Declaration_ENG.pdf)

33. See more in M. Wind, *The Tribalization of Europe – a defense of our liberal values*, (Polity 2020).

34. R. Hirshl, 'The Nordic counternarrative: Democracy, human development, and judicial review'.

35. *Ibid.*

36. J. Christoffersen and M. R. Madsen, 'The End of Virtue? Denmark and the Boomerang of the Internationalization of Human Rights' (2011) *Nordic Journal of International Law* 80(3); see also M. Wind, 'Do Scandinavians Care about International Law? A Study of Scandinavian Judges Citation Practice to International Law and Courts' (2016) *Nordic Journal of International Law* 85(4), 281-302. On this point, see also J. E. Rytter and M. Wind, 'In need of Juristocracy: the silence of Denmark in the development of European legal norms'.

37. See J.H.H. Weiler 'A Quiet Revolution: The European Court of Justice and its Interlocutors' (1993-1994) 26 *Comp. Pol. Stud.* 510; 'The Transformation of Europe' (1991) *Yale Law Journal*, Vol. 100, No. 8, Symposium: International Law (1991), 2403-2483.

ving a 'reductionist perspective on individuality'<sup>38</sup> where the citizen's groundedness in her own cultural society and norms is much more important than previously anticipated and thus not taken seriously enough. The question now is of course whether this is true and if so, how one should address it.

I will not be able to answer these (pertinent) questions in this brief essay; but one important question is whether such a perspective could be soundly transferred to a European context. Should we, in other words, let the identitarian logic penetrate European constitutionalism – something we are already witnessing in parts of the Union? In my humble opinion, any identitarian-based rejection of European constitutionalism would be extremely dangerous and have repercussions for all far beyond its worst protagonists. It would in reality amount to a goodbye to the Union as we know it and the cohesion of the internal market, and most likely also to those common liberal values which are encapsulated in the treaties, the *acquis communautaire* and our common post-war history.

Following Lustig and Weiler, the third wave however represent more than just an identitarian turn. It is also a reasonable reaction to a democratically unaccountable intentional order with no appeal options:

*'To the extent that international law is not legitimated democratically the compliance pull of international institutions, both empirically and normatively, would be weakened... There is no appeal-contrary to a widespread norm of justice which expect judicial decisions to be appealable... if there is merit in this analysis it is easy to see how it feeds, and feeds into, a social and political discourse of 'taking back control' so potent in a variety of manifestations in contemporary politics.'* (p. 345)

In Europe however, European law is democratically legitimated and can be amended by the EU's legislative bodies in unison. A unilateral rejection of the EU legal order, or an insistence on sticking to constitutional identity, on the other hand, embodies a non-compromising identitarian logic, which not only puts European law on the ropes but elevates the (in this case Polish) constitution to a position above the commonly accepted European constitutional settlement. While the German Constitutional Court has on multiple occasions criticized the EU for not being democratic enough and for carrying out tasks that had not (yet) been conferred to it, the revolt we see in Poland is different. It is not about wanting to give more powers and democratic legitimacy to the EU level so that it may better (and legally) carry out its tasks. It is about the opposite – a sovereigntist and identitarian drive to pull up the drawbridge and reject any joint exercise of European sovereignty.

38. *Ibid.*, 369.





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## National Courts and the Construction of Europe: United in Diversity

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The decisive role played by the CJEU of the European Union (CJEU) in European integration is often, and rightly, highlighted.<sup>1</sup>

As Walter Hallstein, the first President of the Commission of the European Economic Community, wrote, the Community, and henceforth the Union, has “no direct power of coercion, no army, no police. Its only instrument, its only weapon, is the law that it lays down”; to which he added: “its mission would be threatened to the utmost and, ultimately, defeated, if this sole means of implementing the Community’s objectives lost its binding and uniform character in all the Member States.”<sup>2</sup>

In these circumstances, the CJEU could legitimately see itself as being invested with a particular mission, which very early on led it to affirm, absent any explicit basis in the treaties, the principles of direct effect<sup>3</sup> and primacy.<sup>4</sup> The two principles reflect the requirement inherent in the European project of ensuring that the Union isn’t bogged down in a system with excessively random or contingent applications. It also defined the contours of this specific, autonomous and integrated legal order that is the European Union and which, in its relations with those of the Member States, responds to an original logic, different from that which traditionally dominates the relations between intermunicipal law and municipal law.<sup>5</sup> From the 2000s onwards, the CJEU has continued its creative work by developing what might be called a Europe of rights and values, with the extension of the Union’s competences, the widening of the scope of its law, the emer-

gence of European citizenship and the enshrinement of the Charter of Fundamental Rights – the implications of which now extend well beyond the economic sphere initially targeted by Europe’s founding fathers.

The Court has thus been one of the main drivers of European integration, largely due to a form of activism it has constantly been reproached for.

This should not, however, detract us from the equally decisive role played by national courts. As the guardian of the treaties, the CJEU certainly sets the proper interpretation of EU law, but its action would be null and void if national courts were not there to ensure its effectiveness. In fact, the judges are responsible, by virtue of a sort of “jurisdictional subsidiarity”,<sup>6</sup> of applying it to the concrete disputes before them and of bringing to life, in the field, the logic of pre-eminence and integration which are at the heart of European construction. It should also be noted that the vast majority of decisions rendered by the Court are at the initiative of national courts, insofar as they decide to make use of the preliminary ruling procedure provided for in Article 267 of the Treaty on the Functioning of the European Union (TFEU).

However, the courts of the Member States are not simply executors, subordinated in a hierarchical and vertical logic to rulings coming from above. On the one hand, as ordinary judges of Union law, they are also those who are first and foremost faced with the difficulties that the application of this law can raise in practice. On the other hand, insofar as they are also the guardians of the national constitutional orders, from which they derive their authority and legitimacy, national courts must prevent the “conflicts of primacy” which are a constant threat, by elaborating mechanisms capable of ensuring a harmonious coordination between the legal orders of the Member States and of the Union. In either case, they can resolve these difficulties either spontaneously or by referring them to the Court, thereby giving it the means, where they consider it appropriate, to enrich or modify its case law. This is an essential function, because the tension between unity and diversity, which is the essence of European integration, can only be overcome through a real dialogue and not the establishment of unilateral solutions, which are often irrelevant and therefore doomed to failure.

The tensions which have recently marked the relations between the CJEU and certain national courts, several of which, such as the Polish Constitutional Tribunal, have not hesitated to directly question the primacy of Union law, are not the occasion to question the essence of the European project, but to reflect on ways to strengthen this dialogue and the mutual understanding on which it must be based, and to reaffirm the essentially collective nature of the work to which the Court and the national courts contribute together.

1. Text written in collaboration with Guillaume Halard, administrative magistrate, *chargé de mission* with the vice-president of the *Conseil d'État*.

2. Speech to the European Parliament, June 1965 session. See, RTDeur, Dalloz, 1965, p. 250.

3. CJEU 5 February 1963, *Van en den Loos*, 26/62.

4. CJEU 15 July 1964, *Costa v. ENEL*, 6/64.

5. See, R. Dehousse, ‘L’Europe par le droit : plaidoyer pour une approche contextuelle’, *Politique européenne*, 2000/1, no. 1, p. 63.

6. See, D. Simon, ‘La subsidiarité juridictionnelle : notion-gadget ou concept opératoire ?’, *Revue des affaires européennes*, 1998, esp. P. 84-85.

I propose to briefly outline the way in which national courts, in particular the French *Conseil d'État*, have gradually established themselves as central players in the European integration (1), before mentioning a number of avenues for reflection that I believe should be explored in order to further develop the dialogue between them and the CJEU of the European Union (2).

### 1. National courts guarantee the effectiveness of Union law while ensuring that it is harmoniously linked to their constitutional rules

*1.A. National courts have gradually abandoned their initial reluctance to allow Community law to penetrate their domestic legal spheres and have fully assumed their role as ordinary judges of Union law*

The hesitations of national courts were undoubtedly caused by the revolutionary nature of the principle of primacy, which upset the conception that many judges had of their institutional role under the separation of powers, while also clashing with their attachment to a pyramid of norms at the top of which sits the national constitution.<sup>7</sup> At the dawn of European integration, a minimalist conception of the role of the ordinary judge prevailed in most of the Member States: he or she was only the organ of the law and of the law alone, whose conformity with the Constitution or any other higher norm he or she could not control. The “outside” dimension remained the exclusive preserve of the legislative and executive powers. Under these conditions, it is understandable that the Belgian Final Court of Appeal or the *Conseil d'État* should take refuge behind the theory of the “*loi-écran*” to refuse to sanction the primacy and direct effect of EU law.<sup>8</sup> In dualist systems, this same minimalism led the Italian Constitutional Court to rule that a violation of EU law did indeed result in the State being in breach and liable at the international level, but “did not deprive the municipal law stating the contrary of its full effect”.<sup>9</sup>

However, the full primacy of European law over municipal laws has gradually been recognized by all national courts, due to a profound transformation of their office.<sup>10</sup>

In France, the first stage was quickly taken by the *Cour de cassation* (i.e., the supreme court of the civil order),<sup>11</sup> only a few months after the Constitutional Council declared itself to be incompetent to review the compliance of municipal laws with France’s international commitments.<sup>12</sup> The *Conseil d'État* took longer to lift its reservations, but finally decided to do so in view of the impor-

tance acquired by European law in the domestic order, the requirement for legal consistency and the concordant case law on this point of the various European constitutional courts and supreme jurisdictions. In the breach opened by its *Compagnie Alitalia* decision,<sup>13</sup> it thus recognized, one after the other, the complete primacy of the treaties,<sup>14</sup> regulations<sup>15</sup> and EU directives<sup>16</sup> over all internal legislative and regulatory provisions.

The second stage consisted of drawing the consequences from these first decisions in order to deepen the integration of European law in the internal order. For example, when a municipal law is incompatible with European law, the *Conseil d'État* required the administration not to adopt any implementing measures.<sup>17</sup> It also required the administration to cease applying, on expiry of the transposition period, both written rules and unwritten principles of municipal law that were incompatible with the objectives of a directive that had not been transposed.<sup>18</sup> It also required the government to make use of the “de-legalization” procedure of Article 37 of the Constitution whenever a legislative provision encroaching on the regulatory domain disregards it.<sup>19</sup> The *Conseil d'État* also recognized the primacy of the general principles of European Union law<sup>20</sup> and gave full effect to decisions of the CJEU given as preliminary rulings, even when they are based on questions referred by the courts of other Member States.<sup>21</sup>

Finally, in a third stage, the *Conseil d'État* brought administrative case law in line with that of the CJEU. A series of decisions were issued to fill in the remaining gaps. With regard to non-transposed directives, which had in the past given rise to frictions with the Court, the *Conseil d'État* gave them full normative power by agreeing to review an individual administrative act in light of their unconditional and precise provisions.<sup>22</sup> In the area of liability, the Court’s case law led the *Conseil d'État* to abandon old solutions that were firmly rooted in our conception of the separation of powers, by recognizing the possibility of finding the State liable where both the law<sup>23</sup> and a final court decision<sup>24</sup> have disregarded EU law.

13. CE 3 February 1989, *Compagnie Alitalia*, n° 74052.

14. CE 20 October 1989, *Nicolo*, n° 108243.

15. CE 9 September 1990, *Boisdet*, n° 58567.

16. CE 28 February 1992, *S.A. Rothmans International France*, n° 56776.

17. CE 24 February 1999, *Association de patients de la médecine d'orientation anthroposopique et autres*, n° 195354.

18. CE 6 February 1998, *Tête*, n° 138777 and 20 May 1998, *Communauté de communes de Piémont-de-Barr*, n° 188239.

19. CE 3 December 1999, *Association ornithologique et mammologique de Saône-et-Loire*, n° 164789.

20. CE 3 December 2001, *Syndicat national de l'industrie pharmaceutique*, n° 226514.

21. CE 11 December 2006, *Société De Groot en Slot Allium B.V.*, n° 234560.

22. CE 30 October 2009, *Mrs Perreux*, n° 298348.

23. CE 8 February 2007, *Gardedieu*, n° 279522.

24. CE 18 June 2008, *Gestas*, n° 295831.

7. See, J.-M. Sauvé, ‘Le renouvellement du droit administratif sous l’influence du droit européen’, *Mélanges en l’honneur de Bernard Stirn*, Dalloz, 2019, p. 511.

8. CE 1 March 1968, *Semolina Manufacturers Union*, Lebon 149.

9. Italian Constitutional Court, 24 February 1964, *Costa v. ENEL*.

10. See, D. Simon, ‘Les exigences de la primauté du droit communautaire : continuité ou métamorphoses ?’, *Mélanges en l’honneur de Jean Boulouis*, Dalloz, 1991, p. 481.

11. Cass. 24 May 1975, *Société des cafés Jacques Vabre*, 73-13-556.

12. Decision No 74-54 DC of 15 January 1975.

All the courts of the Member States have, albeit at different speeds, followed a similar path, asserting themselves as the primary guarantors of the effectiveness of European law.

*1.B. National courts have also developed mechanisms to prevent the risk of collision between the European order and their domestic orders*

The European integration has in fact given rise to a precarious constitutional pluralism, in which the supreme norms of the national and European legal orders are in constant danger of colliding. For, on the one hand, the European Union legitimately aspires, as a supranational entity, to the primacy of all its normative production over the norms of the Member States, including constitutional norms, which in theory requires the national judge “to ensure the full effect of Union law by leaving unapplied, if necessary, on its own authority, any [national] provision that is contrary to it”.<sup>25</sup> On the other hand, the national jurisdictions all logically consider that their constitutions take precedence in the internal legal order: as Ronny Abraham underlined, “[t]his supremacy is thus, as long as international society is based on the political fact of State sovereignty, a primary and unconditional truth”.<sup>26</sup> This situation leads to a “normative aporia”<sup>27</sup> since no solution is provided for determining who, in the event of a conflict, should have the last word. In these circumstances, national courts have a particular responsibility, alongside the CJEU, to prevent European pluralism from breaking down into a “complete cacophony”.<sup>28</sup>

To this end, several European courts have developed a “theory of equivalence of protection” that is likely to prevent most conflicts between supreme norms, which are particularly likely to arise in situations where a domestic act – a law or regulation – transposes a European norm, such as a directive, without any margin of discretion. The aim is then to prevent this internal act, whose substance is one with that of the standard it transposes, from coming into conflict with a guarantee enshrined in the national constitution. According to the theory of equivalence of protection, which originates in the *Solange I* decision of the German Federal Constitutional Court, the national court must first of all find out whether there is no equivalent guarantee in the European order – which is very frequently the case in the field of fundamental rights and freedoms. In such a case, the court will “translate” its constitutionality review into the European order and will first check the conformity of the domestic act in question with the European guarantee, if necessary by calling on the CJEU to intervene by means of a preliminary question.

The European Court of Human Rights<sup>29</sup> and the CJEU<sup>30</sup> have themselves been inspired by this mechanism to create a reciprocal presumption of equivalent guarantees of fundamental rights between Union law and the European Convention for the Protection of Human Rights and Fundamental Freedoms.

In France, the *Conseil d'État* adopted this approach in its *Arcelor* decision of 8 February 2007.<sup>31</sup> But in its *French Data Network* decision, it also established the other side of this reasoning by allowing the defendant, in a dispute in which the conformity of a national standard falling within the scope of Union law with a European directive or regulation is challenged, to argue that a “rule of municipal law, even though it is contrary to the provision of European Union law invoked in the dispute, cannot be set aside without depriving a constitutional requirement of effective guarantees”. It is up to the administrative judge in this case “to investigate whether there is a rule or a general principle of European Union law which, having regard to its nature and scope, as interpreted in the current state of the case law of the Union judge, guarantees by its application the effectiveness of the constitutional requirement invoked”. If so, “it is for the Court, in the absence of any serious difficulty justifying a preliminary question to the CJEU, to set aside that argument before upholding the applicant’s plea, if appropriate”; Conversely, if “such a provision or such a general principle of the law of the Union does not exist or if the scope that it is recognized in the European legal order is not equivalent to that guaranteed by the Constitution, it is up to the administrative judge to examine whether, by setting aside the rule of municipal law on the grounds of its conflict with the law of the European Union, he would deprive of effective guarantees the constitutional requirement of which the defendant avails himself, and, if need be, to set aside the arguments of the petitioner before him”.<sup>32</sup>

In both cases, the courts try as far as possible to avoid any conflict between Union law and municipal law. But in circumstances where a collision is unavoidable, they reserve the right to give precedence to the constitution over European law. This is the meaning of the control of “constitutional identity”, which is often perceived as a threat brandished by the courts of the Member States towards the CJEU. The existence of such a counter-limit is justified in view of the nature of European pluralism. However, its activation is only legitimate on the condition that national courts fully play the game of cooperation and use it only as a last resort: this is the meaning of the efforts made by the *Conseil d'État* to bring French legislation on the retention of connection data in line with the European framework. However, this desire for coordina-

25. CJEU 9 March 1978, *Simmenthal*, C-106/77.

26. See, R. Abraham, *Droit international, droit communautaire et droit français*, Hachette, 1989, p. 35.

27. C. Malverti and C. Beaufils, ‘L’instinct de conservation’, AJDA, 2021, 1194.

28. J. Baquero Cruz, ‘The Legacy of the Maastricht-Urteil and the Pluralist Movement’, *European Law Journal*, vol. 14, No. 4, 2008, p. 414, quoted by C. Malverti and C. Beaufils, ‘L’instinct de conservation’, op. cit.

29. ECHR 30 June 2005, *Bosphorus*, No 45036/98.

30. CJEU 3 September 2008, *Kadi v Council*, C-402 and 415/05, P.

31. CE 8 February 2007, *Société Arcelor Atlantique et Lorraine*, n° 287110.

32. CE 21 April 2021, *French Data Network*, n° 393099.



tion does not seem to be shared by all judges.

## 2. Cooperation between the CJEU and national courts would benefit from further development to ensure the relevance of Union law and further European integration

### 2.A. A dialogue between judges based on trust and mutual understanding is the first key to fruitful cooperation

Given the plurality of legal orders, sources of law and jurisdictions that characterize the European institutional system, the dialogue of judges has quickly become a necessity.<sup>33</sup> This dialogue can be more or less formal and take place in discussion forums such as ACA-Europe, under whose aegis databases such as Dec.Nat and Juri-fast have been set up, which respectively centralize the decisions handed down by national courts in Union law and the bulk of the preliminary questions referred to the Court. This dialogue also involves the close attention paid by national courts to the case law of Luxembourg and the other courts of the Member States, both when they are implementing Union law and when they are faced with problems which are certainly national, but could also arise in other countries.

But its main channel remains the preliminary ruling procedure provided for in the Treaties with the aim of ensuring a harmonized interpretation of Union law. The use made of it by the national courts is a good indicator of the nature of their relationship with the Court. In this respect, we note that the national courts were very quick to make use of the preliminary ruling procedure, and the number of references continued to increase until at least the early 2000s. The example of the *Conseil d'État* speaks for itself in this respect, since it referred 18 questions between 1970 and 1999, 86 between 2000 and 2015, and between 10 and 13 in 2016, 2017, 2018 and 2019. Overall, these figures show a real willingness to coordinate on the part of national courts.

However, it should be noted that the courts of the Member States, when they make use of the preliminary ruling procedure, nowadays adopt a partnership approach rather than a hierarchical one, in which their status as ordinary judges of Union law is fully affirmed. This can be seen, on the one hand, in the margin of appreciation that they are careful to retain as to whether or not to refer a question to Luxembourg. In its 1982<sup>34</sup> *CILFIT* case-law, the Court adopted a particularly restrictive position, requiring that all questions be referred to it for which an answer is not “so obvious as to leave no room for reasonable doubt”. This case-law was probably justified at a time when all the courts of the Member States had not yet fully assumed their responsibilities arising from European integration, but it is much less justified today. It

is understandable that most national courts have refused to apply it strictly, as a recent note commissioned by the CJEU shows.<sup>35</sup> It is less understandable, however, that the Grand Chamber of the CJEU did not draw any conclusions from this when it was given the opportunity, very recently, to reassess the *CILFIT* criteria.<sup>36</sup> National courts are aware of the role that falls to them in the construction of Europe, they know the law of the Union and are often in the best position to resolve the difficulties that may arise from its application, so much so that, as my colleague Jean-Denis Combrexelle noted, it seems to me that today, “institutional balance and no doubt wisdom dictate that the role of the supreme courts should not be confined to that of interpreting the obvious.”<sup>37</sup>

This additional autonomy that should be left to the national court seems all the more appropriate given that the time taken to make a reference for a preliminary ruling corresponds less and less to the time taken for justice to be done on the ground, which is constantly accelerating. It generally takes between one and two years for the Court to consider a reference for a preliminary ruling, which poses an obvious problem of timing, often playing a determinant role in the national court's hesitation to submit the question. In comparison, the success of the priority question of constitutionality is largely due to the three-month time limit within which the Constitutional Council is obliged to rule. Beyond the question of the autonomy of the national courts, could the Court not better distinguish between cases justifying an accelerated procedure, whether they raise particularly sensitive questions or do not warrant the most thorough examination, and those subject to the normal procedure? An urgent preliminary ruling procedure was certainly created in 2008,<sup>38</sup> but it clearly does not manage to respond effectively to the acceleration of judicial time. Could we not also imagine that the Court could intervene as *amicus curiae* before national courts when a question of interpretation of Union law arises? Some thought must be given to resolve this problem.

In any event, the partnership approach referred to above is also expressed in the “uninhibited” attitude of the national courts,<sup>39</sup> which take on the clothes of a “zealous interlocutor” when they seek, by referring a case for a preliminary ruling, to maximize the scope of the principles of direct effect and primacy,<sup>40</sup> as well as those of a “proactive interlocutor” who, by asking questions, seeks to guide or develop the Court's case law. This attitude is

33. See, B. Genevois, ‘Dialogue des juges ou confrontation sous-jacente ?’, in *La Concurrence des juges en Europe. Le dialogue des juges en question(s)*, Ed. Clément Juglar, 2018, p. 19.

34. CJEU 6 October 1982, *Cilfit and others*, 283/81.

35. Research note on the application of the *Cilfit* case-law by national courts whose decisions are not subject to judicial review under municipal law (<https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-01/ndr-cilfit-fr.pdf>).

36. CJEU 6 Oct. 2021, C-561/19.

37. See, J.-D. Combrexelle, ‘Sur l'actualité du “dialogue des juges”’, *AJDA* 2018, 1929.

38. This procedure is currently provided for in Article 23 bis of the Statute of the Court and Rule 104 *ter* of the Rules of Procedure of the Court (RP).

39. See, G. Odinet and S. Roussel, ‘Renvoi préjudiciel : le dialogue des juges décomplexés’, *AJDA*, 2017, 740.

40. This attitude can be seen, for example, in the aforementioned decisions of the Conseil d'État *Arcelor* and *Jacob* of 31 May 2016, No. 393881.



a sign of the maturity of the national courts which, as ordinary judges of Union law, contribute not only to its application but also to its development. The *Conseil d'État*'s sometimes rough dialogue with the Court on the subject of the retention of connection data is a perfect illustration of this: by giving the Court the means to clarify its *Tele2 Sverige* case law<sup>41</sup> in order to take account of the reality of intelligence and criminal investigations in France and many other countries, the *Conseil d'État* wished to play an active part in defining a protective, realistic and effective European legal framework. It has done so by resolutely rejecting the logic of opposition, or even rupture, to which the government was calling when it asked it to carry out an *ultra vires* control, favoring instead the path of dialogue, seen as the only constructive path. Its decision in *French Data Network*<sup>42</sup> thus feeds the Court's reflection, but also, more broadly, that which is underway with a view to drafting the new regulation that will replace the 2002 "e-privacy" directive.<sup>43</sup>

It should be stressed in this respect that the tensions between the Court and the national courts often stem from a problem of text before being a problem of case law. The e-Privacy Directive, drafted at a time when space connection data was yet to gain the attention it has today, is notoriously obsolete. The 2003 directive on working time<sup>44</sup> does not sufficiently address the situation of military personnel in certain countries such as France. The temptation for Member States is then to ask national courts or the Court to repair these defective texts. But should it not be up to politicians to sit down and renegotiate these texts? Otherwise, by shifting such responsibility to the judges, we sow the seeds of discord.

*2.B. A renewed use of the principle of subsidiarity and the concept of national margin of appreciation could in this respect ease the tensions recently observed between European judges*

We cannot turn a blind eye to the tension - if not outright hostility to the Court and to the Union - shown by certain decisions handed down recently by national courts. This is illustrated by the active use of the *ultra vires* review by the Czech,<sup>45</sup> Danish<sup>46</sup> and German<sup>47</sup> constitutional courts, and of course by the recent decision of the Polish Constitutional Tribunal,<sup>48</sup> which has given rise to comments that are

not only harmful but also legally incorrect. On this point, we must be clear: the fact that national constitutions take precedence in the internal orders of the Member States does not mean that they can disregard the fundamental principles of the rule of law through authoritarian excesses. When such principles are openly flouted, it is to the credit of the Union's institutions, in particular the Court, to adopt the firmest attitude. To accuse them of stepping outside their mandate and of being excessively rigid in such cases is dangerous and attests to a clear bad faith.

These decisions remind us, however, that national courts are ultimately free to decide whether or not to apply the Union law, and that, just as they have been the key architects of European integration up to now, they could be the workers in its deconstruction tomorrow. A case like Poland's certainly calls for a political response, to which the Court can add little. But in many other cases, faced with the growing influence of Union law, it is likely that national courts will be all the more cooperative if they are allowed a certain amount of flexibility in its interpretation and application. It is true that in some areas, particularly economic, the uniform application of Union law is essential. In other areas, in particular those under the third integration pillar, the Union's common framework can accommodate certain divergences without calling into question the requirement of uniformity.

This could be achieved, on the one hand, by recognizing that the Court does not have a monopoly over the interpretation of EU law. Such recognition would mean, first, accepting the reality of the division of roles between the Court and the national courts. Second, it would give full effect to the spirit of the second paragraph of Article 4 of the Treaty on the European Union, which requires the Court to respect "the national identities [of the Member States], inherent in their fundamental political and constitutional structures". Finally, it would sanction the particular position of national courts, which are required to show deference to the Union but also, for obvious reasons of democratic legitimacy, to the choices made by their own legislators. Responding to constitutional pluralism, the resulting "interpretative pluralism" would be ordered around a shared ethic, whereby judges would only allow themselves to depart from the Court's case law for sound and duly reasoned considerations.<sup>49</sup>

Symmetrically, the Court could also draw more inspiration from the case law of the European Court of Human Rights, which is obliged "to show restraint in the exercise of its control of conventionality, whenever this leads it to assess an arbitration carried out in accordance with democratic procedures".<sup>50</sup> In this spirit, it modulates the margin of appreciation it leaves to Member States according to the importance of the rights in question and the

41. CJEU 21 December 2016, *Tele2 Sverige AB*, C-203/15.

42. CE 21 April 2021, *French Data Network*, cited *supra*.

43. Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications).

44. Directive 2003/88/EC of the Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time.

45. Ústavní soud, 31 Jan 2012, Pl. US 5/12, *Slovak Pensions*.

46. Højesteret, 6 Dec. 2016, Case 15/2014, *Dansk Industri [DI], acting for Ajos / Succession Rasmussen*.

47. BverfG, 5 May 2020, 2 BvR 859/15, *Sovereign bond purchase programme PSPP*.

48. Decision K 3/21 of 7 October 2021.

49. See for these considerations, C. Malverti and C. Beaufils, 'L'instinct de conservation', *op. cit. in fine*.

50. ECHR 23 July 1968, "*Belgian Linguistic Case*", no. 1474/62; ECHR 1<sup>er</sup> July 2014, *SAS v. France*, no. 43835/11, § 154.

consensus that exists or not, at a given moment, as to the scope they should be given. It is true that the norms stemming from the European Convention for the Protection of Human Rights and Fundamental Freedoms, which is based on the interpretation by the courts of principles that are both very general and plastic, lend themselves more to this kind of exercise than EU law, particularly secondary legislation, which is becoming increasingly precise, detailed and descriptive, including in the ways in which Member States can use this or that option left open by the text. Such an approach could, however, be envisaged by the CJEU in third-pillar matters, as well as when certain

balances between fundamental rights and freedoms are at stake, which are usually closely linked to the political, legal and cultural traditions of the Member States.

I believe that these avenues for reflection must be explored so that, at the cost of a minor notch in the principle of uniformity of Union law, any disagreements between judges can be seen as an asset and not a threat, and so that courts can continue together, united in their diversity, their common work in the service of an ever-stronger Union.



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## State nationality challenged by Union law

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In its precise sense under French law, nationality is the “legal and political bond, defined by the law of a State, uniting an individual to the said State.”<sup>1</sup>

This precision makes it possible to measure how much incongruity there is in questioning the links between nationality and the European Union, the most obvious answer being, at first glance: none. Since the European Union is not a State, it cannot have a “nationality;” having no competence in the matter, it cannot have any influence on the state law of nationality either. The Treaties do not say anything else,<sup>2</sup> we will come back to this.

However, nationality is not a purely abstract concept; the legal bond that it represents indeed has a function, that of describing membership in the population constituting a State and that of carrying legal consequences.

From this perspective, the clear distinction between the domain of the State and that of the Union is blurred. The Union does indeed confer special rights on nationals of the Member States, rights which have gradually acquired such importance that the concept of “European citizenship” has emerged, now enshrined in Article 20 of the Treaty on the Functioning of the European Union (“TFEU”). According to the well-known terms of this provision:

“Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.”

Reading the treaties alone, European citizenship could certainly only be a convenient vehicle for bringing togeth-

er various rights, the list of which is given by the treaty itself. The fact remains that the discourse on citizenship and the very content of this list (right to vote, right to diplomatic protection, right to petition the European Parliament and of course freedom of movement) can only sow doubt. The rights in question, in fact, are undoubtedly major and symbolic prerogatives, which are frequently attached to membership of a determined political community, characteristic of nationality. In this sense, the dynamic of European citizenship is properly political and potentially rich in future extensions.<sup>3</sup>

The temptation would then be strong to see in European citizenship a “pre-nationality,” a nationality in the making, destined to take its full measure if the Union were to move towards a more complete federalism.

However, we must resist this temptation.

Notwithstanding the fact that the future of a federal of Europe is, to say the least, in no way defined, European citizenship, in spite of its importance, is far from having acquired sufficient scope to be able to claim, today as in the future, to replace state nationality.

The fact remains that insofar as state nationality – which remains the exclusive competence of each State – is the key to entry into this specifically European statute that in turn creates specific rights independent of national rights, the question of the articulation between the two cannot fail to arise. This is how, progressively, specifically European directives on the matter emerged, in turn retro-acting on the purely state law of nationality.

The articulation of competences gradually unveiled by the Court (1) thus had a significant impact on the legal regime of nationality, as evidenced today by the important controversy relating to programs for the sale of nationality (2).

### 1. State competence and European competence

There is absolutely no doubt that access to nationality is a national law matter. Exclusive state competence is regularly reaffirmed in Europe, including by the European courts (A). That said, the emergence of fundamental rights and the control of proportionality are gradually changing this solution (B).

#### 1.A. Exclusivity

At first glance, the *Rottmann* case is almost a missed opportunity,<sup>4</sup> where the Court refused to consider that the combined effect of two nationality rights that risked leading to statelessness was contrary to Article 17 EC (now 20 TFEU).

1. *Vocabulaire Cornu*, see “Nationalité;” for a similar definition, see for instance P. Lagarde, *La nationalité française*, Dalloz, 2011, n° 00.02.

2. See in particular the Declaration attached by the Member States to the Final Act of the Treaty on European Union, OJEC n° C 1992, 191, p. 98, reaffirming at the very moment of the creation of European citizenship, the exclusive competence of States in matters of nationality.

3. On these points, see the important works of V. Révéillère, *Le juge et le travail des concepts juridiques – Le cas de la citoyenneté européenne*, Institut Varenne, 2018 and S. Ganty, *L'intégration des citoyens européens et des ressortissants de pays tiers en droit de l'Union européenne*, Bruylant, 2021.

4. CJEU, 2 March 2010, Case C-135/08, *Rottmann v. Freistaat Bayern*. On this decision, see in particular J. Heymann, ‘De la citoyenneté de l'Union comme révélateur de l'Union européenne,’ *Europe*, June 2010, n° 7.

The situation of a person of Austrian nationality was at issue in this case. Leaving for Germany, he applied for and obtained German nationality, which had the consequence, under Austrian law, of revoking his Austrian nationality. Shortly thereafter, however, it emerged that he had concealed the existence of criminal proceedings against him in Austria. Considering this to be a fraud, German authorities then decided to revoke the recently granted nationality. The result of the combination of German and Austrian laws was therefore to render Mr. Rottmann stateless and thus to revoke his status as a citizen of the Union. Puzzled as to the compatibility of such a result with the provisions of European law, the German authorities appealed to the Court for a ruling in interpretation. Two questions were raised, the first to determine whether European law opposed such a result; the second to know how to adapt the state laws of nationality in the event of a positive response.

Contrary to its tenacious and justified reputation for audacity, the Court stuck to a solution which appeared to be very cautious, according to which “It is not contrary to European Union law, in particular to Article 17 EC, for a Member State to withdraw from a citizen of the Union the nationality of that State acquired by naturalisation when that nationality was obtained by deception, on condition that the decision to withdraw observes the principle of proportionality.”

On first reading, it therefore seems that a State can freely withdraw nationality from an individual, even when this withdrawal also deprives him of his status as a citizen of the Union. This solution may, of course, seem a little behind; it can be explained, however, by the exclusive competence of States in matters of nationality.

As the Court asserts, “according to established case-law, it is for each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality” (paragraph 39).

Everything, it is true, converged towards it. First of all, the EC Treaty then applicable, which bound strictly, and still does, nationality and citizenship, by affirming that a citizen of the Union is «every person holding the nationality of a Member State» (Article 17 EC). Article 20 of the TFEU further reinforces this exclusive state competence by asserting that citizenship “shall be additional [and no longer a “complement”] to and not replace national citizenship.” Undoubtedly, the granting of citizenship is a decision which does not belong to the Union: it goes hand in hand with the nationality of a Member State.

The distribution of powers is therefore very clear: each State has the right to determine its own nationals; Union law can then draw consequences for the purpose of Union citizenship. The European solution therefore does not seem to present any specificity in relation to the principle of exclusive state competence in matters of nationality

laid down by public international law,<sup>5</sup> which the Court of Justice already had the opportunity to transpose into European law.<sup>6</sup>

The fact remains that if the Rottmann case drew so much attention, it is because this reaffirmation of exclusive competence was accompanied by a precision which opens up a great deal of debate.<sup>7</sup>

### 1.B. Proportionality

The exclusive competence of the States in no way implies that the Court, as certain intervening States urged it, should purely and simply refrain from any review. As it points out, “the fact that a matter falls within the competence of the Member States does not alter the fact that, in situations covered by European Union law, the national rules concerned must have due regard to the latter” (point 41).<sup>8</sup> Valid in many areas of the law, this affirmation is applicable in nationality law, as the Court already had the opportunity to affirm.<sup>9</sup> However, EU law is clearly affected by the German decision, insofar as the withdrawal of nationality causes the person concerned to lose his status as a citizen of the Union, that is to say, his “fundamental status” under the law of the Union. Consequently, as the Court asserts (paragraph 48), if the *principle* of exclusive competence cannot be challenged, it remains that its *modalities* of exercise could infringe the law to the Union.

The Court’s solution, in fact, establishes important instruments of control for the future, which it will be able to mobilize if necessary. It is true that in this case it uses them extremely cautiously. It appropriates, in particular, the rule of international law authorizing the withdrawal of a nationality when it has been obtained fraudulently. For the Court, there is indeed a reason of general interest, whereby States legitimately control the special relationship of solidarity between a State and its nationals. Such a justification encompasses in the spirit of the Court not only the loss of nationality, but also the possible concomitant loss of European citizenship. EU law therefore aligns well with national law.<sup>10</sup>

5. P. Lagarde, *op. cit.*, n° 11.21.

6. CJEC, 7 July 1992, *Micheletti*, Case C-369/90.

7. See in particular J. Basedow, ‘Le rattachement à la nationalité et les conflits de nationalité en droit de l’Union européenne,’ *Rev. Crit. DIP.* 2010. 427; S. Corneloup, ‘Réflexions sur l’émergence d’un droit de l’Union européenne en matière de nationalité,’ *JDI*, 2011. 491 and S. Bariatti, ‘Multiple Nationalities and EU private international law,’ *Yearbook of PIL*, 2011, p. 1.

8. The solution is classic. For instance in tax matters, where the Court uses a formula that has become a case-law standard: ‘Although, as Community law stands at present, direct taxation does not as such fall within the purview of the Community, the powers retained by the Member States must nevertheless be exercised consistently with Community law,’ CJCE, 14 February 1995, Case C-279/93 *Schumacker*, n°21; same solution in social matters, as shown by the well-known decisions *Laval* and *Viking*: CJEC, 11 December 2007, Case C-488/05, *Viking* and CJEC, 18 December 2007, Case C-341/05, *Laval*.

9. CJCE, *Micheletti*, aforementioned.

10. Since then, see CJEE, Grand Chamber, 12 March 2019, Case C-221/17, *Tjebbes et al.*, which, however, concerned a Dutch rule that was very questionable because of its excessive rigor. On this matter, see in particular D. Kochenov, ‘The Tjebbes Fail,’ *European Papers*, April 2019, available online at: [www.europeanpapers.eu](http://www.europeanpapers.eu).



However, the Court did not relinquish the possibility of review. As we have seen, the Court enjoined the national courts to verify that such a withdrawal does indeed respect the principle of proportionality. In practice, this involves some concrete checks, in particular ensuring that the loss of nationality is justified in relation to the gravity of the offense or to the time elapsed between the naturalization decision and the withdrawal decision.

The exact content of this review under Union law is undoubtedly called upon to become clearer, in particular in the face of a certain tightening of state rights of nationality, which portend closer control.<sup>11</sup>

In this respect, the principle of proportionality may well find its first application in the near future. Indeed, Advocate General Szpunar proposed it in his important conclusions in a case not unlike Mr Rottmann's.<sup>12</sup>

Once again, the poor articulation of the nationality laws of two States led to rendering the applicant stateless. Originally Estonian, Ms. JY applied for Austrian naturalization. The Land of Lower Austria granted the request in principle, on condition that the applicant renounced her Estonian nationality. So she did. Despite the assurances given, however, she was ultimately denied Austrian nationality on account of various offenses, in particular traffic violations. No longer Estonian, but not Austrian, the person had therefore become stateless and, therefore, deprived of her European citizenship.

The rich conclusions of the Advocate General, in line with the many precedents cited, provide a better understanding of the principle and scope of the intervention of Union law.

If indeed the situation falls within the scope of EU law, it is not because Estonian and Austrian state laws do not comply. It is from their combination that the potential infringement results: the renunciation of Estonian nationality was only accepted in contemplation of future Austrian naturalization; assurance as to naturalization was only granted on condition of a renunciation of the initial nationality. The final denial therefore comes up against a situation which can only be understood globally and which therefore leads to the person being deprived of her European citizenship.

If the situation then clashes with the principle of proportionality, it is because of the disproportion that exists between the seriousness of the offenses (driving while intoxicated and a failure to affix a vehicle inspection sticker) and that of the sanction (a refusal of naturalization and, consequently, a definitive loss of European citizenship). Justified in principle, a review under European law would therefore lead, in this case, to condemning a state decision on the granting of nationality. The shake wouldn't be thin.

It remains of course, to await the decision of the Court. In any event, this example shows once again how much nationality laws must from now on be used by States in contemplation of their overall European impact: casuistry, little by little, brings out the requirements of the Union in this area.

In this regard, two particularly fruitful fields of experience must be examined with attention.

The first, conflicts of nationality, will not be discussed here. Let it be simply noted that the questioning of traditional principles of resolving nationality disputes is not in doubt. Over the course of abundant case law, the Court has completely overturned the usual principles of primacy of the nationality of the forum and of taking into account the effectiveness of foreign nationality, to the point that it is now proposed to abandon them.<sup>13</sup> This reversal took place with relative discretion, which seems to be explained by the fact that the reasoning of the Court is not based on an abstract vision of conflicts of nationality, but on a concrete approach to the rights guaranteed to the citizen. As soon as a subjective right guaranteed by the treaty is in question, it must be guaranteed to the citizen, whether or not she has another nationality,<sup>14</sup> whether or not the other nationality is that of the forum,<sup>15</sup> whether or not the nationality of the other Member State was acquired under questionable conditions.<sup>16</sup>

In any event, the question of the conflict of nationality, although it affects the nationality regime, does not constitute its conceptual heart. This is all the difference with the second example, that of nationality sales programs, which pose a much more formidable challenge to the Union.

## 2. Nationality Sales Programs

Some States around the world have implemented actual policies to sell their nationality. "National havens" have thus been created, just as there are "tax havens." In both cases, in fact, the existence of exclusive state competence allows certain states and private firms providing lucrative advice to engage in opportunistic – some would say disloyal – behavior for economic gain. Born in the Caribbean, these mercantile policies undermining the very heart of the idea of nationality have spread to Europe.<sup>17</sup> These programs have elicited almost unanimous condemnation. Can these programs go so far as to make the nationality of

11. See on this, S. Carrera Nunez and G. R. de Groot, *European Citizenship at the Crossroads. The role of the EU on loss and acquisition of Nationality*, 2015, WLP Pub.

12. Request for a preliminary ruling from the Verwaltungsgerichtshof (Austria) lodged on 3 March 2020, Case C-118/20, JY.

13. See the large-scale codification model developed by the European Group for Private International Law at its Lausanne session in 2013 (in French) : "Position du Groupe européen de droit international privé sur la solution des conflits positifs de nationalités dans les instruments existants de droit international privé de l'Union européenne," Lausanne 2013, available at: <https://gedip-egpil.eu/wp-content/uploads/2013/10/Position-du-Groupe-europ%C3%A9en-de-droit-international-priv%C3%A9-sur-la-solution.pdf>

14. CJEC, 7 July 1992, Case C-369/90, *Micheletti*.

15. CJEU, 14 November 2017, Case C-165/16, *Toufik Lounes*.

16. CJEC, 19 October 2004, Case C-200/02, *Zhu and Chen*.

17. On this topic, see A. Shachar, "Citizenship for sale?", in A. Shachar, R. Bauböck, I. Bloemraad, M. Vink, *Oxford Handbook of Citizenship*, Oxford University Press, 2017, p. 789.

one Member State unenforceable against another Member State?

## 2.A. European condemnations

Certain Member States, foremost among them Malta and Cyprus, have a particularly explicit policy in this matter and thus allow, under extremely liberal conditions, the purchase of their nationality.<sup>18</sup> This creates a major difficulty for the Union, insofar as the nationality of these States has, by virtue of European citizenship, an effect which goes well beyond the respective borders of these two islands.

These programs have therefore led to strong condemnations of these States by the European institutions.

First of all, the European Parliament has on several occasions vigorously criticized these programs as undermining the values of the Union.<sup>19</sup> Also, in the 13<sup>th</sup> point of its resolution, the Parliament:

“Calls on the Member States that have adopted national schemes which allow the direct or indirect sale of EU citizenship to third-country nationals to bring them into line with the EU’s values.”

The formula is pleasant but very ineffective. In the current state of Union law, in fact, invoking its values can in no way provide a key to analysis (or condemnation) of national policies on nationality. The Parliament is perfectly aware of this, and in point 6 of its resolution “acknowledges that matters of residency and citizenship are the competence of the Member States” and, therefore, “calls on the Member States, nevertheless, to be careful when exercising their competences in this area and to take possible side-effects into account.” The incentive remains very vague.

Exclusive state competence in matters of nationality is in fact the insurmountable obstacle against which calls for respect of the values of the Union stumble. In the current state of Union law, it is the States and not the Parliament, which are the judges in this matter of the interpretation to be given to them. Therefore, apart from the pressure exerted on a country in particular regarding a practice whose political condemnation is unanimous, the invocation of values is of absolutely no use, neither to describe the possible lack of conformity between state law as it stands and Union law, nor, prospectively, to determine the direction which European law should take.<sup>20</sup>

The European Commission then took up the subject, first of all through an important report presented to the European Parliament, the Council, the European

Economic and Social Committee and the European Committee of the Regions which, far from the usual diplomatic prudence, is extremely vigorous in its criticisms of these programs of nationality sale and, more generally, of granting of a residence permit by direct investment.<sup>21</sup> Most clearly, the Commission describes and condemns the “the possible security gaps resulting from granting citizenship without prior residence, as well as risks of money laundering, corruption and tax evasion associated with citizenship or residence by investment.”<sup>22</sup> This report criticizes the possibility of obtaining the nationality of these States without any link being established between the applicant and the Member State, sometimes without even requiring a residence other than a formal address, or a physical presence other than that on the day of the delivery of the title. More broadly, the Commission describes in great detail the various crimes likely to be committed in connection with these programs (attack on the security of States, money laundering, corruption, tax evasion, etc.).

These programs are all the more open to criticism as the Commission notes that the advantages of Union citizenship are precisely at their core: what is sold here is not only Maltese or Cypriot nationality but the possibility of benefiting from all the prerogatives attached to the status of European citizen.

More theoretically, the Commission sees these practices as calling into question a conception that would be common to the Member States, that of effective nationality.

As it states :

“Such a common understanding of the bond of nationality also lies at the basis of Member States’ acceptance that Union citizenship and the rights entailed by it under the Treaty on the Functioning of the European Union (TFEU) would accrue automatically to any person becoming one of their citizens. Granting naturalisation based on a monetary payment alone, without any further condition attesting to the existence of a genuine link with the awarding Member State and/or its citizens departs from the traditional ways of granting nationality in the Member States and affects citizenship of the Union.”<sup>23</sup>

The principle of loyal cooperation, invoked by the Commission, would therefore oblige the States to adopt rules on nationality more in line with the requirements of Union law which, in the present case, would therefore require the adoption of rules relating to the effectiveness of nationality.

Then moving from theory to practice, the Commission launched two infringement proceedings against Cyprus

18. For the description of these programs, see in particular European Commission, ‘Investor Citizenship and Residence Schemes in the European Union,’ COM (2019)12 Final, 23 January 2019.

19. European Parliament resolution of 16 January 2014 on EU citizenship for sale: 2013/2995 (RSP); in the same vein, but this time linked to the fight against money laundering and the financing of terrorism, see resolution of 10 July 2020: 2020/2686 (RSP).

20. On this appeal (and its ambiguity) to the values of the Union, see in particular I. Pingel, ‘Les valeurs dans le traités européens,’ JDI, 2020. 845 et 1169.

21. European Commission, ‘Investor Citizenship and Residence Schemes in the European Union,’ COM (2019)12 Final, 23 January 2019.

22. COM (2019)12 Final, 23 January 2019, n° 1; in the same vein, see European Commission, ‘Report from the Commission to the European Parliament and the Council on the assessment of the risk of money laundering and terrorist financing affecting the internal market and relating to cross-border activities,’ COM (2019) 370 final, 24 July 2019, p. 7 and concl., p. 23.

23. COM (2019)12 Final, 23 January 2019, n° 2.4, p. 5-6.

and Malta, considering that these programs, on the one hand, are not compatible with the principle of loyal cooperation enshrined in Article 4§3 TEU and, on the other hand, that they undermine the integrity of the status of Union citizen provided for in Article 20 TFEU.<sup>24</sup>

These proceedings are ongoing and it is not easy to know what is likely to happen. The fact remains that the legal bases invoked make it possible to assess the difficulty.

## **2.B. Sale of nationality, effectiveness and enjoyment of rights**

As we have seen, States, including in the Union, in fact continue to enjoy unquestioned exclusive competence; in the absence of the Union's competence in matters of nationality, an eventual conviction therefore seems uncertain. It is certainly not excluded, because if the principle of exclusive competence prevents any encroachment of Union law, the exercise by the States of the latter could be contested when it undermines a policy of the Union. Conviction, although uncertain, is therefore not excluded.

But, in any event, this cannot lead to a modification of the internal law of the nationality of the countries concerned; only to the intervention, to a greater or lesser extent, of the Union in the exercise by the Member States of their exclusive competence. This is evidenced by the follow-up given to the European Parliament's resolution of 2014. This had led to negotiations between the European Commission and Malta leading the Maltese State to back off. But its concession was only partial. The Maltese State had in fact in no way given up on its program, but simply agreed to subject it to a residence condition, itself also very vague, even if the Commission had then declared that it was satisfied with it, which had therefore enabled the definitive adoption of the Maltese law on personal investments. Six years later, the compromise has clearly proved insufficient, since the Commission has launched infringement proceedings against the State.

It is therefore plausible to expect political and diplomatic intervention from the Union, supported by the legal instruments at its disposal; and it is not excluded that this intervention will indeed lead to changes, even reluctantly, in the States involved. Nationality selling programs are undoubtedly a serious deviation from the very idea of nationality and the *raison d'être* of the European Union. As such, the legitimacy of the fight against these rules is not in doubt.

The fact remains that on an individual basis, citizens who were granted their nationality in this way remain European citizens and as such benefit and must continue to benefit from the rights attached to this status. In the current state of Union law, it seems quite out of reach to prevent nationals of Member States, on the pretext of too

weak a link with their State of nationality, from enjoying the prerogatives attached to their European citizenship. It is one thing that States grant their nationality too liberally, but it is another of quite different dimensions that the individuals who have benefited from such largesse be sanctioned. From the moment interested parties have fulfilled the legal conditions required from them, in a matter that leaves almost no room for individual autonomy but which, on the contrary, is entirely in the hands of the States and of their administration, no reason justifies making a distinction between nationals who deserve to have access to the rights guaranteed by the treaties and others.

States, of course, are not totally powerless to challenge the exercise of their rights by these citizens. Thus, in particular with regard to entry and residence, Directive 2004/38, applicable to citizens and their families, contains provisions allowing for the removal of nationals of other Member States, in particular in the event of a public order violation. Likewise, assuming any offenses committed by these neo-Europeans, the resources of criminal law could be mobilized to punish these acts. In any event, the very principle of citizens' access to their rights remains guaranteed.

In this situation, the review of effectiveness would constitute a double interference, in the exclusive competence of another Member State and in the enjoyment of her rights by the European citizen, which appears neither legally valid nor politically desirable.

One could only rejoice if States agreed on common criteria in matters of nationality; but it would be fatal to the very principle of European citizenship if a State made itself the judge of the conditions under which the nationals of other states enjoy their prerogatives attached to their citizenship.

This is undoubtedly the main conclusion of this confrontation between state nationality and European citizenship. The movement involved, it is obvious, is not a replacement of the former by the latter. The fact remains that the identification of a new collectivity, that of European citizens, to which new prerogatives are conferred, has not remained without influence on state nationality. The logic of subjective rights, which is that of Union law, undoubtedly has its limits. But it also has its own dynamic, which allows us to understand both the reason and the extent of this influence.

The European people may not exist as an autonomous political community; yet the European citizen does exist, and her conquering prerogatives cannot be ignored.

24. [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_1925](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1925); the procedure gave rise on 9 June 2021 to a formal opinion from the Commission: [https://ec.europa.eu/cyprus/news/20210609\\_2\\_en](https://ec.europa.eu/cyprus/news/20210609_2_en).



**Arancha González Laya** • Former Minister of Foreign Affairs of Spain, Ministry of Foreign Affairs, European Union and Cooperation of Spain.

## Interdependence, Resilience and Narrative: European Geopolitics of the 21<sup>st</sup> Century

Since the opening speech in 2019 of the Von der Leyen Commission, in which the president said she wanted to head a “geopolitical commission,” the term has become topical again in the field of international relations. Scholars often define geopolitics on the basis of three key notions: territory, power and narrative. However, I believe that in the 21<sup>st</sup> century, the territory as physical space, the concept of power and the current narrative do not fully respond to these elements as keys to international relations.

“Geopolitics is more than power politics, since it encompasses geography. It is about the strategic advantages or vulnerabilities of a country in relation to oceans and continents, to rivers, mountains, or deserts. The approach therefore requires a spatial self-image, the will to define a territory, and to develop a strategic lay of the land in relation to other actors” as Luuk van Middelaar defines in his article ‘Europe’s Geopolitical Awakening.’<sup>1</sup>

Territory today, in the 21<sup>st</sup> century, is much more than a geographical space or in any case is not only a spatial delimitation. The great challenges of this century are global and ignore borders in an interconnected world. The pandemic has been an illustration of that, or even climate change; in the same way as with the Lehman Brothers crisis in which the failure of a bank in the USA almost brought down the economies of half of Europe. In an interconnected world like that of today, the idea of territory is not only a geographical construction, it is also a sum of interests and values which must adhere to a certain notion of territory which today is not only defined by the geographic boundaries of a country. Rivers, mountains, seas today demarcate maps, but little more. The territorial reality of countries is much more diffuse and linked to their interdependence. It is more the management of interdependencies between countries than that of the territory.

In these times when the responses attempting to triumph propose a return to the territory, to the border, to the wall, to the purely national response, it must be stated that what really protects are the supranational institutions, in Europe the European Union, and in the world the global multilateral organizations.

The pandemic cannot be used as an excuse to normalize the reductive ideas of the far-right. Strategies to confront the right to mobility, migrations or lockdowns should not generate electoral income. It is certainly disturbing that the defeat of Donald Trump in the midst of a wave of infections in the United States has left a feeling of mere temporary relief, as if this were the exception rather than the rule.

It is time to claim the ideas of interdependent progress because we have before us a smoke machine, which is very effective, which constantly repeats that what it protects is the return to the national border, the repatriation of powers, the return to the strong State. What will really protect French, Spanish, German or Dutch citizens in an increasingly complex world where everything is changing more and more quickly, is a European Union that is increasingly united and more and more European. This is where the answer lies.

That is to say: we must build our future on the basis of co-responsibility. Nothing sustainable can be built from dependence. The twenty-first century is already no longer the century of the North and the South; the North telling the South what to do, or the North buying from the South and the South selling itself to the North. This is the century of co-responsibility, where both parties understand that we play the future as soon as we are ready to work to give it a shared response. None of the common challenges we have can be approached from another angle: climate change, migrations, protecting biodiversity or protecting values, rights and freedoms.

My second point tackles the notion of power: power in the 20<sup>th</sup> century was power that revolved around the crudest sense of the word: it was the armed power of the military, defense, and security. In the 21<sup>st</sup> century, this conception of power has changed. Power is like energy: it cannot be created or destroyed, it is simply transformed and we must be able to adapt to these transformations.

Power today does not only reside in the expression of a State: it is also the expression of the corporation. Today we have large corporations, which in many sovereign spaces are much more powerful than the government or the State in the classic sense. And we can’t forget either, when we talk about power, the public opinions of the generation of informants and disinformers. Consequently, power is today also much more diffuse than this hard power which was used as one of the axes of the notion of geopolitics. Power is also today a concept that moves away from its classical definition to move towards more diffuse, more compound, more complex forms of power.

1. L. van Middelaar, ‘Europe’s Geopolitical Awakening’, *Le Grand Continent*, April 2021.



In a world like today's, it would be more accurate to talk about resilience.

And I come back again to the example of the pandemic. The power to respond to the pandemic today is the power that lies in the ability to innovate. It is the power of science. It is the power inherent in the individual's inventiveness.

It is much more than an army. Today, the power to respond to a pandemic is a vaccine. And whoever lacks it loses the war. But it is no longer war in the classic sense of the term. It's war on a pandemic. What is it today that allows us to win the fight against climate change - which is also a war because it leads us to the destruction of ecosystems, of biodiversity, of the only planet we have? To win this war, it's not enough to have an army.

We must have the technological power that allows us to decarbonize our production processes. This power, about which we should be able to talk more, is a much more composite power. It is a more three-dimensional power. It is not a purely military power. It is a technological power, it is a normative power, it is a scientific power, it is also a power of conviction. We also need to be able to manage this complexity of power.

For this reason, the concept of "strategic autonomy," which has become the capacity for resilience, which is constantly emerging, is an adequate concept. It's not just about the number of warheads in one's arsenal. And that is why we, in Europe, need to understand what this new version of power in the 21<sup>st</sup> century is. We must certainly be able to promote a Europe of defense, where we create and innovate much more in common and build more defense and security in common, but we must also be able to build technological power. Another co-enterprise. And we must also build a greater monetary power, since we have a currency very present on the financial markets, given that we represent more than a quarter of international trade.

It is this version of the power in the 21<sup>st</sup> century that we must promote from each of our capitals, by building this new European power in technological and monetary areas, but also security and defense.

As for the third point mentioned by Luuk van Middelaar, which is the narrative, the epic, this ability to mobilize a people behind an idea or an ideal; it is the great challenge for Europe to succeed in transforming a narrative based on the past into one anchored in the future. The epic of the past, the epic of Franco-German reconciliation after the Second World War is an epic which speaks much less and which mobilizes much less the citizens of the 21<sup>st</sup> century, the European of the 21<sup>st</sup> century who has never known this reality very far from him; the European more concerned about his place in the world of the post-pandemic future.

The pandemic has strengthened support for a social and employment model that protects Europeans, as the latest Eurobarometers indicate. Citizens want the development and the implementation of a social Europe; almost half of those consulted believe that the EU should play an active role in guaranteeing equal opportunities, access to the labor market, working conditions guaranteeing a decent life, as well as quality health care - which still reflects the damage caused by the pandemic. This is the story that must be constructed, that of a Europe that protects.

Interdependence instead of territory, resilience instead of power, and a narrative rooted in the future instead of the past as driving force: this is what we must define to bring about a more geopolitical European Union.

A European Union that must be valued for the way in which it has responded to this crisis. In merely a year and a half, Europe has made a qualitative leap in terms of economic integration, coordinating its response to the crisis - which did not happen in 2008, nor in 2009, nor in 2010, nor in 2011, when integration met brutal resistance. Taboos on fiscal expansion and pooled borrowing, which hampered the recovery a decade ago, have been broken. In 2020, we crossed this Rubicon. And it is a very important Rubicon for the part of the European construction which concerns a greater integration of the members of the European Union in terms of their economies, their finances and their commitment to reforms.

We must also underline the fact that in this short period of a year and a half, Europe has been able to invest massively to invent vaccines from which European citizens benefit massively. With the vaccine, the EU has regained ground. It has positioned itself among a very small group of players with the capacity for innovation, production and distribution of vaccines.

It is also the result of the European Union. I want to underline this, and I want to stress the importance of institutions in Europe. While it is true that leadership is needed, we also need institutions. In reality, it is the institutions that have the reflexes and the mechanics that succeed in translating a series of tools into immediate responses in times of crisis to support and protect citizens. I stress this because sometimes it is true that in view of the functioning of institutional processes, we forget the enormous qualitative leap they represent.

There is no real European strategic autonomy that is not built on alliances. That's why I don't like to talk about sovereignty very much. I like to talk about resilience more than anything else, a resilience that is open and built on other links. Because in reality it is about generating a critical mass that allows us to weave a set of standards, agreements and institutions that meet our interests and our values. And we won't do it if we turn our backs on the world. We will only get there if we can generate real agreements.

We cannot afford a divided world. We need an international community which acts in co-responsibility in the search for solutions to global problems, because individualist struggle is vain in the face of the gravity of the challenges which threaten us, terribly inefficient economically - which we must also foresee - and foreign also in an ideological sense to the ideas of fraternity and solidarity shared by a large majority of people, even if this seems paradoxical.

We are building today the post-pandemic world of tomorrow. Citizens are aware of the generalized crisis in their societies, whether it is an economic crisis or undemocratic tendencies, which are increasingly present in different countries and require coordinated strategies. Europe must respond to these challenges by knowing how to combine growth and environmental sustainability, with objectives commensurate with the risks we face. We must

leave a habitable world, ecologically and sanitarily, to future generations. This world must also be able to combine the necessary belonging to the community and respect for the diversity of the citizens who compose it, with particular emphasis on the fight against racism and xenophobia at a time when various crises have increased the migratory flows of those who fleeing wars, conflicts and misery. Reconciliation between technological innovation and professional integration; between the boom in telecommunication and public deliberation. And always with a firm commitment to equality between men and women.

Only a shared effort, which comes from work dynamics capable of integrating new challenges, will be able to undertake the major decisions, investments and innovations required for the well-being of tomorrow. Let's not get lost.



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## Thinking About and Fostering Europe as a Power

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What do we mean by “Europe as a power”? This idea has recently been sweeping through public debate and political discourse, even if I mentioned it as far back as 2001 in a work where I reflected upon “*L’Europe, une puissance dans la mondialisation*”.<sup>1</sup> French President Emmanuel Macron, during a speech at the Sorbonne in 2017, used the term “power” to characterize Europe. At the European level, it was indirectly referred to by former High Representative for Foreign Affairs, Federica Mogherini, when she declared that “soft and hard power go hand in hand” in 2016. Following the example of Commission President Ursula von der Leyen, who in 2019 defined her administration as a “geopolitical Commission”, the call to “power” has since been embraced by European leaders.

The designation of “Europe as a power” leads to a subtle change in the very definition and concept of power. It seems obvious that Europe has not historically sought to situate its power in the Weberian sense of the word, which refers to “every chance, within a social relationship, of enforcing one’s own will even against resistance”,<sup>2</sup> or even in the reformulation put forth by Raymond Aron, which is to say, “the capacity of a political unit to impose its will upon other units”.<sup>3</sup> Nevertheless, in the same historic perspective, Europe was in fact often associated with power in various and nuanced forms. This is how John Galtung, as early as 1973, saw “a superpower in the making” in the European community due to its economic and demographic weight (“resource power”) and its ability to create international structures (“structural power”).<sup>4</sup> At the same time, Louis-François

Duchêne spoke of “civil power” as an engine of peace and prosperity.<sup>5</sup> Advances spurred by European law led to discussion of “normative power”, the term popularized by Ian Manners<sup>6</sup> and Zaki Laidi;<sup>7</sup> Europe would be endowed with a capacity for moral influence which would work to raise international standards.

Often invoked, but always limited, “Europe as a power” has until now only been defined in a cautious and proportionate way. It is now asserted and claimed. To me, this seems justified in a world which – far from having reached “the end of history” as imagined by Francis Fukuyama as a universal, peaceful, and liberal paradise – is once again marked by major geopolitical tensions, first and foremost the global confrontation / cooperation between the United States and China. If Europe wishes to carry any weight, it can no longer escape the need to define itself as a power and to acquire its characteristic attributes. This is a new European vision, which I share while adding one nuance from the outset: for Europe to truly emerge as a power, it must concentrate its energy in the key areas of tomorrow and devise a way of conceptualizing its actions.

Europe must first and foremost be a green power. The European Commission’s Green Deal announced on 19 December 2019, which aims at making Europe the first carbon-neutral continent in 2050, is in line with the ambitions for power shown by the Union. However, it will have to be implemented as quickly as possible in order to be credible and not be pre-empted by the US plan. Given this context, it would seem appropriate to consider the introduction of a Carbon Border Adjustment Mechanism (CBAM),<sup>8</sup> as well as the revision of the European Emissions Trading Scheme (ETS)<sup>9</sup> in order to achieve the aforementioned objectives. The combined implementation of these two mechanisms would make reconciling environmental and economic objectives possible by working towards carbon neutrality by 2050 through an increase in the price per ton of CO<sub>2</sub>, as well as maintaining European companies’ competitiveness and limiting the risk of their leaving. Green power goes hand in hand with regulatory power which is able to impose rules on international commerce in the name of environmental principles and economic justice.

Europe must also, as a whole and not only through its nations, assert itself as an economic power. In my view, this need has two main components: reforming the eu-

1. See P. Moscovici, *L’Europe, une puissance dans la mondialisation* (Seuil 2001).

2. See M. Weber, *Economy and Society: A New Translation* (Keith Tribe tr, Harvard University Press 2019) 158.

3. See, R. Aron, *Peace and War: A Theory of International Relations* (1<sup>st</sup> edition, Routledge 2003) 47.

4. See J. Galtung, *The European Community: A Superpower in the Making* (Universitetsforlaget 1973).

5. See, L.-F. Duchêne, ‘Europe’s Role in World Peace’ in Richard Mayne (ed), *Europe tomorrow: sixteen Europeans look ahead* (London 1972).

6. See, I. Manners, ‘Normative Power Europe: A Contradiction in Terms?’ (2002) 40 *Journal of common market studies* 235.

7. See for example, Z. Laidi, *La norme sans la force* (Presses de Sciences Po 2013).

8. See, Proposal for a Regulation of the European Parliament and of the Council establishing a border carbon adjustment mechanism (COM/2021/564 final).

9. See, Proposal for a Directive of the European Parliament and of the Council amending Directive 2003/87/EC as regards the contribution of aviation to the Union’s economy-wide emission reduction target and implementing an appropriate global market mechanism (COM/2021/552 final).

rozone's architecture and developing industrial and digital sovereignty. The Stability and Growth Pact, the mechanism for coordinating national fiscal policies of eurozone Member States, a common regulation for the 19 countries sharing the same currency, cannot remain as it is. It should be reformed so as to streamline and simplify it and add a debt reduction rule specific to each country, according to their circumstances. The European framework for the governance of public finances must keep up with reality if it is to truly contribute to the emergence of Europe as a power. It was revised in the aftermath of the financial crisis, notably through the six-pack, the Treaty on Stability, Coordination and Governance (TSCG), and the two-pack; but its pro-cyclical and rigid character<sup>10</sup> has not changed and has even worsened following the "whatever it takes" approach to the Covid-19 crisis. When I was European Commissioner for Economic, Financial and Taxation Affairs, I fought – successfully – to introduce flexibility in the application of our rules and put an end to the nominal and punitive interpretation that had prevailed until that point. This political shift made it possible to avoid sanctions against Italy, Spain, or Portugal, which would have had a negative impact. We must now go even further.

In a context where most Member States have seen their debt levels surpass 60% of GDP, can the Eurozone maintain identical rules if they cannot be respected? I know from experience that it is difficult to modify treaties; it would therefore be counterproductive to suggest a *grand soir* (or grand reform) of these rules, their overall renegotiation, or even their repeal. We should take a pragmatic approach by determining a debt level which is appropriate for each country's macroeconomic situation, leaving more leeway for counter-cyclical fiscal policies. In reality, this is about grounding the new governance criteria in the evaluation of the quality of public spending and the sustainability of debt, as recommended by the European Fiscal Board. The French *Cour des Comptes*, which I chair, shares this vision and also recommends reforms to the national public finance framework in order to enhance its multi-annual dimension and improve its capacity for projection and anticipation. I also believe it is advisable to strengthen the role of independent budgetary institutions, such as the French High Council of Public Finances, in order to assess the quality of public spending and participate in the debate on public debt. At a moment when public spending and debt are at historic levels – and with significant differences within the eurozone – the governance of our public finances must be greatly improved. Europe has made considerable progress during the crisis, accepting debt mutualization for the first time and deploying massive solidarity programs along with structural reforms. Now it is time to make the most of this progress by establishing a more ambitious, better managed, and democratically debated budgetary policy for the long term, backed by real resources of its

own. We are primarily interested in energy taxation or in a modern digital tax system, which are part of the new rules adopted within the OECD concerning businesses.

Europe must also take charge of its destiny and develop a new industrial autonomy. European industry has weakened over the last several decades, particularly in France, even though it has retained some strongholds. Today, European industry is highly dependent on China. The Covid-19 crisis revealed the need to end de-industrialization, which fuels populism and nationalism and is thus politically harmful, and to start reclaiming our productive sovereignty. In this respect, I wish to commend the European Commission's upcoming launch of the Industrial Alliance for Processors and Semiconductor Technologies<sup>11</sup> and the Alliance for Industrial Data, Edge, and Cloud.<sup>12</sup> By launching such projects, the European Union is truly embarking on the path of technological transition. Strategic independence is therefore justifiably at the center of the French Presidency of the European Union, which begins this coming January. In the long term, if Europe guarantees its strategic independence, it no longer needs to fear the risk of shortages or the withholding of goods by a third-party country. In reality, it is a question of resilience, if not survival, given the global geopolitical tensions that are at play.

Europe as a power – and this aspect is essential in my view – will necessarily be a political Europe. From this perspective, the European Union must undertake serious reforms of its internal organization. European institutional debate has been stalled since the Constitutional Treaty failed in 2005, which was surreptitiously and partially recovered by the Treaty of Lisbon in 2008. This debate is once again emerging, albeit tentatively, with the Conference on the Future of Europe. Nevertheless, it is unavoidable. First of all, the Council's unanimous vote should be replaced by a majority system for the simple reason that unanimous voting prevents the necessary decisions for true economic and social cohesion. Admittedly, the unanimity rule reflects the culture of compromise and the constant search for consensus which are at the heart of European construction. However, it has become an impediment in a Europe that is larger, more diverse, and plagued by constant struggles over diverging interests, which strike at the very heart of the European spirit. This was illustrated by the Hungarian and Polish blocking vote on 16 November against the inclusion of the clause on respect for the principles of the rule of law in the European recovery plan. Qualified majority voting should gradually become the rule in financial, fiscal, and foreign policy matters in order to ensure European cohesion and unity. This will not happen overnight; there will be hesitation and resistance to overcome, but we must proceed in this direction with determination.

11. See, <https://digital-strategy.ec.europa.eu/en/policies/alliance-processors-and-semiconductor-technologies>

12. See, <https://digital-strategy.ec.europa.eu/en/policies/cloud-alliance>.

10. Public debt below 60% of GDP, deficit below 3% of GDP.



I have long believed that we must continually strengthen European institutions and reinforce the Parliament-Commission relationship – which is at the heart of European democracy – in order to bring balance to a political system that tends to favor intergovernmentalism. This is why I believe it is imperative to further politicize elections to the European Parliament by enshrining the Spitzenkandidaten system – the system by which each European political party is represented by one candidate who presents its political agenda at a European level. The candidate of the winning party and/or the one able to form a majority coalition becomes President of the Commission. This system was abandoned in 2019 in favor of the European Council taking over this nomination which, in my opinion, regardless of my assessment of the quality of the candidates at the time, is a regrettable step backwards. It must be reintroduced in 2024 and made permanent. I am also in favor of setting up transnational lists for European elections and a right of parliamentary legislative initiative.

I do not think it is feasible to limit political Europe to a purely and strictly internal dimension. In a globalized world, power is also understood as the ability of a State or a group of States to look beyond their borders and assert themselves on the international stage. Bringing together the views of the last two Commission presidents, Jean-Claude Juncker and Ursula von der Leyen, Europe must be both political and geopolitical. In this regard, European defense has been neglected for far too long. EU Member States, and France in particular, have refused to shift the levers of “hard power” to the EU level because of the devastating memories of the World Wars on the Old Continent. The failure of the European Defense Community (EDC) in 1954 led to the United States placing Europe under its guardianship through the North Atlantic Treaty Organization (NATO), of which 21 European countries are currently members. Even though the Maastricht Treaty calls for a common defense policy, progress remains limited and is unlikely to make Europe an international geopolitical power. The withdrawal of US troops from Afghanistan, or the termination of the submarine contract by Australia in favor of the United States and the United Kingdom, illustrate Europe’s current inability to influence major geostrategic matters. This inability is also evident at an internal level: Europe is still struggling to adopt a common and humanitarian stance on migration issues.

This assessment should not, however, lead us to be fatalistic. On the contrary, it must spur us to undertake bold initiatives, bolstered by true political courage. Given the US pivot towards the Pacific and in the context of Europe’s industrial and strategic emancipation, the

creation of a common defense, and even eventually a European army coordinated with NATO, must now become a priority. I do not want to seem naive or irenic, and I am well aware of the cultural, political, and geopolitical differences between European countries, as well as the differences in interests, capabilities, and wills that exist among them. It is not by chance that this dimension of European construction has never progressed as much as it should have. But now we no longer have a choice. We must move forward. We cannot rely forever on the protection of the United States alone; our ally is calling on us to share the burden, and the threats are considerable. We must absolutely find a way to move forward, be it in a flexible manner, by prioritizing enhanced or structured cooperation, and by including the United Kingdom in our reflections, beyond any post-Brexit disputes.

Lastly, to be powerful is to have a vision. In order to find a concrete incarnation, a powerful or sovereign Europe must have a sense of purpose and must be thought through. The French presidency of the European Union, whose motto is “Recovery, power, belonging”, has an essential role to play. First of all, the presidency must have a clear and strong political vision, based on a clear strategy. There are many challenges, but the short duration of the presidency requires that choices be made if concrete results are to be achieved. The French Presidency will be distinguished by its ability to build consensus on divisive matters which will require political agility and close cooperation with other Member States. For instance, negotiations on the carbon tax and the GAFAM tax, which are highly political, will be discussed as early as 2022, and France will have to be fully involved.

Thinking about power is at the very heart of the European project. The European idea may be worn out and criticized, but it remains indispensable because it embodies an unequaled and unparalleled ambition. It is the ambition to unite nations and peoples who have for so long opposed each other, even to the point of war, destruction, and genocide, in order to eliminate any bellicose tendencies among them and to at last bring them together in a united political project. In order to turn this “power of thought” into “Europe as a power”, it is up to European political leaders to undertake the kinds of actions that will meet the challenges of the 21<sup>st</sup> century. Europe as a power is now our horizon; it will emerge out of a symbiosis of our original vision and the commitment of our efforts for tomorrow. I am convinced that Europe is not doomed to disappear from history, as some people claim or even seem to want, but has an essential role to play in the world in order to assert its values and its economic, social, environmental, cultural, and democratic model.



**Pascal Lamy** • Coordinator of the Network of Think Tank Jacques Delors (Paris, Berlin, Brussels), President of the Paris Peace Forum and former Director General of the WTO

## Defining European Sovereignty

For a long time, Europe has had a sickly relationship with power. But the claim to “power” now seems to have been assumed by European leaders. The French Secretary of State for European Affairs, Clément Beaune, even speaks of a new “mental and concrete projection towards power”.<sup>1</sup> What is your feeling on this issue?

The failure of the European Defence Community (EDC) in the early 1950s led the Founding Fathers to initiate, through what later became the European Union, a project of peace, an enterprise of geo-economic rather than geopolitical integration. This choice followed from a pragmatic observation: geo-economics deals with quantities of mostly fungible things, whereas geopolitics mobilizes a sense of belonging, a community that is felt and experienced, often built around common threats, dreams, and nightmares. Geo-economic integration – through the common management of steel and coal at the outset – was understood to lead naturally to political integration. This is what Robert Schuman’s concept of “*de facto* solidarities” refers to: economic integration should have resulted in political integration. We now understand that it is not enough to work the lead of the economy to find the gold of politics. Between the consumer, the worker, the *homo economicus* on the one hand, and the citizen, the *homo civicus*, on the other, there is a species barrier that European integration has not yet been able to overcome.

On several occasions, the Union rejected its geopolitical responsibilities, and sometimes did so in a dramatic way, for instance during the Yugoslav wars. But Europeans have also begun to perceive the need to equip themselves with the means for political action commensurate with their position in the world: the increasing fragmentation of the world and the acceleration of the United States

– China confrontation is forcing us to shift our paradigm.<sup>2</sup>

During the Cold War, Europe had clearly identified its friends, its American protectors, as well as its foe, the Soviet Union. Donald Trump forced Europe to open its eyes to a new political reality: the United States’ gaze is now essentially turned towards China, its ideological, military, technological and economic rival. While geo-economics is a positive-sum game, as shown by Ricardo and Schumpeter, geopolitics is a zero-sum game, and the Americans deem that any step taken by China towards world power is to their disadvantage, undermining their own values and interests. For Europe, China is both a competitor and a rival, but also a partner, these different positions being given different weights from those given by the United States. If Europeans do not find an appropriate positioning (which cannot be an equidistance) between these two worlds while they pursue in a more aggressive way their age-old rivalry, they will be crushed. Europe has its own interests, which it will have to defend on its own, if it is able to acquire the means for a political action fitting its ambitions in the world.<sup>3</sup>

This new international context brings Europe back into geopolitics, and therefore into power in the political sense of the term. Today we find ourselves at the heart of a revolution in Europe’s relationship with the outside world: our world is not, or no longer, the one that enabled Europeans to focus most of their efforts on their priorities of economic integration and on their futuristic model of political unification. We have entered a world where Europe cannot but embrace power<sup>4</sup> and understand itself as being a political entity. This is a novelty for a continent whose nation-states have been inoculated against the damage done by the will to power. Indeed, in the collective imagination of most Member States, the latter is still viewed as the characteristic of the bellicose nationalisms of the 20<sup>th</sup> century that produced Nazism, fascism and the Shoah, the worst of what humanity has ever known.

For the men and women who shaped European unity in the first post-war decade, creating the conditions for a lasting peace was the beating heart of the European project, conceived in opposition to a nationalist impulse that unfolded almost naturally whenever the will to power is assumed. Europe thus undertook to inoculate itself against this will, which obsessed it for centuries, by fostering the dream of internal unity. But the logic of power was suppressed to the point where the Union became unable to act at the appropriate level. Ursula von der Leyen’s first public statements emphasized that she heads the first “geopolitical commission”, which points out that new perspectives are now open.

1. ‘In Conversation With Clément Beaune’, *Groupe d’études géopolitiques*, 3 December 2020.

2. P. Lamy, ‘Union européenne, vous avez-dit souveraineté ?’, *Commentaire*, Spring 2020, n°169.

3. P. Lamy and N. Kohler-Suzuki, ‘Une Chine mondialisée est moins dangereuse qu’une Chine autarcique [Chapitre du rapport Construire l’autonomie stratégique de la Chine]’, Institut Jacques Delors, 7 December 2021.

4. ‘L’Europe est condamnée à la puissance. Une conversation avec Pascal Lamy’, *Le Grand Continent*, 17 October 2018.

**But isn't one of the conditions for fostering European power that Europeans be able to first define their common interest?**

For Europeans, Europe is still a project of reason, rather than one of passion. Our common interest is not very complicated to define and to defend when it comes to economic integration: the common currency, the common market, the customs union can easily be understood as the avatars of a community of interests emerging from the sheer laws of economics. But "one does not fall in love with a large market" as Jacques Delors liked to say. It is much more difficult to define a common interest in the hearts, that is to say a political community.

There is a significant challenge in defining and articulating the will to power in the political space as long as Europe suffers from a democratic deficit and its political space doesn't amount to a *demos*. The institutions of the European Union (*kratos*) embody the democratic canons: we have a quasi-government (the Commission) controlled by a Senate of the Member States (the Council of Ministers), a Parliament that can overrule the Commission and finally a Supreme Court (the Court of Justice). Europe has all the necessary institutions, which are functional and democratic, but they are not, or hardly, driven by a sense of common belonging. The European political space doesn't give rise to passions, and most Europeans do not perceive it as a space of power similar to what they can experience at their local, regional or national levels; this is clear from the significantly lower participation in European elections.

Take the example of a common defence policy, which is supported by the Europeans if we are to believe the polls: it presupposes first of all a security policy, which is itself only a component of foreign policy. In matters of geopolitics, and particularly in the field of security, we are not in the realm of reason but still in the realm of passion, and I do not believe that there is a reasonable common interest that can override the particular interests rooted in passions, just as we have not succeeded in bringing about a political union based solely on an economic union. Several barriers must be overcome: the matter of belonging that leads to a common security policy is above all symbolic, it is not real, it is in the mindsets, in the nightmares, in the representations.

Today, it seems important to seek the elements of a new common narrative in the infra-political. The future of the European project rests on the emergence of a true sense of belonging to Europe, and on the way in which the identity issue that haunts our continent will be resolved: we cannot continue the path of European integration while ignoring the emotional need for belonging. The European identity, which is a source of great complexity for Europeans, whose national identities are partly built on narratives of differentiation, appears in a much more obvious way to non-Europeans. We need to identify what, beyond the heterogeneity of our historical experiences,

brings us together as Europeans, and connects us to the rest of the world. For this, we need a new, richer, and more widely shared political grammar - a grammar that lives up to the formidable ambition of creating a space for political belonging without resorting to conflict or coercion. We have done a lot of theorizing about the institutional architecture of the Union, its common market, and its legislation, but we have not done enough empirical research on Europeans, their collective imaginations, and their daily lives. One of the avenues I have been pursuing for several years now is that of developing an anthropology of European integration.<sup>5</sup>

This will be a long road; it is a matter of time, of narrative, of debating. The shift will be very complex. I commend Josep Borrell's initiative to build a strategic compass for the Union, but he acknowledges himself that it will take time.<sup>6</sup> Once the question of the European interest raised and answered, its procedural implementation will follow. The way in which institutions and procedure are to be crafted should not be decided before we settle on what our goal is. The debate on the transition from unanimity to majority voting in the European Council does not make much sense as long as this work on the definition of a European interest has not been completed. To be sure, the transition to a majority rule will not lead to majority decisions on military interventions. On these issues, we need to really agree on the essentials, considering in particular that the European political space is only superimposed on national spaces, which are the real spaces of solidarity and belonging; this is where one can truly decide to put one's life in danger.

**But isn't the shift to geopolitics itself based on geo-economics? Economic sanctions are often perceived today as an instrument of foreign policy. The extraterritoriality of US law seems to be the very example of this porosity, and also one of the subjects on which a European interest could be most easily determined.**

It is precisely the interest of this field of foreign economic relations that it is the one that most closely blends geo-economics and geopolitics. The American sanctions respond to a strictly national interest but directly affect European companies; indeed, it is a unilateral manner that the Americans withdrew from the Vienna Agreement and imposed sanctions on China. But not all developments come from within. Let us take the example of the euro: although discussions on its creation began in 1969 with the Werner report, the issue only really took off when Nixon decided to put an end to the gold standard.

This non-alignment of interests creates the conditions for the emergence of a European strategic autonomy. This

5. P. Lamy, 'Jalons pour une anthropologie européenne', *Le Grand continent*, 8 January 2020.

6. J. Borrell, 'What European foreign policy in times of COVID-19?', *Groupe d'études géopolitiques*, 14 December 2020.

is what is at stake in the new anti-coercion instrument that the European Union is expected to be handed in the coming months and which aims to enable it to prevent and counter measures of economic constraint taken by third countries against the European Union.

As we showed in several publications of the three Instituts Jacques Delors, which inspired the Commission's proposal, the development of a comprehensive and well-

articulated arsenal of measures capable of preventing or limiting the damage caused to Europeans by extraterritorial sanctions (American or other) is likely to be the first real operations test of the new discourse on strategic autonomy, the translation of sovereignty into the language of European institutions.<sup>7</sup>

*Interview by Hugo Pascal and Vasile Rotaru*

7. M-H. Bérard, E. Fabry, F. Fatah, E. Knudsen, P. Lamy, G. Pons, L. Schweitzer and P. Vimont, 'American extraterritorial sanctions: did someone say European strategic autonomy?', Institut Jacques Delors, 22 March 2021.





Didier Reynders • European  
Commissioner for Justice

## We Face a Systemic Problem rather than Isolated Violations of European law

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In a decision rendered on October 7, 2021, the Polish Constitutional Tribunal ruled that a part of primary European law is unconstitutional in terms which would suggest that the primacy of European law will no longer be recognized in that jurisdiction. Now, a few months after the crisis caused by the ruling from the court in Karlsruhe which called into question the ECB's public debt purchasing program, what is your reaction to this decision?

Living in a Union implies that, above all, Union's law is applied equally everywhere. A Polish, French, or German judge is also a European judge who is therefore tasked with enforcing European law and, in case of doubt about its interpretation, to consult the Court of Justice of the European Union (CJEU), the only authentic interpreter of European law and the only authority able to judge whether a European institution is in violation of European law.

The primacy of European law over national law – including constitutional provisions – and the binding nature of CJEU decisions have been asserted on multiple occasions. But attempts to question it are not specific to Germany yesterday or to Poland today. We were already highly concerned when the French government, in writings submitted to the French Conseil d'État concerning the legality of data collection and retention systems, invited the court to conduct an *ultra vires* review deeming the CJEU's *La Quadrature du Net* ruling to be inconsistent with the allocation of competences between the European Union and its Member States, and therefore to ignore it. In its decision, the *Conseil d'État* refused to follow this path and, adhering to CJEU precedent, asked the government to return in six months with a new law compatible with European law.<sup>1</sup> We also have concerns about the situa-

tion in Romania, where a decision from June 8, 2021, has raised similar issues.<sup>2</sup>

The particularity of the Polish case lies in the fact that it is the primacy of European treaties themselves which have been directly called into question, and not that of secondary law or decisions from one of the European institutions. It should also be noted that this decision follows a request submitted by the Polish Prime Minister – and therefore at the request of the government – and this in a context where the Commission could already express its reservations in regard to the independence of the Polish Constitutional Tribunal. It is this political aspect which is the second particularity of the Polish case.

**The Polish government does not seem to have the intention of beginning formal proceedings to leave the Union, which would go against the opinion of a large majority of the Polish population. And yet, if the Constitutional Tribunal's decision is applied to the letter, Poland already seems to be disconnected from the European legal order. Is this a case of legal 'Polexit'?**

Indeed, the Polish government has never shown willingness to activate the treaties to start the process of leaving the Union. There is also not much demand among the Polish population since most surveys show that around 80% of the population would like Poland to remain in the Union.

In regard to the Constitutional Tribunal's ruling, I wouldn't necessarily say it is a legal 'Polexit', but I would emphasize the fact that there is a risk that the functioning of the European Union as a whole would be called into question. It is therefore up to the entire Union – and in particular the Commission as it is the guardian of the treaties – to react and sort out the Polish situation as has been done, often successfully, in many other cases in the past.

Today we face a systemic problem rather than isolated violations of European law or concerns regarding the res-

and limited circumstances, which were not met in the case at hand. In its judgment of 21 April 2021, the *Conseil d'État* rejected the French government's argument to review the legality of the CJEU's decision, considering that it was not its task to 'ensure that the Court of Justice itself complied with ... the division of powers between the European Union and the Member States'. Nevertheless, the *Conseil d'État* asserts with unprecedented force the primacy of the French Constitution over European law, and stresses that a European directive or regulation that 'would have the effect of depriving one of these constitutional requirements of effective guarantees' would be set aside 'to the strict extent that respect for the Constitution so requires'. This safeguard clause was not applied in this case. See also, Loïc Azoulay and Dominique Ritleng, 'L'État, c'est moi'. Le *Conseil d'État*, la sécurité et la conservation des données', RTD eur. 2021.

1. *Editor's note:* The judgment of the *Conseil d'État*, *French Data Network et al.*, dated 21 April 2021 (nos. 393099, 394922, 397844, 397851, 424717 and 424718) follows the CJEU judgment *La Quadrature du Net* dated 6 October 2020, in which the CJEU considered that certain generalized and undifferentiated personal data retention obligations provided for by French law for reasons of national security, could only be compatible with European law under strict conditions
2. *Editor's note:* In a decision dated 18 May 2021 concerning a series of Romanian reforms relating to the organization of the judiciary and the disciplinary and liability regime for magistrates (joined cases C-83/19, C-127/19, C-195/19, C-291/19, C-335/19 and C-397/19), the CJEU stated, *inter alia*, that the principle of primacy of Union law precludes national legislation of constitutional rank which deprives a court of a lower rank of the right to leave unapplied, of its own authority, a national provision falling within the scope of Decision 2006/928 (establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption) and contrary to Union law. By a decision of 8 June 2021, the Romanian Constitutional Court states, on the contrary, that the Romanian Constitution retains its primacy in the domestic order, and Romanian judges cannot review the conformity of the provisions of national law declared constitutional by the Constitutional Court in the light of the European recommendations.

pect of rule of law principles, fundamental values, or democracy. For individual cases, we are easily able to enter into a dialogue with the Member State in question and the response is often to welcome our comments and to try to improve the situation by making the necessary reforms. Today, however, we feel that there is a more systemic willingness to damage the independence of the Polish judiciary and even, in some ways, to damage the validity of the European treaties, which is not acceptable to the Commission and does not seem to be acceptable to the other European institutions either. This unity is a good thing.

In this respect, the European Commission does not lack the tools to defend the very foundations of the Union and its capacity to effectively pursue different policies throughout Europe with basic principles that must be respected, and which underlie our institutional structure. European law must be applied in the same way everywhere. Yet the Polish Constitutional Tribunal's ruling suggests that European law could be applied '*à la carte*', and that it could therefore be possible to choose at any given moment which provisions would be applicable, and which could be disregarded for their alleged incompatibility with national constitutional law.

Such a development would not only be very dangerous for citizens – first and foremost Polish citizens, who, for example, could be denied a number of protections provided for by the European treaties which could be disregarded for one reason or another by Polish authorities – but it would also be a tremendous obstacle to the functioning of the internal market. Investors must be certain that European law is applied in the same way in the Member State in which they intend to invest as in the rest of the Union, as well as being certain that any legal disputes would be judged by independent, qualified, and effective courts – and this point is a second area of concern regarding the state of the Polish judiciary beyond its Constitutional Tribunal.

**Concretely, what are the other tools available to the Commission to respond to the current situation?**

We are absolutely determined to use all necessary measures to ensure that the principles that form the very basis of the Union, such as the primacy of European law and the binding nature of CJEU rulings, are respected.

But I would first like to stress that the timeline of social networks and political reaction is not the timeline of law. When a ruling such as that of the Polish Constitutional Tribunal is handed down in the morning, we cannot lodge a complaint in the afternoon and obtain a decision from the CJEU in the evening, even though we always respond immediately in order to protect the foundations of the Union. This is a bit frustrating, of course, but if we want to uphold respect for the rule of law and the principles that stem from it, we must set an example ourselves. It is therefore our duty to take the time necessary to build our legal arguments on solid and complete bases before

engaging – as European procedure require us to do – in a dialogue with the Member State. It is only at the end of this process that we can bring an appeal before the CJEU or ask the Council to issue a statement. Given the current circumstances, the stakes are too high to risk failing due to poor preparation of the case and of our arguments.

Coming back to the available tools, there are a number of them, and they can be used simultaneously. These are infringement proceedings, the 'conditionality' regulation, or sanctions proceedings as laid out in Article 7 of the Treaty on European Union. It is our duty to ensure that all the mechanisms at our disposal are as effective as possible, whether we are acting before the CJEU, the European Council, or within the Commission's own areas of authority, for example in relation to decisions on financing.

I would like to note that we have been involved in proceedings before the CJEU concerning the independence of the Polish judiciary for quite some time now. We were particularly very concerned with the disciplinary proceedings that had been introduced into Polish legislation and the provisions on the waiver of immunity for judges which we have already challenged before the Court on two occasions. The CJEU, at our request, even ordered Poland to adopt interim measures pending a final judgment and recently ordered Poland to pay a penalty for every day of non-compliance with the prescribed interim measures.<sup>3</sup>

Financial tools are also very effective. To give a recent example, 'LGBT ideology-free zones' were enacted in a number of Polish municipalities and provinces in 2019, which declared themselves as being free from the presence of the LGBT community. This justifiably elicited very strong reactions as it is blatant discrimination and in clear violation of the Charter of Fundamental Rights. As a response, six of these municipalities were excluded from participating in Twinned Towns programs with other European municipalities and thereby lost access to the European funding linked to this program. More significantly, this year we made the decision to withdraw funding, under the cohesion fund, if the potential beneficiary adopts these types of discriminatory measures. Subsequently, a number of Polish provinces and municipalities reversed their positions and repealed these declarations regarding the exclusion of the LGBT community from their territory. This means that financial tools are useful and, even for

3. *Editor's note:* On 1 April 2021, the European Commission brought an action for failure to fulfill its obligations against Poland before the CJEU, arguing, among other things, that a Polish law was not compliant with EU law in that it prohibited national judges from verifying that the courts responsible for applying EU law in Poland met the conditions of independence and impartiality (Case C-204/21). Pending the Court's ruling that will bring the case to an end, the Commission asked the Court to order Poland to adopt a series of interim measures, which the Vice-President of the CJEU granted by an order of 14 July 2021. Upon request submitted by the Commission on 7 September 2021, the Vice-President of the CJEU subsequently found that Poland had not complied with its obligations under the order of 14 July 2021, and ordered Poland to pay the European Commission a daily penalty payment of EUR 1 million for each day of delay or until final judgment is delivered in Case C-204/21.

very sensitive issues, can be effective. I am emphasizing this point because we will be regularly considering the use of these financial tools, independently of implementing a more specific mechanism.

Now regarding the famous ‘conditionality’ – which gives the European Union the possibility of suspending, reducing, or restricting access to European funding in the event of a violation of the guarantees of the rule of law in the use of funds – it should be remembered that the 2020/2092 regulation which allows for this has only been in effect since January 1<sup>st</sup>, which we sometimes forget. Since the beginning of the year, we have been trying, together with Johannes Hahn, the European Commissioner for the Budget, to identify the factual elements which allow us to ascertain that the conditions are being met in certain Member States, or that we at least have questions about the situation. This new budget protection mechanism, which is completely inclusive and open, also requires that we build the strongest case possible before seeking its implementation. We have therefore been working hard recently, together with the Parliament and the Council, to finalize clear guidelines on the potential implementation of the conditionality mechanism. All the institutions are unanimous in their desire to protect the final beneficiaries of European funds; it would be unacceptable, for instance, for farmers or associations that defend and promote the rule of law to be deprived of funding by implementing this mechanism to sanction a government.<sup>4</sup> I am also anticipating a response from the CJEU before the end of 2021 on appeals by the Hungarian and Polish governments challenging the ‘conditionality’ regulation, which should provide us with more clarity on the matter.<sup>5</sup>

Beyond that, in her State of the Union address, President von der Leyen very clearly stated our willingness to start the process through written proceedings.

**In light of all this, and particularly the numerous attempts to challenge the primacy of European Union law and the respect of rule of law principles, would you agree that the Union is experiencing an existential crisis?**

We must keep in mind the historical context of the current situation. In recent times we have devoted a lot of time and resources to verifying the progress made in eco-

nomie convergence and in proper budgetary management throughout the Union. This has resulted in a series of positive developments, notably in response to the financial and sovereign debt crises. The priority at the time was to put in place effective tools to better oversee the banking and insurance sectors and the financial markets in general, with an increased role for the European Central Bank. The debate surrounding European values was almost non-existent during this period; in other words, the Copenhagen criteria were receiving less attention than the Maastricht ones. There was almost the impression that when new Member States were accepted into the Union or the eurozone, the most important thing was to ensure that there would be no budgetary misconduct and that all the necessary economic reforms were implemented. Respect for democratic principles, fundamental rights, and the rule of law was considered as a given.

We can see today that the situation is completely different. Beginning in 2016, the Commission introduced a review of adherence to the principles of the rule of law in each of the Member States, with a first report on the matter being published last year and the second in July of this year. At the same time, the CJEU and the ECHR have been increasingly issuing rulings that define, incrementally, what is meant by the rule of law and judicial independence. The European Parliament has also been committed to this approach, mostly since 2016. This is a recent realization within all European institutions and has certainly been accelerated by worrying developments such as the constitutional reforms in Hungary or the participation of extremist parties in the governments of certain Member States, such as Austria.

That being said, I do not believe at this time that the Union is experiencing an existential crisis. Of course, we are facing challenges to the Union’s foundations through certain actions or decisions, but what is encouraging is that a large number of Member States, as well as the European institutions, have immediately mobilized in response to demand that the fundamental principles of the Union be adhered to. This realization is essential today because if we do not respond quickly, the future will indeed be threatened; an ‘à la carte’ Union is not a Union.

#### **But what can be done to avoid this situation?**

Recent events demonstrate that we are experiencing now just the opposite. I will use the example of health policy. Since the beginning of the Covid-19 crisis, many people have been wondering where Europe has been. Yet the Union has virtually no authority in this area. But Europe was not absent. Over the course of weeks and months, we successfully built a true health, research, and vaccine development policy. Today, we have budgets that will be made available at the European level to promote a common health policy. The same conclusion holds true when considering the current discussions on strategic autonomy, the common defense and security policy, or even

4. *Editor’s note:* In a resolution dated 8 July 2021, the European Parliament called on the European Commission to apply the cross-compliance regulation immediately and in full, considering that the text of the regulation was clear and that its application needed no further interpretation. With regard to the drafting of the guidelines, the Parliament called on the Commission to clarify in particular that violations of the rule of law in a Member State resulting from events occurring before 1 January 2021 do fall within the scope of the regulation as long as their effect is still ongoing, and to take account of the fact that cases of persistent violations of democracy and fundamental rights may have an effect on the protection of the Union’s financial interests. Finally, the Parliament stresses the importance of protecting the interests of final recipients and beneficiaries of funding in the implementation of the regulation.

5. *Editor’s note:* The governments of Poland and Hungary have each filed an application with the CJEU to have the cross compliance mechanism annulled on the grounds that the rules are confusing, unpredictable and devoid of legal basis. Hearings before the CJEU began on 12 October 2021.



the desire to make Europe a global actor in the microprocessor industry; there is a real expectation that policies at the European level must be strengthened.

However, for this strengthening to be possible, we must ensure that the crisis of values in certain Member States – which, it cannot be denied, is very serious – does not result in a contagion that would threaten the very survival of the Union in the long term. Of course, we cannot compare the current situation to the domino effect of the financial crisis several years ago; we are nowhere near that kind of danger. But we cannot afford to delay our immediate reaction to troubling situations with all available legal and financial tools.

**Apart from Poland and Hungary, do you have the impression in your daily practice that the rule of law is a notion which is shared and understood in the same way throughout the Member States?**

If we look at the situation throughout the world, it is true that there are very clear differences in the way different jurisdictions understand these values, at least in relation to what is meant by ‘rule of law’ in Europe. Of course, if we look too closely at the situation elsewhere, we might tell ourselves that, overall, Europe is quite a good pupil, which is confirmed by various international rankings in this matter. But this does not mean that we are exempt from ensuring that the principles of the rule of law, fundamental rights, minority rights, and democratic principles are respected within the Union on a daily basis.

When preparing the annual report on the state of the law in the Union, we are also faced with the problem of defining the notion of rule of law itself. The work we have done on the standards used in the report are direct testaments to the fact that common criteria do indeed exist.

There are, of course, differences from one Member State to another. Let’s take the example of the democratic system: we have twenty-seven different electoral systems. I am not sure that everyone in Germany can explain how the Bundestag is formed, even during elections. However, we have come to accept that even though we have different cultures, different historical paths that have led to this or that parliamentary or presidential system, elections by majority or proportional vote, there is a sort of family resemblance between these systems, which are all democratic. It is the respect of a certain number of fundamental principles that counts and that allows us to recognize the common identity despite the diversity of national specificities. We would therefore never ask that political or judicial systems be perfectly identical; it is enough that they respect the values of the Union. The same is true when it comes to racism and xenophobia. The Scandinavian countries traditionally protect freedom of expression and do not want to take legal measures as strict as we advocate, which brings about ongoing debate. Finally, different cultures lead to different systems, but this diversity does not pose a problem as long as the sys-

tems are equivalent, which is to say that they truly respect our fundamental values.

To return to the guarantee of respecting the principles of the rule of law in the Union, we must remember that the primary aim of these principles is to protect the citizens in each Member State. If the rule of law is not respected, then all other essential rights of European citizens will also suffer. It is this awareness that led us to the Report on the Rule of Law in the Union as well as the twenty-odd debates in which I have already taken part before national parliaments to explain our conclusions and recommendations.

We are engaged in a pedagogical work that joins parliaments, governments, and members of civil society. In order to strengthen this dialogue, I recently asked the European Union Agency for Fundamental Rights (based in Vienna) to work on a model for increasing these exchanges with civil society organizations. I am also deeply convinced that the rule of law, fundamental rights, democracy, as well as climate awareness and the prevention of hate speech, are all subjects that should be included in school curriculums throughout the Union. It is vital that European citizens understand from an early age the importance of these different issues in their daily lives. It should be explained to them, for example, why access to an independent and impartial – and if possible efficient – judiciary is indispensable for the protection of all other rights they enjoy. To give another example, if the independence of the media is not guaranteed, they will never be able to form their own opinions.

The solution to the problems we face today in this regard will undoubtedly come from the younger generations whose extraordinary mobilization on the climate issue, for example, is obvious. We may or may not agree with the methods used, but this mobilization cannot be ignored when it comes to defining the actions of States or the Union. At the same time, it is our aim to convince the younger generations that in all areas which are important to them, respect for our values, the democratic process, and the rule of law are essential in order for them to express themselves and to have a real influence on the political choices which will shape the world of tomorrow.

**Beyond its importance for the daily life of European citizens, respect for the rule of law seems to be intimately linked to a certain projection of European regulatory power abroad. In your perspective, does the strength and longevity of the now famous ‘Brussels effect’ depend as much on the significance of the European market as it does on succeeding in this fight to ensure that fundamental values are truly shared across the Union?**

The work done within the Union is an essential prerequisite for any European attempt to exert influence on the course of world affairs. If we do not do the work at home, so to speak, it will be very difficult for us to demand reforms from our neighbors.



The work we are doing in the 27 Member States will allow us to apply the same strict analysis to the candidate countries in the Balkans and to assert in good faith that respect for our fundamental values is a *sine qua non* condition for membership. When we meet with the leaders of Georgia and Moldova, all the reforms we advocate for in the areas of justice and the rule of law are a direct reflection of the work we are also doing within the Union. It was the same situation when we traveled with Commission members to Addis Ababa to meet with members of the African Union Commission.

I am convinced that European influence stems from our ability to project an attractive image, and that when situations deteriorate somewhere in Europe, the image of Europe as a whole suffers. I fear, however, that many Europeans do not realize that the situations we have been talking about – as well as migration crises and other dramatic situations – are never isolated phenomena in particular Member States; for non-Europeans, it seems to be the whole European Union that is undergoing a major crisis.

The work that must be done within the Union before we can speak with a credible voice outside the Union should therefore be taken very seriously. For example, the GDPR made it possible to set up a personal data protection system in Europe. This is not only a concern for Europe, it is shared by many other jurisdictions, and so this regulation has also provided a model showing how the protection of data and privacy of individuals can be ensured. The regulation is not strictly extraterritorial, but it can have a contagious effect. More and more states around the world have put comparable tools in place, directly inspired by our regulation. The work that we are doing at home in this area, I will not say leads by example, but at least inspires confidence in the possibility of protecting personal data in today's world. The Green Deal, which is one of the Union's most significant initiatives, is a new opportunity to try to create a global mechanism from what we do in the Union.

Without very serious internal work, we would not have the capacity to bring partners on board and therefore have influence on defining standards at the international level. I must acknowledge that the return of the United States – or at least the willingness of the new administration to work in the spirit of multilateralism – helps to strengthen our influence when the values we want to defend are shared by the United States.

**European soft power therefore derives in part from its ability to export its normative model. Is this component of projection truly part of what the Commission thinks about when it works, for example, on the regulation of the digital economy, or is it an unexpected consequence of a work which is mainly focused inwards?**

Those in the Commission who say they don't really think about it are a bit like Molière's Monsieur Jourdain – they are participating in the projection of European

normative influence without knowing it. When we try to define the best possible rules within the Union, we also believe that these rules would not be absurd outside the Union and could therefore also serve as international standards. This is clearly proven when it comes to the protection of our fundamental values, where this normative projection was an objective in itself. We have always considered that what we do within the Union allows us to maintain credibility outside the Union.

For example, the increased number of deaths in the Mediterranean compels us to review our migration policy, not least because it would be difficult for us to point the finger at external humanitarian disasters if we ourselves do not do enough to put an end to the dramas in the Mediterranean. The Commission has therefore put a new migration pact on the table in an attempt to redefine the way in which this issue is dealt with. Setting a good example is indispensable if we want to require anything of others.

Another example is the death penalty. We have succeeded in making sure that this punishment disappeared both in the Union and in the Council of Europe, and it is no longer an issue today. Even though there was a debate in Turkey a few years ago, the death penalty has not been reintroduced. Only Belarus still uses it and is, therefore, not part of the Council of Europe. Without first achieving complete abolition in Europe, we would not be credible in discussing it elsewhere. This is yet another example where Europe has taken a leading role, but only because we have successfully aligned the positions of all the Member States, and even the whole continent, with one exception.

**This discussion leads us to the question of 'European identity'. Would it be fair to say that the strength of its values, as embodied in its law, is the only way for Europe to define itself and to maintain its role in a globalized world? In other words: could European identity ultimately be a normative identity?**

I believe that the treaties are very clear in this respect. Article 2 of the Treaty on European Union leaves no doubt that our fundamental values are integral to European identity. Furthermore, in order to become a member of the Union, candidate countries must meet the conditions for adherence to these principles, and oversight in this regard has been increased in recent years.

This core encompasses a range of values and standards that we believe are universal – even if they are not yet universally accepted, such as democracy – and our ambition is to promote them. This is done through certain, specific regulations concerning the protection of fundamental rights, privacy (such as the RGPD), or the rule of law.

We also do this by addressing issues that sometimes seem less related, but which share the same exact logic. I am thinking in particular of the work to foster mutual trust, whether between citizens and public authorities, or between consumers and companies. Our regulations in a

variety of areas serve this end. This is the case when we take an interest in the protection of privacy with regard to companies, but also with regard to public authorities and intelligence services. This is also the case when we work with companies within the framework of the Green Deal to support them in their desire to create an economy that is not only more sustainable, but also more respectful of rights; I am thinking in particular of the due diligence needed to avoid the use of forced labor in the production chain in certain regions of the world – Xinjiang in China, for example – or child labor.

Along the same lines, by the end of this year I hope to be able to present, together with Thierry Breton in his role as Commissioner for the Internal Market, an initiative on sustainable corporate governance. This would include a change in the definition of social interests based on the model of the Pact law in France and a duty of vigilance for companies in their operations and supply chain relating

to risks, potential negative impacts on the environment, biodiversity, climate change, and also human rights.

Yet what are we doing through these efforts? When we take an interest in these matters, or in how platforms fight online hate speech, or in protecting consumers from dangerous products, or in bias when it comes to artificial intelligence, or in fighting fraudulent behavior, our ultimate goal is to strengthen trust between all parties. We are indeed trying, as you point out, to ground ourselves in our core values to show European citizens that the Europe we are building is a place of trust.

Europe is therefore stronger and can assert its identity when its actions and its normative framework, in any given sphere, embody and protect its most fundamental values and rights. This is the whole purpose of our actions.

*Interview by Hugo Pascal and Vasile Rotaru*



**Jean-Claude Juncker** • Former President of the European Commission (2014-2019) and former Prime Minister of Luxembourg (1995 -2013)

## Everything is geopolitical

**When we look back on the year 2021, the American withdrawal from Kabul seems to mark a turning point. The President of the European Council, Charles Michel, shared his assessment<sup>1</sup> at the time of the sequence of events that began in August. What is your assessment?**

I have not yet made a final analysis. The images that we saw made me sad and perplexed. Sad because the *Afghan affair*, if I may use that expression, ended very badly, in defeat, and with a feeling of wasted effort. I felt perplexed because I believe that this affair will undergo developments which will be difficult to predict but which do not bode well for Europe. It has led us into a situation about which, to tell the truth, we know almost nothing.

**How did you interpret the Biden administration's stance vis-à-vis its allies?**

Biden should have consulted with his allies. But the Afghan affair, in and of itself, did not change anything about the European relationship with the United States. The American president's words told us one thing: we have gone down the wrong path. The Atlantic world's thinking for the last several years, perhaps even since the end of the Cold War, has run its course. The imperative of intervention, even with the aim of avoiding the worst, is no longer appropriate. The idea that we can intervene from the outside in the internal development of societies that do not resemble ours was wrong. It has only produced failures.

With the Taliban takeover of Kabul, the Americans, the Europeans, the "NATO countries" lost on two fronts: that of credibility vis-à-vis other world powers and that of the trust in their capabilities. This is the point we must start from. This is what the president of the United States

means when he says again and again that we ought to learn to manage our own affairs before concerning ourselves with the affairs of others.

To do this, we must develop our own analysis. Rather than talking about strategic autonomy I would urge us to first of all put in place an analytical autonomy through a study of geopolitical positions which must be much more complete than it is at present, taking into consideration interests that are in line with our values.

**What would this analysis tell us about the state of Atlantic relations?**

We experienced the Donald Trump era, with whom I got along well with, oddly enough. We have transitioned to the Biden administration. I knew Joe Biden well when he was vice-president to Barack Obama. He is a much better listener than Trump to say the least. But above all, he knows Europe much better.

Donald Trump had an inaccurate view of Europe. He held this surprising fantasy that the Union had been created as a sort of plot against the United States, that it had been designed to undermine America's influence in the world. You can say many things, but this is simply not the case. The Union was a project led by affirmed Atlanticists. That's the bottom line.

**Do you see a continuity between the two administrations?**

Yes, in a certain way there is continuity. Trump – like Biden – operated from the idea that he was responsible for American interests and that the president of the United States and his foreign policy should respond to the needs of the middle class. As such, the interests of others are not very important. Is that so different from European heads of state? But Biden listens, and we can see that today.

**What exactly defines the Atlantic relationship today?**

The geopolitical problem which faces us today has three names: China, Russia, and to a lesser degree, the area immediately surrounding Europe which includes Turkey and the Middle East. On all these matters we are fortunate to be able to exchange ideas with the Biden administration.

**There is an idea which is increasingly present in Washington of a "New Cold War" with China. Do you share this idea?**

From an economic and trade point of view, China is an important partner for us. To say otherwise has no basis in reality. But we in Europe have been naïve with regard to Beijing for far too long. We have accepted Chinese companies having access to our interior market even while European companies have been denied the same access to China.

I feel that I have helped to correct the situation. In the last meeting I had in Paris as president of the Commission with Emmanuel Macron, Angela Merkel, and Chinese Pre-

1. C. Michel, 'Elements For A Doctrine: In Conversation With Charles Michel', Groupe d'études géopolitiques, 8 September 2021 : < <https://geopolitique.eu/en/2021/09/08/elements-for-a-doctrine-in-conversation-with-charles-michel/> >.

sident Xi Jinping, I said to the Chinese president – who took it very calmly – that of course China was a partner, but that it was also a rival and a competitor that did not play by the rules.

**What is your analysis of the Union's relationship with Russia?**

Unlike with the United States, Russia is our next-door neighbor. We cannot change geography; Europe is close to Russia, and this proximity has consequences. To envisage a security architecture for Europe without reserving a place for Russia is a dead end. I would not say that this is regardless of the problem in Crimea or Eastern Ukraine, but we must have an ongoing relationship with Russia. We have to talk to each other. The Americans are not in Russia's immediate vicinity.

In regard to these two matters – Russia and China – we cannot follow the instructions coming out of Washington; we must have analytical and operational autonomy.

**You are using words recently introduced into the European vocabulary – geography and autonomy. When I interviewed Romano Prodi in 2019, he seemed surprised by the circulation of a geopolitical vocabulary in Brussels. According to him, these concepts were not in the toolbox of the Commission he chaired between 1999 and 2004. What is your impression? Have you sensed an acceleration of this awareness with the Von der Leyen Commission, which aims to be “geopolitical”?**

I had stated that I wanted my Commission to become political. This already implied that the geopolitical dimension would play a greater role. This is because we need to define a relationship with the rest of the world – with China, with Russia, and with Africa, a continent whose importance is greatly underestimated by European nations.

Everything is geopolitical. Geopolitics is the intersection of politics and geography. This is a Luxembourgish you're talking to. There are large agglomerations – sometimes even large continents – which are often more important than us from a geographical or demographic point of view.

**We have just celebrated the thirtieth anniversary of the fall of the USSR. With the Belovezh Accords we saw a shift in political maps, but was it really a geographical transformation?**

The USSR was an immense empire; Europe, which cannot be reduced to the European Union, is quite small. We are the smallest continent in the world even though we always think we are the center of the world. We are not, and never have been, the masters of world history. Every time that someone in Europe has tried to become the master of the world, it has gone awry; Hitler and his associates chased a foolish quest for power.

**Does analyzing Europe's place in the world lead you to a kind of humbleness?**

Yes. In a geopolitical analysis of the world and the intertwining of different groups we must be humble. Of

course, we have something special. Apart from the Hungarian and Polish setbacks which we are observing with concern – and it is important not to neglect supporting the democratic movements that are beginning to mobilize in these countries – we have a set of values that others do not have. Neither the Americans or the Chinese – especially not the Chinese – have this because they subscribe to a vision of man and a societal model that we do not share, and the same is true of Russia. Naturally, there have been improvements with regard to human rights, which, after being invented in France, have spread widely to the rest of the European continent.

**You have been central to the Union's transformation into a regulatory power. Is this the direction to take in order to implement European geopolitics?**

The European Union is an entity which sets norms at a continental level. Those who are not members adopt – sometimes rather reluctantly such as Switzerland or Norway – our norms. We therefore have a normative responsibility. Other actors, such as the United States, go it alone. We all too often adopted responses that did not reflect Europe. I am thinking of this brazen neo-liberalism that has infected the bureaucratic and political elites of the member states and Europe itself and that has set a course that does not match the European approach.

**Based on your personal insights of the European institutions, what, in your opinion, is the most profound change brought about by the Covid crisis? Do you see historical transformations?**

At the beginning I was surprised, even shocked, by the lack of motivation shown by member states. Each one was kind of off on its own, doing what it felt was appropriate. Of course, the Union didn't have any authority in the public health realm and so the point of reference became the national level. It was utter chaos. The von der Leyen commission deserves a lot of credit; it successfully took charge of the situation. It imposed common rules.

I have drawn a positive lesson from this crisis, insofar as one can take anything positive from a pandemic. Europeans, and European public opinion, came to the realization that no member state – not Italy, not Spain, not even France or Germany – had anything to gain from dealing with a sweeping global crisis alone. The idea that there should be joint action in response to this crisis therefore gained traction. This was reflected in the European Council's adoption of the 750-billion-euro *Next Generation EU* package.

**Is this a lasting change? Do you see this as a shift away from the consensus that you yourself just described as “neo-liberal”?**

I will say that this should have been done much sooner. I had already advocated for Eurobonds in 1999. That idea was immediately rejected by the Germans and Austrians. We have reached a point which, from my point of view, is a positive change and which, in fact, ushers in a future of greater solidarity and mutual understanding.



**How do you explain this change?**

By a return to the European project's roots. We were reminded of the reasons that united us in the first place. The member states, and especially public opinion, realized that Germany or Italy alone did not have the means necessary to respond to the pandemic crisis. The national governments – for whom I have the utmost respect because Europe is not built against the nations that make it up – recognized their weaknesses and the strength they have when they act together.

**The other issue that would have been even more central to the Commission's initiatives if the pandemic had not struck is the ecological transition. What is your analysis of its actions?**

I think that the Green Pact is an initiative that should, in fact, be pursued and encouraged. The goal of zero emissions in 2050 is good for Europe and can serve as a model to other powers such as China, the United States, and the rest of the world. It is an initiative that allows the European Union to have a common understanding of the future it envisions.

**Do you think that we are in the process of developing new conditions for debate and a new consensus that is specific to Europe? You spoke of the need to move beyond the neoliberal phase. In your opinion, what are the priorities for achieving this *aggiornamento*?**

This is a challenge that is still relevant today. I put a lot of care into the development of a social Europe, which I have always believed in. It is a delusion to imagine – as many have done in recent decades – that the European Union could continue to exist while neglecting its social aspect and which has been characterized by an uninhibited and shameless neoliberalism.

Wanting to build the European Union in a way that is almost openly against the interests of workers does not work. Neoliberal measure after neoliberal measure, workers – and not just trade union organizations, but workers in general – have rebelled; they can no longer support this model. What has been missing in Europe's recent history is solidarity. This is a matter that we must continue to improve upon. During my mandate, the Commission laid a foundation, step by step, for European social rights. This has continued with the current Commission, and I believe that this is the right path. I have great hope that the French Presidency of the Council of the European Union (PFUE) will succeed in furthering this engagement.

**What is your analysis of the Council's apparent predominance over the other European institutions?**

There are both positives and negatives. The positive side is that by meeting more often than in previous years, the member states, governments, and above all the heads of state feel more involved in European affairs. Moreover, the European level has palpably been integrated into national thinking.

There is also a negative side because the European Council does not always respect the normal interplay of the institutions. It does not have enough respect for the European Parliament, which is, after all, co-legislator with the Council of Ministers. It also has little respect for the Council of Ministers, which in many cases can decide by qualified majority, whereas the Council has to decide unanimously, which leads it to agree on vague concepts that, in legislative and practical terms, do not lead to any result.

We can detect a desire on the part of some – not all – to reduce the role of the Commission. I always fought against this harmful temptation, and I always defended the unique role of the Commission which must remain the driving force of European construction. I believe I succeeded because I restored the Commission's authority.

**What is your understanding of the evolution of the far-right in Europe? It seems to be losing ground in Germany, while in France it is reaching unprecedented levels in terms of voter intention...**

The European and especially the French far-right still does not have Europe at its core. It systematically gives in to the temptation to reject others. For the major European political families – liberal, socialist, conservative – others exist in the same way as us. The far-right is incapable of this show of solidarity.

Throughout my long career, and especially in recent years, I have seen attempts to bring together far-right forces at the European level. This has always failed because in reality, in addition to not liking others, these parties have no love for each other. I remember when I gave my inaugural speech, Ms. Le Pen stood up and said that she was going to vote against me. I told her that I didn't want any votes from her party, which hates others. True conservatives must understand that the far-right is a danger to Europe. If the far-right were to win in France – despite the polls, this is not my prediction, I don't think they will win – but if they were to even expand their role it would be a defeat for all democratic forces in Europe.

**What is your analysis of this triad that seems to be reforming between Italy, Germany, and France?**

Germany has been able to make Europe an essential part of its *raison d'être*, and the new chancellor and his government are resolutely pro-European.

I have been following the improvement of the Franco-Italian relationship, which has not always been very good, with great interest. Its strengthening in no way poses a danger to the Franco-German partnership. It is quite the opposite. The fact that Italy, under Mario Draghi, has become a highly constructive force actually strengthens the driving role of the Franco-German friendship.

*Interview by Gilles Gressani*

# The New EU Agenda



**Gilles Briatta** • Secretary-general of the Société Générale Group, Former French General Secretary for European Affairs (SGAE) and European Advisor to the French Prime Minister

## Can the Renewed Debate on European Power Lead to a Paradigm Shift in Brussels?

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For a long time, the construction of Europe has been seen by French public officials as a construction of power. The European Union (EU) could in no way remain a mainly economic and financial organization without a government worthy of the name, or without the usual attributes of international power, including military capabilities and foreign policy.

The creation of the single currency was thus considered by France as a fundamental and politically indispensable step, which was to foreshadow the rest; while the development of a common foreign policy, the creation of the office of High Representative of the Union for Foreign Affairs and Security Policy, the function of permanent President of the European Council, the multiple attempts to launch a common industrial policy centered on strategic sectors in terms of influence, the groundwork of a common defense policy, all of this could be considered by French officials as parts of a long-term plan aimed at building, step by step, a European power.

However, this French evidence has never been unanimously accepted in Europe, and for a long time it has even remained a minority opinion, for several reasons.

These reluctances are first and foremost part of the historical heritage of Europe. The concept of European power can bring back bad memories for many Europeans. One can cite the recurrent fear of the domination of a few “big” States (France and Germany in particular) over all the others, a theme that is still very present in daily European relations, or the suspicion of a more or less confused “Gaullist” desire for a France dominating Europe, a caricature that is still very much alive in the minds of certain of France’s partners, or the more general fear of the more or less distant reconstitution of a “European empire,” a term that remains an absolute taboo in Europe, especially - but not only - in the East.

They also result from certain French inconsistencies: the decades of European construction have not always been a coherent path for the French policy on Europe. Our partners readily accuse France of forgetting its objective of European power as soon as it suits it, particularly in foreign policy or arms policy, in order to focus on its own interests and prestige in the world, including vis-à-vis the United States or Russia. It is also emphasized that the French promotion of a strong Europe is far from being unanimous in France itself, where a strong Euroscepticism is developing, including in the national political class. France is certainly no worse than its partners in these two areas, but the contrast with the announced objective can sometimes be confusing.

There are also important cultural differences in Europe concerning the notion of power: in this debate, France has always favored the traditional (and indeed indisputable) instruments of international power: common government worthy of the name, common economic and industrial policy associated with a single market for goods and services, European military capabilities, European diplomacy, the international role of the euro... It has tended to invest less in the international influence of economic, environmental and technical regulations, a means of intervention that is very well suited to the European Union, and above all to underestimate everything that revolves around legal power, whereas the EU has rapidly enshrined respect for European law as the supreme norm of its functioning, the law having been for centuries a international weapon commonly used to assert one’s power.

It may be noted that the creation of a single European capital market has not historically been a priority objective of French policy on Europe either, not being included in the French cultural vision of power, whereas France had long been able to see the spectacular effects of American financial power (the role of the dollar and the depth of the American capital market being closely intertwined) and should not have forgotten the role that British finance played in the assertion of the United Kingdom’s world power throughout the 19<sup>th</sup> century. It is ironic that it was a British European Commissioner who finally decided to put the Capital Markets Union on top of the Brussels agenda...

Finally, the real and symbolic place of the United States in Europe has changed: for decades, the assertion that European power should aim in particular to free itself from American influence in Europe provoked - for obvious historical reasons - an outcry from many of France’s partners. The theme is still very present and very sensitive, especially around everything that concerns the role of NATO (above all in a period of tension with Russia), but it has been evolving rapidly for several years, since it is above all on the American side that Europe is less and less perceived as a priority interest, thus forcing all Europeans to rethink - often against their will - the transatlantic relationship.

These changes in the United States' vision of its relations with Europe are one of the reasons for the revival of the debate on European power in Brussels. Indeed, several factors have combined to renew interest in this old French idea.

First of all, we are witnessing a geopolitical transformation: faced with the United States' growing disinterest in Europe, but also with the sudden withdrawal of American troops from Afghanistan and the extension of Sino-American rivalry to the entire world, Europe feels more isolated and marginalized. The prolonged impotence of traditional multilateral bodies, such as the World Trade Organization, challenges the basis of consensus on external relations within the EU. It is difficult not to mention the feeling of European economic decline, with the consequences of the overwhelming domination of the GAFA and other American platforms in the digital sector, the European delay in other sectors of the future (such as solar energy against China), the growing position of large private American financial institutions in Europe, the new fragility of a German export system that has relied heavily on China, and the American progressive domination of Internet satellites. The health crisis, where we have become aware of the limits of outsourcing the health industry, and the difficult management of the Brexit, which has forced Europeans to urgently define the best means of defending their common interests, are undoubtedly the last two triggers.

The renewal of this debate on European power in Brussels is evident: the Commission is thus launching numerous communications and legislative initiatives in areas as diverse as digital, electronics, industrial policy, trade policy, financial services, the international role of the euro, protection against non-European extraterritorial legislation... aimed at promoting open strategic autonomy, a term that is more consensual in Europe than that of "power" but which clearly goes in the same direction. There is no longer any taboo in Europe on the need to discuss strategic autonomy.

However, this movement can only lead to a real paradigm shift if certain fundamental conditions are met:

1. This strategic autonomy must be perceived as compatible with the interests of the greatest number of member States and European citizens: the debate on European power has long been polluted by the fear it could lead to the domination of certain "big" States over the whole of the EU. It is essential, from the outset, to guarantee that the interests of the greatest number of people will be taken into account and to convince them that this project does not serve the interests of one or two member States but a collective interest. To fail on this point would be to condemn the whole initiative in advance.

2. The objective of strategic autonomy must be supported by publicly stated examples of concrete benefits expected in the future: nothing is worse than a European policy that cannot explain concretely the goals pursued.

For example, it needs to be explained more clearly why we cannot let American digital platforms continue to dominate the market to such an extent, and what is the reasonable long-term objective for Europe in this area, or why we cannot remain passive in the face of the development of extraterritorial legislation in the world (in the United States, but also in China and elsewhere). Behind the communications and legislative proposals there is still sometimes a certain confusion about the real objectives sought.

The example of the capital markets union is enlightening in this respect: it is certainly an official objective of the Union, but few European officials seem convinced of the link between this objective and very concrete problems: very abundant European savings but massively exported, especially to the United States, a shareholding of large listed European companies increasingly dominated by non-European funds, an endemic weakness of venture capital in Europe, etc... Connecting objectives with concrete problems to be solved is vital for the coherence of the action and for its political support.

3. Strategic autonomy will only be an illusion if it is not compatible with the other major objectives of the European Union: this is of course obvious for the energy transition, a major objective of the current legislature in the EU. These objectives are likely to reinforce each other, but this is not at all a foregone conclusion and will require fine coordination in the medium and long term between many services of the European Commission, which is not always the hallmark of this great institution.

4. One of the greatest potential obstacles to European power is its internal division. I will not go back to the fear of domination by the "big" States over the others. Alongside this recurring fear, there are other divisions in Europe that threaten the very existence of the EU: the North-South divide, which was brought to light during the great financial crisis of 2008 and especially 2011, and which has left deep marks on public opinion, and which must continue to be addressed. And, of course, there is also a growing East-West divide, which is very dangerous because it is based on sometimes different perceptions of history and values, and which will not be resolved simply by appealing to the European courts.

Finally, there is a social divide, which runs throughout the member States themselves. This social divide was one of the documented causes of the success of Brexit in the United Kingdom and is all the more threatening as the profound changes linked to the energy transition are likely to increase the scale of this divide in Europe. Allowing these fractures to deepen would be a surefire recipe for threatening the very existence of the EU and forever abandoning any dream of European power.

5. To build its strategic autonomy, the EU must rely on its strengths, but also draw lessons from past decades.

Building on its strengths means first of all continuing



to defend the rule of law and the primacy of European law, the cornerstone of European construction, especially at a time when this primacy is increasingly being questioned in European public debates. But it would be very dangerous to imagine we could solve the deep internal divergences within the EU, and particularly the East-West divide that we have just mentioned, solely through legal action and without wanting to debate the political substance of the disagreements. Such an exclusively “jurisdictional” treatment of substantive problems, an ever-present temptation in the EU, would certainly lead to failure.

Relying on its strengths also means continuing to regulate, which the EU is doing on a massive scale, particularly in the fight against climate change. But here again, we must not imagine that we can solve everything through regulation: in Europe there is a tendency to regulate a priori, including by promoting technological choices that the market has not always had time to validate. To build its strategic autonomy, the EU should look a little more closely at the methods used outside the EU and do more to direct market forces without systematically wanting to predetermine everything in detail. This is particularly important for the success of the energy transition, a vital environmental objective, but also for strategic economic autonomy, as well as for the future of the European social divide.

6. Finally, there will be no success for the various initiatives underway to assert European power without the development of appropriate common tools.

We know that the EU is a strange political animal, an international organization with enormous powers (common trade policy, very broad internal regulatory powers, a common currency and a single banking supervisor for the euro zone, primacy of European law over national laws, etc.) without having the other usual tools of power: no common government worthy of the name, no common police force, no common military, and of course no common ideology that can serve as a basis of identity for peoples who do not speak the same language and who often have strong differences in culture and perception of their history.

This strange political animal cannot succeed in achieving its objectives without giving itself the appropriate tools, particularly in terms of execution or control. We would not have had a common commercial policy or a competition policy without the constitution of a strong and competent European Commission.

When it became necessary to fight against international terrorism after September 11, 2001, we could only progress by inventing the very audacious legal construction of the European arrest warrant. And we could not unify the conditions of prudential supervision of banks without a single banking supervisor for the euro zone, created by regulation in 2013, after several years of financial crisis.

When we analyze the main objectives of European strategic autonomy, we quickly see that we will need new adapted tools. It is difficult to be serious about influencing third countries that are developing their extraterritorial legislation without developing greater European criminal jurisdiction (in OFAC litigation involving large European companies on suspicion of violating American embargoes, it is almost always the federal prosecutors of the US Department of Justice who have had the major influence on the litigation), nor without the creation of a European OFAC for the non-criminal aspect. It is hardly conceivable to move towards a true capital markets union without a true European regulatory authority for financial markets.

And the tools needed in Europe are not all public; on the contrary, the most essential ones are probably private: it is thus necessary to accelerate the establishment of conditions to foster the emergence of European digital platforms capable of competing with their American partners, as well as European investment funds and European financing and investment banks of sufficient size, without which a capital markets union would make no sense for Europe and its financial autonomy.

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If these different conditions for success are properly analyzed and addressed, the renewal of the debate on European power can become a paradigm shift for the EU. A taboo has been broken, mainly by a combination of circumstances external to Europe. Now the hardest part begins for European strategic autonomy. To succeed, the EU must remain true to what has always made it successful, in particular its formidable legal power and its ability to make laws and regulations, but it must also constantly reinvent itself to avoid falling into well identified traps, traps as considerable as the opportunity that lies ahead of us.



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## Reframing and Energizing Transatlantic Regulatory Cooperation

Following four years of tumultuous transatlantic trade relations under President Trump, the Biden Administration is taking important, but cautious, steps to improve U.S.-EU economic ties. These steps, including the creation of the U.S.-EU Trade and Technology Council, bring a new focus to transatlantic regulatory cooperation, in a way that thankfully has not (yet) elicited the uproar over “chlorinated chicken” that spoiled negotiations toward the Transatlantic Trade and Investment Partnership, TTIP. As welcome and important as the steps are, however, they are too timid. This reflects a misunderstanding of the TTIP debate, and misses a critical opportunity to be both more ambitious on transatlantic trade and more effective in protecting European and American consumers, workers, savers, investors and our environment.

Behind this missed opportunity is a fear of popular opposition to deeper transatlantic regulatory cooperation. This opposition can be addressed, if European and American politicians and policy-makers both listen to their citizens and reframe the debate, as this article attempts to do. It begins by briefly reviewing how Europe and the United States got to where they are; suggests a more efficient way out of the morass; and then focuses in on both the underlying rationale for true transatlantic regulatory cooperation and ways to promote this. Some more general recommendations follow in conclusion.

### How Did it Come to This?

The United States and the European Union share a truly unique economic relationship, unique because it is based on investment rather than trade. That American companies have invested more than \$2.5 trillion in Europe, and European companies \$2.0 trillion in the United States, shows the deep equity each side has in the other. Even the U.S.-Canada relationship cannot compare, for Canada is a much smaller economy: U.S. companies have invested \$442.1 billion in Canada, while some \$490.8 billion has flowed the other way. Nor does the U.S. or EU

relationship with China or Japan come close, as shown in the table below.

*Table 1 - Foreign Direct Investment, historical position, billions of dollars, euros*

Country	United States	European Union	Canada	China	Japan
U.S. FDI in 2020	-	\$2,515.2	\$442.1	\$123.9	\$131.6
EU FDI in 2019	€2,161.5	-	€399.3	€198.7	€108.2

This investment-based relationship in turn generates \$1 trillion each year in bilateral trade in goods and services between the United States and Europe, much of which is intra-company - engines and other components shared between Ford Spain and Ford Detroit; intellectual property and production process technology shared between J&J/Janssen.

Behind these investments are people - the Americans who work for “European” firms in each of the 50 states, and the Europeans who often run and work for “American” companies in Europe. Indeed, a substantial amount of the investments European and American firms have made “across the pond” is dedicated to collaborative research and development, bringing the best minds in Europe and America together to improve our lives and societies.

The depth of the equity each side of the Atlantic has invested in the other is directly relevant to transatlantic regulatory cooperation: regulatory decisions on one side of the Atlantic affect the other.

When the United States was the world’s undisputed economic power (way back when), decisions made in Washington affected European companies who needed to export to the American market. As one example, for many decades the Federal Aviation Administration took years to certify new Airbus models as airworthy. As the European Union deepened the Single Market and its GDP reached and even exceeded that of the United States, this became more balanced, and indeed seemed to turn the other direction as American companies protested EU chemicals regulation under REACH and privacy regulation under the General Data Protection Regulation (GDPR), leading to talk about a “Brussels Effect.”<sup>1</sup>

The focus on bilateral dynamics began to shift, however, as China came on the scene, and began to rival the economic prowess of both the United States and the European Union. This was one reason German Chancellor Merkel called for a transatlantic free trade agreement as early as 2007 (this led to the Transatlantic Economic Coun-

1. A. Bradford, *The Brussels Effect: How the European Union Rules the World*, Oxford University Press, 2020. A. Bradford, “The European Union in a globalised world: the “Brussels effect””, *Revue européenne du droit*, Paris: Groupe d’études géopolitiques, March, 2021, 2, p. 75.

cil)<sup>2</sup>, and was why Presidents Obama, Barroso and van Rompuy launched the Transatlantic Trade and Investment Partnership (TTIP) negotiations in June, 2013. The three presidents believed that, because the U.S. and EU were so deeply invested in each other, TTIP would make European and American firms and workers more globally competitive by reducing costs to bilateral trade and investment, developing new rules for international economic relations, and facilitating regulatory cooperation as they built a “barrier-free transatlantic marketplace.”

The ambitious effort quickly ran into trouble, however. First, because of missteps in the negotiations, when the U.S. low-balled its initial tariff offer, leading the EU to be recalcitrant in its offer on services. Second, the uproar caused by Edward Snowden’s revelations about National Security Agency access to personal data held by U.S. companies. Third and most critically, the growing concern among Europeans that the United States would use TTIP to weaken EU regulatory protections, whether by directly forcing changes in rules governing such things as GMOs and chlorinated chicken, or indirectly through investor-state dispute settlement (ISDS).

The talks had essentially stalled when Mr. Trump became president in January 2017. He immediately began railing against the EU’s \$150 billion trade surplus, and was not about to exempt Europe from the punitive duties he slapped on imports of steel and aluminum under the pretext of national security, despite the NATO relationship. Instead, he ratcheted up the pressure, frequently threatening to use “national security” again to tax Europe’s \$60 billion in auto and auto-part exports. So it was little surprise when he acted immediately to levy tariffs on \$11 billion of EU imports when the WTO finally ruled EU subsidies of Airbus illegal in October 2019. And of course Trump further discomfited Europe by waging a trade war against China and undermining the WTO’s dispute settlement system. Mr. Trump’s pugilistic approach to trade was motivated by a belief that U.S. presidents since World War II had lowered protections against imports to gain a “putative” geopolitical advantage with foreign countries. Not surprisingly, the targets of Mr. Trump’s trade travesties, including the EU, all immediately fired back.

### The Tentative New Start

Mr. Biden became president in January 2021 as the virtual embodiment of America’s post-WWII foreign policy – after all, during half a century of public service he was long on (and chaired) the Senate Foreign Relations Committee as well as having been Mr. Obama’s Vice President. He vowed above all to renew America’s traditional alliances, particularly with Europe. And many on the eastern shore of the Atlantic breathed a sigh of relief.

But while he could have used his executive power to reverse his predecessor’s trade policies, Mr. Biden was aware

that over 70 million Americans had voted for Mr. Trump in part because they shared his view that U.S. foreign policy had too often worked to the disadvantage of “normal” Americans. Biden and many on his team also directly experienced European demonstrations against TTIP, and fear Europeans would oppose any effort to restart those talks. A fear shared by European political leaders.

So Biden and his team have moved very cautiously, including with Europe, where the Administration agreed with the EU in March to suspend the Airbus-Boeing tariffs for five years<sup>3</sup> and to work on rules governing subsidies to large civil aircraft;<sup>4</sup> established the Trade and Technology Council at the U.S.-EU Summit in June;<sup>5</sup> and most recently converted the tariffs on European steel and aluminum into substantial tariff-rate quotas,<sup>6</sup> although without removing the national-security justification of them or the punitive tariffs on imports above the quota. In return, the EU removed the tariffs it had imposed in response to Trump’s moves, withdrew its WTO case against the national security measures, and has stepped up collaboration with Washington on addressing problems both see stemming from China. And the warmer winds from Washington have also allowed the two to manage other differences – mainly emanating from Europe – over such things as data protection and digital services taxes.<sup>7</sup>

The Trade and Technology Council is seen as the major forum for promoting this transatlantic trade reconciliation. Commission Executive Vice Presidents for economy and trade and for competition and digital policies, Valdis Dombrovskis and Margrethe Vestager, met their American counterparts (Secretary of State Antony Blinken, Commerce Secretary Gina Raimondo and US Trade Representative Katherine Tai) in Pittsburgh in September and issued a lengthy statement<sup>8</sup> promising much work in ten areas, seven related to technology (including artificial intelligence standards, clean tech, supply chains, 5G and data governance) and three more focused on trade, including ways to fight against Chinese subsidies and improve the functioning of the WTO.

These are all clearly very important efforts, and the annexes accompanying the TTC statement on investment

2. <https://www.gmfus.org/news/rebuilding-strategy-transatlantic-economic-relationship>

3. Joint Statement of the European Union and the United States on the Large Civil Aircraft WTO Disputes (05/03/2021), see : [https://trade.ec.europa.eu/doclib/docs/2021/march/tradoc\\_159458.pdf](https://trade.ec.europa.eu/doclib/docs/2021/march/tradoc_159458.pdf)

4. USTR Announces Joint U.S.-E.U. Cooperative Framework for Large Civil Aircraft, see : <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/june/ustr-announces-joint-us-eu-cooperative-framework-large-civil-aircraft>

5. EU-US launch Trade and Technology Council to lead values-based global digital transformation, see [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_21\\_2990](https://ec.europa.eu/commission/presscorner/detail/en/IP_21_2990)

6. Joint US-EU Statement on Trade in Steel And Aluminum, see <https://www.whitehouse.gov/briefing-room/statements-releases/2021/10/31/joint-us-eu-statement-on-trade-in-steel-and-aluminum/>

7. USTR Announces, and Immediately Suspends, Tariffs in Section 301 Digital Services Taxes Investigations, see <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/june/ustr-announces-and-immediately-suspends-tariffs-section-301-digital-services-taxes-investigations>

8. EU-US Trade and Technology Council Inaugural Joint Statement, see [https://ec.europa.eu/commission/presscorner/detail/fr/STATEMENT\\_21\\_4951](https://ec.europa.eu/commission/presscorner/detail/fr/STATEMENT_21_4951)

screening, export controls, semiconductors, artificial intelligence and global trade challenges show a good deal of common purpose, especially with respect to China.

### The Lack of Ambition

But just as the Biden administration's efforts on Airbus-Boeing and the steel and aluminum tariffs put off rather than solved the problems, the TTC efforts do not get to the heart of the transatlantic economic divide. Indeed, the TTC won't even touch the most problematic issues in the relationship, including renewing the "Privacy Shield" arrangement that facilitates the data transfers on which the transatlantic economy depends (declared invalid by the European Court of Justice in July 2020) or deep divisions on food safety. This is in part because political leaders on both sides are reluctant to enunciate a clear vision for transatlantic economic integration, for fear their workers (in the US) or NGOs (in Europe) will once again revolt, as they did over TTIP.

This unfortunately means the TTC and most other U.S.-EU discussions are based mainly on a negative motivation – against China – rather than a positive vision of building the transatlantic economy.<sup>9</sup>

On the one hand, this makes some sense: the main lesson from the failure of TTIP is that, in the transatlantic context, trade and regulatory issues must be kept separate. The TTC agenda accomplishes this.

But in failing to reaffirm the value to all our citizens of a barrier-free transatlantic marketplace, and separately announcing efforts to renew FTA negotiations – importantly, without the regulatory cooperation part – the two sides have missed an important opportunity both to promote their competitiveness and to argue the rationale for true transatlantic regulatory cooperation.

### Reframing Regulatory Cooperation

Again, regulatory cooperation should not be included in renewed FTA negotiations, which should focus on eliminating tariffs and enhancing trade rules. The reason is simple: the public reaction against TTIP, especially in Europe, underscored how dangerous it can be to put trade negotiations and regulatory cooperation together. Even the appearance that the business interests of trade might undermine the level of protection of consumers, workers, investors and the environment can be inflammatory.

Yet transatlantic regulatory cooperation faces two very real constraints that quite literally would prevent any transatlantic trade agreement from reducing regulatory protections. These constraints were never properly explained to the public; rather, officials merely stated they had no intention of using TTIP to that effect. And such promises, on their own, held no credibility.

The first of these constraints, so grounded in international law and practice that no one ever bothered to discuss it during the TTIP debates, is that every good and service sold in any country must meet that country's legal requirements, and every foreign investment in a country is subject to its laws. Period. If not, the imported goods or services are illegal and can be confiscated, while the offending foreign investor will be hauled before a court of law – or, in some places, simply thrown in jail or placed before a firing squad. As such, neither the U.S. nor the EU could have agreed in TTIP that products or services that did not meet regulatory standards could be imported.

The second principle is less universal, as it depends on the political system. In some countries, laws may be determined by autocratic fiat. But in a democracy, the laws and regulations governing goods and services placed on the market and the behavior of firms in it reflect the values of the people who elect the politicians who make the laws. For the United States and Europe, democracy is more than just a "shared value;" it is an important transmission belt that expresses the "collective preferences" of our citizens. Politicians in both Europe and the United States would refuse to adopt a trade agreement or a subsequent law that violated those democratically-expressed preferences, which they would face again in the next election.

Similarly, in a democracy, regulators who enforce laws answer to those elected politicians. They cannot themselves change the law, and if voters are harmed because they don't enforce it, they will feel the full wrath of those politicians. Indeed, publicly accountable regulators can get into very hot water if consumers, savers or investors are harmed even when no law exists or is broken.

Regulators, then, like the politicians who oversee them, are naturally domestically-oriented, and leery of international engagement. Certainly in the United States, regulatory agencies strive to keep a distance from trade negotiators, and indeed Congress has made many key regulators<sup>10</sup> answerable only to it rather than the President and the Executive branch.

Reflecting this reality, international laws governing trade and investment, which were written by the leading democracies, recognize the primacy of domestic collective preferences. But they recognize as well that some boundaries must be placed around these "preferences" to ensure that countries treat each other fairly and in accordance with rules, not just power. These boundaries are straightforward: regulatory processes need to be transparent; foreign interests should not be discriminated against merely because they're foreign; and regulation should be grounded in scientific evidence so that all parties can see the potential harms being ruled against.

Some are concerned the requirement for a science-

9. P. Chase, 'Enhancing the Transatlantic Trade and Investment Relationship', 3 February 2021, see <https://www.wilsoncenter.org/article/enhancing-transatlantic-trade-and-investment-relationship>

10. All regulatory "Commissions" are independent of the executive branch – the Securities and Exchange Commission (SEC), the Federal Trade Commission (FTC), the Federal Communications Commission (FCC) and the like.



based approach may run against the precautionary principle,<sup>11</sup> where a government may act to protect the environment, consumers or other interests even if the evidence is incomplete or speculative and the costs of regulation high. This concern arises often in the debate about GMOs, where the U.S. government is seen as particularly permissive. But this perception misses two things: The EU permits many GMOs<sup>12</sup> (mainly for import and use) after extensive scientific evaluation. And the United States is a great practitioner of the precautionary principle,<sup>13</sup> which is why it usually takes far longer to approve medicines used regularly in Europe, refuses to accept “suppliers’ declarations of conformity” for what the EU considers “low risk” electrical appliances, and has such a restrictive visa policy.

Rather, the requirement in trade law to use a science-based approach to justify regulation helps ensure that government decisions regulating imported products and services is not arbitrary or capricious. This principle is firmly upheld by many rulings governing the EU Single Market as well as U.S. court decisions.

Regulators, politicians and indeed the public do not always appreciate being bounded by the requirements for transparency, non-discrimination and evidence; not all “collective preferences” pass muster. But neither do they appreciate being subject to arbitrary and capricious behavior from others. So these principles are enshrined in international trade law, and we generally accept the boundaries because they apply equally to all.

### Transatlantic Regulatory Cooperation in Practice

Within those boundaries and despite their domestic-orientation, regulators do cooperate internationally. This is especially true between Europe and the United States, where similar levels of development and our democratic systems have long meant we often face similar societal problems.<sup>14</sup> Much of this initially was with the larger member states and through the OECD; it began with the EU only after the Single Market process gave more regulatory authority to Brussels. Indeed, formal U.S.-EU regulatory cooperation started only in 1997 with the first joint statement on principles of good regulation.<sup>15</sup> This expanded rapidly in the early 2000s, and gained profile with the creation of the High-Level Regulatory Cooperation

Forum (HLRCF) in 2005, which was in turn swept into the 2007 Transatlantic Economic Council (TEC) process.<sup>16</sup> U.S. regulators were initially leery; they did not like that the U.S. Trade Representative and DG Trade “facilitated” the initial efforts since they did not accept that foreign considerations had anything to do with their work. This was one reason for the move to the HLRCF, which was co-chaired by the U.S. Office of Information and Regulatory Affairs (OIRA) and the Commission’s Secretariat General. The TEC also kept a distance from trade as it was chaired by the President’s Deputy National Security Advisor for International Economic Affairs and the Commissioner for the Internal Market.

The real work, of course, was done by the counterpart U.S. and EU regulators themselves. The discussions were often tedious and frustrating, in part because of a major structural difference between the two sides: U.S. regulators are also accountable for enforcement (and the consequences of when enforcement fails), while the EU generally relies on member state governments for this.

Yet the two sides have been able to record many notable successes, including at the highest level of regulatory cooperation – mutual recognition of the other’s decisions on the safety of a product or service, which allows that product/service to be sold equally in the two markets. The U.S. and EU have done this in a number of areas, including (ironically) where they’ve had major trade disputes: large aircraft air worthiness certification, prudential practices for accounting standards and derivatives, trusted traders and travelers, organic foods labeling, active pharmaceutical ingredient production. The European Commission even twice recognized U.S. data protection practices as equivalent, although the European Court of Justice unwisely ruled invalid the adequacy decisions underlying the Safe Harbor and Privacy Shield arrangements.<sup>17</sup>

In each case, the factors driving these agreements had little to do with a desire to promote trade, as such. They were motivated instead by the practical needs of the regulators themselves. U.S. and European regulators are stretched thin – laws and regulatory protections continually grow more stringent and must be enforced on ever-increasing volumes of domestic as well as imported goods and services, even as agency budgets are slashed. Regulators know they need to become more efficient to be effective in carrying out their mandate of protecting their citizens, financial systems and environment. And to do that, they need partners they can trust: counterparts who demand – and enforce – similar levels of protection.<sup>18</sup>

Every U.S.-EU regulatory cooperation agreement rests wholly on the trust and confidence between the res-

11. Communication from the Commission on the precautionary principle, see <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52000DC0001>

12. [https://webgate.ec.europa.eu/dyna/gm\\_register/index\\_en.cfm](https://webgate.ec.europa.eu/dyna/gm_register/index_en.cfm)

13. [https://www.europarl.europa.eu/RegData/etudes/STUD/2016/578022/EXPO\\_STU\(2016\)578022\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2016/578022/EXPO_STU(2016)578022_EN.pdf)

14. Of course, this is not just a transatlantic issue – the Organization for Economic Cooperation and Development (OECD) has long facilitated regulatory dialogues and cooperation among its members, and that membership has grown considerably more diverse since Japan became the first non-transatlantic member in 1964. Members outside Europe and North America include Chile (2010), Colombia (2020), Costa Rica (2021), Israel (2010), Japan (1964), Korea (1996), Mexico (1994).

15. For details of this history, see Chase and Pelkmans, *This Time It’s Different: Turbocharging Transatlantic Regulatory Cooperation in TTIP*, Centre for European Policy Studies, June 2015. The Annex provides an exhaustive list of U.S.-EU regulatory cooperation efforts up to the start of the TTIP negotiations.

16. <https://2009-2017.state.gov/p/eur/rls/or/130772.htm>

17. P. Chase, ‘Navigating the Transatlantic Data Conundrum’, 21 September 2021, see <https://cepa.org/navigating-the-transatlantic-data-conundrum/>

18. This rationale is well-articulated in President Obama’s May 2012 Executive Order on Promoting International Regulatory Cooperation.

possible regulators. That trust and confidence can evaporate in a moment, as happened after the 2008 financial crisis - no politically-accountable regulator will lightly take the chance of being hauled before democratically-accountable legislators because he or she blindly outsourced responsibility to another country's regulator. But where that trust and confidence is strong, it can even withstand mistakes - as happened with the FAA certification of the Boeing 737 Max.

So transatlantic regulatory cooperation is not and cannot be about "reducing barriers to trade." It may have that effect, but that is not its purpose. Rather, transatlantic regulatory cooperation exists to promote regulator efficiency and effectiveness. It's about strengthening regulatory protections, not weakening them.

### **Energizing Transatlantic Regulatory Cooperation**

The Trade and Technology Council agenda does cover some regulatory cooperation: possible equivalence on approvals of "high-risk" applications of AI/machine learning; developing common methods for calculating greenhouse gas emissions embedded in products/manufacturing processes; adopting similar approaches to regulating social media platforms; identifying and controlling the leakage of national security related dual-use technologies. These efforts preceded the TTC, but it gives them a prominence and impetus that should spur results. And it wisely does so in a way that is (now) divorced from traditional trade/market access concerns ... although those may well arise again, especially in the digital realm. Even without that as a distraction, the discussions will be lengthy and often tough, as these are relatively new areas where both sides may even lack laws, regulations and enforcement authorities - not a recipe for trust and confidence.

But the TTC agenda, as good as it is, is insufficient. Especially because regulators on both sides have some catching up to do, having been unnaturally restrained by the dynamics of the TTIP negotiations and then sundered as trust and confidence plummeted during the Trump years.

Fortunately, some cooperative activities continued, and some are starting again, albeit often at a low and technical level. Perhaps the single most prominent example is with Covid vaccinations, when the pandemic forced the FDA and the European Medicines Agency to share data, findings and even approvals at an unprecedented level - a level that could not have been achieved had the two agencies not had two decades of gradually increasing cooperation behind them.

It is this sort of effort that the public on both sides of the Atlantic needs, in many more areas. That does not mean these activities should come "under" the TTC; they shouldn't. Instead, the EU and the United States should, as a first step, dust off the High-Level Regulatory Cooperation Forum under the White House (OIRA and the NSC) and the Commission Secretariat General. This should start with a quick mapping of existing transatlantic regulatory coo-

peration efforts, including noting where previous efforts have faltered. It should ask all agencies to list and discuss possible areas of further collaboration, and then invite stakeholders to comment on these. This process could help determine priority areas for collaboration, which could in turn be given profile and impetus through a higher-level oversight process. Akin to the TEC, but improved.

Improved in part by the reframing: Not toward reducing "trade barriers." But to promote regulator efficiency and effectiveness. Even so, each of the individual regulatory cooperation activities could remove "obstacles" to transatlantic trade and competitiveness - where the regulators themselves have learned through dialogue that the levels of protection they each seek are equivalent, and where they have confidence that the other side can and will enforce the law.

These two concepts - equivalence and enforcement - are critical. The European Union is more accustomed to equivalence; this is the foundation for the Single Market. But across the Atlantic, it can be more difficult, not least as U.S. and EU laws are very different. Yet as demonstrated above, U.S. and European regulators know equivalence when they see it. One of the best examples: following the August 2006 plot to bring explosives onto flights from London to the U.S.,<sup>19</sup> U.S. authorities at first banned liquids on all planes and then relented to allowing bottles of three ounces,<sup>20</sup> a common small size in the United States. Europe doesn't normally use bottle of 88.7 milliliters, however, and complained; very quickly, the U.S. agreed that, for the purpose of this rule, 100ml would equal 3 ounces. Which it doesn't, but 100ml also would meet the U.S. (very precautionary) regulatory objective as it also was too small for an effective explosive device.

Enforcement, as noted above, is also critical, and is more difficult in Europe. The EU wants all member states treated equally. But in reality, enforcement capabilities vary. Within the EU, this variation is problematic, but the Commission and member state authorities constantly work with counterparts to address problems that arise. For U.S. regulators, however, this is difficult to accept; they may not know each of the EU member state enforcement agencies, and cannot have the necessary trust and confidence in them. The EU need for equal treatment could slow every transatlantic regulatory arrangement, but pragmatically the two sides have often reached an accommodation under which a U.S.-EU agreement applies initially only to the member states that represent a "critical mass" of EU exporters to the United States, with others added as trust and confidence grow. An alternative approach was used in the 2016 U.S.-EU mutual recognition agreement on active pharmaceutical ingredient good manufacturing practices; here, the European Commission over the course of more than a year demonstrated to the FDA that it had a process

19. The 2006 transatlantic aircraft plot, see [https://en.wikipedia.org/wiki/2006\\_transatlantic\\_aircraft\\_plot](https://en.wikipedia.org/wiki/2006_transatlantic_aircraft_plot)

20. J. Sharkey, 'Turns Out There's a Reason for Those 3-Ounce Bottles', *NY Times*, 11 September 2007, see <https://www.nytimes.com/2007/09/11/business/11road.html>

to ensure effective oversight of pharmaceutical manufacturing in all member states. As the Commission had not conducted such oversight inspections for some years prior to the FDA asking about them, this TTIP-induced process notably strengthened EU regulatory protections.

### Conclusion

Despite the reality of a deeply integrated transatlantic economy, based on literally trillions of dollars of investment, the U.S. and EU all too often seem to stumble over their own feet when dealing with bilateral trade issues. But they should not let even the traumatic experience with the TTIP negotiations stop them; in today's vastly more competitive world, European and U.S. workers cannot afford politicians and policy-makers who are afraid to take ambitious steps.

The transatlantic partners need instead to take a different lesson from TTIP. They need to reaffirm their ambition of a barrier free transatlantic marketplace, but reframe it. Many steps can be taken today in the context of an ambitious EU-U.S. free trade agreement to reduce the costs to in-

tegrated transatlantic intra-firm supply chains, independent of the Trade and Technology Council process, and independent of the regulatory cooperation as discussed above.

Launch that, and at the same time encourage EU and U.S. regulators to work together, in their own interest as well as that of their citizens rather than in an FTA context. They can and will, even in the fraught area of non-GMO food safety regulation, where many of the "barriers" reflect more bureaucratic foot-dragging than real concern about food safety. Indeed, constructive progress can also come in the most sensitive area of "genetic modification," especially if the United States can start by acknowledging that the EU's rigorous evaluation process is legitimate and that export of seeds is less relevant than the approval of import and use of commodities.

Transatlantic regulatory cooperation has atrophied. This should change. The European Union and the Biden Administration have an opportunity to re-energize it ... if they have the wisdom to successfully reframe it as well.



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## Europe as an international normative power: state of play and perspectives

Twenty years after an initial assessment,<sup>2</sup> Europe still aims to define itself as being a power whose influence isn't rooted in its military force, but in its capacity to set rules or behavioral norms that have an international outreach. Indeed, as early as the 1970s, what was to become the European Union was already viewed as being a 'civil power' by international relations theorists.<sup>3</sup>

The status of the European power is yet to be built, but it will certainly rely on the consolidation of the European Union's influence in the international crafting of norms. Influence is the social and political power of a person or group which allows it to direct the course of events and to induce changes in an indirect and non-coercive manner.<sup>4</sup> Normativity is a 'freely accepted process of harmonization of players' preferences in order to advance common interests by strictly adhering to a certain number of rules.'<sup>5</sup> The normative influence of the European Union, which has been referred as the 'Brussels effect',<sup>6</sup> can be broken down into three parts. First, the ability to enact its own law and to enforce it within its territory, and even beyond (extraterritoriality); second, the ability to influence the content of norms (legal, technical) resulting from an international negotiation process within various multilateral fora; and third, the ability to serve as a voluntary norma-

tive model within the international community.<sup>7</sup>

The recourse to norms as a source of influence is, first of all, a reflection of the project of the European integration itself. Indeed, Europe has a primary preference for norms, which provide the grounds for its own internal legitimacy. It is through the crafting of common norms, resulting from a peaceful and negotiated resolution of the conflicts having arisen between historically hostile Nation-States, that the European project emerged, to safeguard the peace on the Old Continent.

If the concept of power traditionally refers to diplomatic and military capabilities, normative influence is today even more necessary because international conflicts tend to trade-in the military uniform for the more civilian garments of economics, law and technology. The controversies arising out of the extraterritorial application of US law are a landmark example. In an interdependent world, regulation through a set of institutions, legal rules and procedures has become essential. Normativity is, then, a reflection of power strategies. It is therefore appropriate to discuss not the existence as such, but the degrees of the European normative influence today.

The successes of the European Union as an international normative power will thus be analyzed in the first place, using concrete examples in various areas. The second part will point out the obstacles hindering this ambition, before concluding on the importance and the limits of normativity itself as an instrument of power.

### 1. Europe as an international normative power: declared ambitions and achievements

Positioning itself very early on as a community of law, Europe has been able to draw on undeniable successes to establish its normative power.

#### 1.A. Europe, a community of law

The European project was conceived very early on in normative terms, as a 'community of law'. This legal construction of the European Union was first carried out within the Union itself, through the creation of an institutional system able to generate norms. In addition to the Council, within which qualified majority voting in many areas has been a driving force for integration, and the key role of the Commission, the Court of Justice of the European Communities (CJEC)—now the Court of Justice of the European Union (CJEU)—very quickly developed an innovative case law that accelerated and stressed the normative capacity of the European project thanks to its monopoly over treaty interpretation.<sup>8</sup> As early as 1964, the Court enshrined the principle of the primacy of community law over the domestic laws of its Member States,<sup>9</sup>

1. With the collaboration of Martin Méric.

2. See, L. Cohen-Tanugi, *L'influence normative de l'Union européenne : une ambition entravée*, (Les notes de l'IFRI, n° 40, Paris, IFRI, 2002).

3. See, F. Duchêne, 'The European Community and the uncertainties of Interdependence', in M. Kohnstamm, et W. Hager (eds.), *A Nation Writ Large? Foreign Policy Problems Before the European Community*, Mac Millan, Basingstoke, 1973.

4. See, *Dictionnaire Larousse*, 'Influence', ed. 2021.

5. See, Z. Laïdi, 'The Normative Empire: the unintended consequences of European Power', 2008, p. 3.

6. See, A. Bradford, 'The Brussels Effect', *Northwestern University Law Review*, Vol. 107, No. 1, 2012; A. Bradford, 'The European Union in a globalised world: the "Brussels effect"', *Revue européenne du droit*, Paris: Groupe d'études géopolitiques, March, 2021, 2, p. 75.

7. See, L. Cohen-Tanugi, *L'influence normative de l'Union européenne : une ambition entravée*, p. 11.

8. Article 344 of the Treaty on the Functioning of the European Union.

9. CJEC, case 6/64, 15 July 1964, *Costa v/ E.N.E.L.*



including their constitutional norms.<sup>10</sup> This principle of primacy, which prevented the erosion of community law by domestic legislation, was gradually accepted by national courts. A year earlier, in 1963, the CJEU had already recognized the principle of direct effect of community law, by virtue of which private individuals could rely on the provisions of the treaty and secondary legislation if their provisions expressly conferred rights upon them and imposed obligations on the Member States that were so clearly defined, precise and unconditional that they did not require any implementing measures.<sup>11</sup> Through the combination of primacy, the direct effect of European law and its control of the compatibility of national legislation with this legal order,<sup>12</sup> the CJEU has opened the way to the constitutionalization of the European treaties according to Judge Frederico Mancini.<sup>13</sup> It has thus taken the European project out of its intergovernmental cradle, where it could have stayed forever, and turned it into an institution of a federal nature.

The European Union has also influenced its Member States through the assertion of a certain number of cardinal values in its constitutive treaties, such as respect for human dignity, freedom, democracy, equality or the rule of law.<sup>14</sup> The respect of these values by the States is a *sine qua non* condition for accession to the European Union,<sup>15</sup> and their breach by a Member State may expose it to sanctions going as far as the suspension of its right to vote in the Council.<sup>16</sup> It therefore constitutes the first step towards the normative power of the Union. This is complemented by the Union's preponderant normative involvement in the field of human rights and individual freedoms. The two World Wars led the international community, and in particular the Europeans, who were lagging behind in this respect, to formulate and constitutionalize fundamental rights, sometimes under the control of supranational courts. If the case law of the European Court of Human Rights at the level of the 'greater Europe' is a driving force in this respect, the Union itself doesn't sit still, having adopted the Charter of Fundamental Rights of the European Union in 2000.<sup>17</sup> Like the treaties, the Charter has been legally binding since the Lisbon Treaty of 2007.<sup>18</sup> It also has a broader scope, since it provides a number of social, economic and environmental rights (such as rights to education, working conditions, and environmental pro-

tections). It also contrasts with the marginalization of the US in the crafting of an international human rights body of rules and case law. The US reluctance to ratify international conventions (the Kyoto Protocol, the Rome Statute of the International Criminal Court, withdrawal from the Paris Agreement under the Trump administration), including in the field of humanitarian law, is a constant characteristic of US foreign policy, emphasized by the refusal to recognize their primacy over domestic law.

This normative construction has also relied on the four EU freedoms of movement.<sup>19</sup> By opening up the market between its Member States, the Union has created the conditions to make the law governing it unavoidable. Indeed, it is mainly through the Single Market and the treaty, directives and regulations that govern it, that the European Union has given itself a 'territory' and, therefore, an increasingly uniform and weighty law.

### 1.B. The European normative power: undeniable international successes

- *The European Union: a regional generator of international standards*

The construction of the Single Market enabled the Union to draw up its own law and to enforce it on its own territory. Competition law is the area where this form of the European normative power has been the most striking, thanks to the exclusive competence of the Union in this field.<sup>20</sup> Thus, the so-called 'effects theory' asserted in the 'Wood Pulp' ruling of the CJEU prohibits anti-competitive practices by undertakings established outside of the Union where the effects of such agreements or practices extend to the territory of the Union.<sup>21</sup> Similarly, above certain thresholds, the Commission oversees and may prohibit, any concentration or merger between undertakings that could affect competition in the Single Market.<sup>22</sup> This control by the Commission applies to the European undertakings, but also to extra-European ones. The recent review of the takeover of Grail by Illumina, two US companies, illustrates the sovereignty of European law over competition conditions within the Single Market and elsewhere.<sup>23</sup>

Personal data protection is another area where Europe is imposing its views beyond its borders. Directive 95/46/EC of 24 October 1995 was the first step towards

10. CJEC, case 11/70, 17 December 1970, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*.

11. CJEC, case 26/62, 5 February 1963, *Van Gend & Loos c/ Netherlands fiscal administration*.

12. Articles 256 and 267 of the Treaty on the Functioning of the European Union.

13. See, F. Mancini, 'The Making of a Constitution for Europe', *Common Market Law Review*, vol. 26, n° 4, 1989.

14. Articles 2 and 3 of the Treaty on European Union.

15. Article 2 of the Treaty on European Union.

16. Article 7 of the Treaty on European Union.

17. Charter of Fundamental Rights of the European Union of 7 December 2000.

18. Article 6.1 of the Treaty on European Union.

19. The free movement of goods (Articles 28 *et seq.* of the Treaty on the Functioning of the European Union), of persons (Article 45 of the Treaty on the Functioning of the European Union), right of establishment (Article 49 of the Treaty on the Functioning of the European Union), freedom to provide services (Article 56 of the Treaty on the Functioning of the European Union) and freedom of movement of capital (Article 63 of the Treaty on the Functioning of the European Union).

20. Article 3 of the Treaty on the Functioning of the European Union.

21. CJEU, C-89/95, 27 September 1988, the joined cases 'wood pulp'.

22. Regulations No. 4064/89 of 21 December 1989 and No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings ('the EC Merger Regulation').

23. European Commission, 'Mergers: Commission starts investigation for possible breach of the standstill obligation in Illumina / GRAIL transaction', press release, 20 August 2021. Accessible via : [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_21\\_4322](https://ec.europa.eu/commission/presscorner/detail/en/ip_21_4322).

harmonizing the legislation of the Member States and preventing the transfer of data collected in Europe to third countries where an adequate level of protection was not guaranteed.<sup>24</sup> US companies were free to voluntarily adhere to a system of protection more or less similar to that applicable to their European counterparts. The case law of the CJEU has also enshrined the ‘right to be forgotten’ for the European users of US web platforms.<sup>25</sup> The European normativity in this area has taken on a new impetus with the adoption of Regulation 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (the ‘GDPR’), whose the extraterritorial effect is clearly asserted.<sup>26</sup> It was on the basis of the GDPR that, in its Schrems II ruling of 16 July 2020, the CJEU invalidated the 2016 agreement between the US and the EU on the transfer of data from Europe to the US (the ‘Privacy Shield’).<sup>27</sup> The Privacy Shield was itself the result of the annulment in 2015 by the same Court of the previous transatlantic data transfer authorization scheme, known as the ‘Safe Harbor’.<sup>28</sup> In 2020, the Court held that the limitations on the protection of personal data arising from the domestic law of the United States on the access and use by US public authorities of such data transferred from the European Union to the United States, which the Commission assessed in the Privacy Shield Decision, are not framed in a way that meets the requirements substantially equivalent to those of the Union.<sup>29</sup> The protection of personal data therefore underscores a European normativity ‘from the top’, relying on the setting of the highest standards. Its power and legitimacy are grounded in choices that are coherent and unchallenged by the Member States, which enables the EU to have a negotiating power rarely reached in its bilateral relations with the US before.

Europe’s normative power is also highlighted by a wealth of European legislation on environmental protection and the fight against climate change. The EU is a party to the Kyoto Protocol of 11 December 1997 and the Paris Climate Agreement of 2015. Numerous European acts have been adopted on subjects as diverse as air quality,<sup>30</sup> the emission of greenhouse gases,<sup>31</sup> the control of hazards

related to chemical substances,<sup>32</sup> the management of electronic waste<sup>33</sup> or the protection of biodiversity.<sup>34</sup> Numerous other European law instruments are laying down the foundations for the EU’s environmental normative power.<sup>35</sup> Business undertakings are incentivized to comply in order to be able to operate in the Single Market. The European Climate Pact (the ‘Green Deal’) presented in December 2020 by the Commission marks a new decisive step in the construction of a European normative influence in the field of environmental protection and the fight against climate change.

This facet of the EU’s normative power might find a new embodiment in a possible European duty of vigilance (*devoir de vigilance*), which was proposed by the European Parliament in March 2021.<sup>36</sup> Originating from international soft law, the idea of a duty of vigilance has been taken up and ‘hardened’ by the national legislations of several EU Member States,<sup>37</sup> such as the Netherlands,<sup>38</sup> France<sup>39</sup> and Germany.<sup>40</sup> Pending the Commission’s proposal, it should be noted that the European Parliament’s proposal of March 2021 assumes its extraterritorial outreach. Indeed, it is proposed that the duty of vigilance applies to companies which are not established on the EU territory as long as they operate in the internal market selling goods or providing services.<sup>41</sup> It would have the effect of disseminating the very high European social, health and environmental standards throughout the global value chains and would therefore constitute an instrument of the European normative power.

#### *- The European Union: an influential player in international negotiations*

A second sphere of normative influence lies on Europe’s intense bilateral and multilateral negotiation acti-

24. Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

25. CJEU, gr. ch., C-131/12, 13 May 2014, *Google Spain SL and Google Inc. v Agencia Espanola de Proteccion de Datos*, para. 88.

26. Article 3 of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

27. CJEU, gr. ch., C-311/18, *Data Protection Commissioner v Maximilian Schrems and Facebook Ireland*, 16 July 2020, known as ‘Max Schrems II’.

28. CJEU, gr. ch., C-362/14, *Max Schrems v Data Protection Commissioner*, 6 October 2015, known as ‘Max Schrems I’.

29. CJEU, gr. ch., C-311/18, *Data Protection Commissioner v Maximilian Schrems and Facebook Ireland*, 16 July 2020, para. 185.

30. Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe.

31. Directive 2015/2193 of the European Parliament and of the Council of 25 November 2015 on the limitation of emissions of certain pollutants into the air from medium combustion plants.

32. Directive 2012/18/EU of the European Parliament and of the Council of 4 July 2012 on the control of major-accident hazards involving dangerous substances, amending and subsequently repealing Council Directive 96/82/EC.

33. Directive 2012/19/EU of the European Parliament and of the Council of 4 July 2012 on waste electrical and electronic equipment (WEEE).

34. Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds, amended by Regulation (EU) 2019/1010 of the European Parliament and of the Council of 5 June 2019 on the alignment of reporting obligations in the field of legislation related to the environment.

35. For a list of the European policies and legislations relating to environmental protection and the fight against climate change, see [https://eur-lex.europa.eu/summary/chapter/20.html?expand=230807,2020#arrow\\_2020](https://eur-lex.europa.eu/summary/chapter/20.html?expand=230807,2020#arrow_2020)

36. European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129 (INL)).

37. See, C. Coslin, L. Naidoo, M. Renard, ‘Duty of Care and Vigilance in Human Rights Matters: From an International Impulse to European Implementations’, *Revue européenne du droit*, September, 2020, no. 1, p. 71.

38. Dutch Child Labour Due Diligence Act, 14 May 2019.

39. Law no. 2017-399 of 27 March 2017 on the duty of vigilance of parent companies and ordering companies.

40. German Bill for a ‘Supply Chain Act’ (Sorgfaltspflichtengesetz).

41. See, Article 2.3 of the Recommendations for drawing up a directive of the European Parliament and of the Council on corporate due diligence and corporate accountability, annexed to European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129 (INL)).

vity. The common commercial policy and international investment law, where the EU has exclusive competence,<sup>42</sup> are powerful strategic tools for this way of exercising the European normative power. A good example comes from the original model of the Investment Court System of the EU-Canada Comprehensive Economic and Trade Agreement (the 'CETA'), whose ratification by all the EU Member States is still awaited.<sup>43</sup> In addition to promoting the European health, social and environmental standards,<sup>44</sup> this free trade agreement establishes for the first time a permanent investment tribunal.<sup>45</sup> The tribunal will be composed of fifteen members appointed by the EU and Canada, rather than arbitrators appointed by the investor and the defendant State. The tribunal will rule in panels of three members appointed on a random basis. The treaty establishes an appellate tribunal to review the initial tribunal's decisions.<sup>46</sup> The European Union is promoting this model with a view to eventually establishing a multilateral investment court within multilateral institutions such as the United Nations Commission on International Trade Law.<sup>47</sup> This court would operate in a manner similar to the tribunal established under the CETA.<sup>48</sup>

- *The European Union: A normative model for the world*

Finally, normative power is expressed by the ability to serve as a voluntary normative model within the international community. Europe's normative influence outside of its borders lies first of all in the exemplary nature of its own organizational model, as defined in the treaties of Rome, Maastricht and Lisbon. The European integration embodies, first of all, an unprecedented experience of the peaceful and successful emergence of a regional economic and political entity, arising out of Nation States that are culturally diverse and historically hostile. The political miracle of this adventure and the institutional genius behind it confer upon the European Union a real aura for the rest of the world in terms of development of modern and progressive international relations. The Union has undoubtedly inspired regional integration projects in Latin America (Mercosur), Asia (ASEAN) and Africa (ECOWAS,

CEDAC, the African Union).

Indeed, the influence of certain European legislative acts goes far beyond their mere extraterritorial application. Some States have drawn their inspiration from the European regulatory model to create their own set of rules. Take personal data protection, an area in which the European model set forth in the GDPR has spread around the world, from the California Consumer Privacy Act (the 'CCPA'),<sup>49</sup> where the global digital giants are headquartered, to the Japanese regime reformed in June 2020.

## 2. A hindered ambition

The undeniable achievements of the construction of a European normativity should not however conceal the limits and obstacles to this ambition.

### 2.A. International institutional handicaps

The Lisbon Treaty has removed many obstacles to the assertion of the European normative power. Indeed, the express division between the exclusive competences of the Union and those shared between the Union and its Member States clarifies the areas of its intervention.<sup>50</sup> The Treaty also established the legal personality of the European Union, allowing it to conclude international conventions, to go to court, and to be a member of international organisations.<sup>51</sup> Nevertheless, not all the obstacles have been removed.

Indeed, the Union is still dependent on the principle of unanimity of the Member States within the Council in its effort to wield its normative influence. Unanimity is still required in areas as diverse as taxation,<sup>52</sup> the harmonization of laws, regulations and administrative provisions of the Member States which have a direct impact on the establishment or functioning of the internal market,<sup>53</sup> certain areas of the construction of the European social policy,<sup>54</sup> and even trade agreements in the field of cultural services which could undermine the cultural exception.<sup>55</sup> Taxation is one specific example of this, where plans to tax the digital giants are being slowed down by Irish reluctance.

Similarly, the EU's legal personality, which allows it to conclude international agreements, is not a panacea. The EU remains dependent on the division of exclusive and shared competences in the case of mixed agreements, i.e., agreements whose subject matter does not fall within the exclusive competence of the EU. Member States then also need to ratify them according to their internal

42. Article 3 of the Treaty on the Functioning of the European Union.

43. On the dispute resolution model developed in the framework of the CETA agreement, see Articles 8.18 *et seq.* of the Comprehensive and Economic Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part.

44. Chapters 8, 23 and 24 of the Comprehensive and Economic Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part.

45. Articles 8.18 *et seq.* of the Comprehensive and Economic Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part.

46. Articles 8.28 *et seq.* of the Comprehensive and Economic Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part.

47. Council of the European Union, Negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes, 12981/17, 20 March 2018, paras. 6-7.

48. Council of the European Union, Negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes, 12981/17, 20 March 2018, para. 10.

49. California Consumer Privacy Act (CCPA) of 2018 [1798.100 - 1798.199.100].

50. Articles 3 and 4 of the Treaty on the Functioning of the European Union.

51. Article 47 of the Treaty on European Union.

52. Article 113 of the Treaty on the Functioning of the European Union.

53. Article 115 of the Treaty on the Functioning of the European Union.

54. Article 155 of the Treaty on the Functioning of the European Union.

55. Article 207.4 of the Treaty on the Functioning of the European Union.



constitutional rules.<sup>56</sup> This division slows down and limits the EU's ability to speak with one voice in international negotiations and to impose its own norms and standards.

An additional factor that hampers the EU's normative ambitions is its insufficient participation in technical standardization bodies. Progress has been made over the last twenty years:<sup>57</sup> the Union joined certain technical standardisation bodies such as the Codex Alimentarius in the field of food safety,<sup>58</sup> and has recognised the role of the European Committee for Standardisation ('CEN') as a standardisation body<sup>59</sup> working in cooperation with the International Organisation for Standardisation ('ISO'). However, CEN is not a member of ISO. The European Committee for Standardization in Electronics and Electrotechnology is not a member of the International Electrotechnical Commission ('IEC'), either. Increased participation in technical standardization bodies is becoming a marker of normative power, in which China is fully engaged. The announcement of the China Standards 2035 plan, through which China sets for itself the objective of becoming the main exporter of international technical standards over the next ten years, is a perfect example.<sup>60</sup> The EU must respond if it intends to assume its leadership regarding standardization.

Lastly, the EU still has recourse to the practice of minimum harmonization by means of directives, whereby Member States are left to opt for different means of implementation, and are also given the possibility of maintaining or establishing more stringent rules. The EU's legislative activity does not fulfil its unifying function since the legislative choices depend on the will of the Member States. Minimum harmonisation weakens the Union's capacity for regulatory influence and the negotiating leeway of the European institutions. For instance, France is reluctant to adopt measures that go beyond the minimal European requirements.<sup>61</sup>

Faced with these obstacles, federalisation is the surest way for the European normative power to reach its full effectiveness. Legislation by means of regulations, which, unlike directives, are of general scope and directly appli-

cable in all Member States,<sup>62</sup> is the most effective way for exerting influence. The areas where integration is most advanced (e.g., competition, monetary and trade policies) proves that the more the legislative disparities between the Member States will be reduced, the more the EU will look like a coherent whole having an influence comparable to that of other standard-setting powers.

## 2.B. Europe's reaction to foreign laws of extraterritorial application

The internationalisation of trade, combined with the dematerialisation of the flows of goods and services, has accentuated the dilution of the territoriality of legal norms and favoured the advent of norms with a broad extraterritorial scope. If, as we have seen, the European Union makes extensive use of extraterritoriality to enforce its competition or personal data protection standards, other jurisdictions are following a similar path. US extraterritorial laws and prosecutions in the fight against corruption or economic sanctions fuel public and legal debates on this topic.<sup>63</sup>

To counter these normative incursions, the EU has equipped itself with legal instruments of dubious effectiveness. The so-called 'European blocking regulation', which prohibits persons established on the territory of the Union from complying with the requirements of foreign jurisdictions,<sup>64</sup> was of no help when the Trump administration decided to impose new unilateral sanctions against Iran. The 'special corporate vehicle' establishing a barter system between the EU and Iran to deal with these unilateral sanctions didn't convince European businesses, either.

The right answer is to bring Europe up to speed in those areas where the extraterritoriality of foreign laws is exercised. In the fight against corruption, France and the United Kingdom have reformed their national laws to meet the international requirements of the OECD<sup>65</sup> and the United States. The French law of 9 December 2016, known as '*Sapin II*', notably requires companies of a certain size to adopt preventive measures against corruption, introduces the judicial public interest agreement ('CJIP') in cases of breach of probity involving legal persons, and allows for the prosecution in France of acts of bribery of foreign public officials against any person carrying out 'all

56. CJEU, Opinion C-1/94 of 15 November 1994 - Competence of the Community to conclude international agreements on services and the protection of intellectual property - Procedure under Article 228(6) of the EC Treaty.

57. See, L. Cohen-Tanugi, *L'influence normative de l'Union européenne : une ambition entravée*, pp. 29-30 and Appendix.

58. Article 1 of the Council Decision of 17 November 2003 on the accession of the European Community to the Food Code Commission, 2003/822/EC.

59. Regulation (EU) 1025/2012 of the European Parliament and of the Council of 25 October 2012 on European standardisation.

60. See, A. Gargeyas, 'China's 'Standards 2035' Project Could Result in a Technological Cold War', *The Diplomat*, 18 September 2021. Retrieved October 14, 2021: <https://thediplomat.com/2021/09/chinas-standards-2035-project-could-result-in-a-technological-cold-war/>

61. See the ministerial circular of 26 July 2017 on controlling the flow of regulatory texts and their impact, which prohibits, as a matter of principle, any measure that goes beyond the minimum requirements of the directive, unless this is the subject of a choice assumed and confirmed by the Prime Minister's office.

62. Article 288 of the Treaty on the Functioning of the European Union.

63. See, J.-M. Sauvé, 'La territorialité du droit. Introduction', the Inter-Networks Meeting (Franco-American, Franco-Brazilian and Franco-Chinese) on the theme 'The internationalisation of law: pathology or metamorphosis of the legal order?', Collège de France, 10-12 April 2012; K. Berger, P. Lellouche, *Information report on the extraterritoriality of US legislation*, 5 October 2016.; R. Gauvain, *Restoring the sovereignty of France and Europe and protecting our companies from laws and measures with extraterritorial reach*, report submitted to the French Prime Minister on 26 June 2019.

64. Article 5 of Council Regulation (EC) 2271/96 of 22 November 1996 protecting against the effects of the extraterritorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom, the so-called 'EU Blocking Statute'.

65. OECD, Phase 3 report on France's implementation of the OECD Anti-Bribery Convention, October 2012.



or part of its economic activity on French territory'.<sup>66</sup>

The EU would be well advised to follow such a strategy, which is the only way to fill the gaps left by foreign legislation on the one hand, and to make the European response credible on the other. For instance, there are proposals to strengthen the European anti-corruption regime.<sup>67</sup> Up to now, the European Union has not sufficiently dealt with these issues of economic and financial crime. To this end, it could make use of the ordinary legislative procedure, in accordance with Article 83(1) of the Treaty on the Functioning of the European Union.<sup>68</sup>

More generally, the European normative power should have an enforcement arm to ensure its effectiveness, like the European Commission in competition law. Indeed, Europe does not yet have prosecution authorities as effective as the US Department of Justice, the Office of Foreign Assets Control within the US Treasury, or the US Securities and Exchange Commission in their respective areas of competence. The European Public Prosecutor's Office has jurisdiction over offences against the financial interests of the EU, namely fraud, cross-border VAT fraud, money laundering, embezzlement and corruption.<sup>69</sup> In the future, we can hope for an extension of its jurisdiction to intra-European economic and financial crime, to environmental law or to the fight against terrorism, making it a key player in the assertion of the European normative power.

## 2.C. The populist challenge to the founding principles of the European project

Finally, the ambition of asserting the European normative power is now being undermined by the growing internal attacks from certain of its Member States.

As already pointed out, respect for the rule of law and human rights are cardinal values of the European Union and are a condition for the accession of new Member States.<sup>70</sup> Their breach is likely to result in the suspension of a Member State's voting rights within the Council.<sup>71</sup> However, despite this clear statement, the illiberalism of certain Member States, such as Hungary or Poland, is flourishing within the Union in contradiction with these principles. The regulatory capacity of the Union is weakened because the Member States cripple the unity of the European normative power by attempting to repatriate their own normative power.

The recent decision of the Polish Constitutional Tribunal, composed of judges appointed by the Europhobic Law and Justice party under conditions criticised by the CJEU in July 2021,<sup>72</sup> goes one step further. The tribunal ruled that the Polish constitution takes precedence over the treaties that constitute the primary law of the European Union.<sup>73</sup> In other words, the primacy of European law, one of the main pillars of European integration, inherited from ECJ's *Costa v. Enel* decision in 1964, is undermined.

Even the courts of the most pro-European Member States sometimes shake up the European legal order, built upon the foundations of the case law of the CJEC and then the CJEU. In a decision of 5 May 2020, the German Constitutional Court stated that the ECB had exceeded its mandate with its bond purchase programme, even though this policy had been vetted by the CJEU. This decision indirectly challenged the principle of the primacy of European law, as recalled in a statement by the President of the European Commission.<sup>74</sup> With regard to France, the Constitutional Council has recently (and for the first time) given content to a 'principle inherent to the constitutional identity of France' by integrating into it the prohibition on delegating 'the exercise of public force to private persons'. The Council took this step in order to review the legislative provisions transposing a EU directive which are limited to drawing the necessary consequences from its unconditional and precise provisions.<sup>75</sup>

The Polish ruling is to be distinguished from the efforts of the other Member States to adapt their national constitutions to European law, with a view to eliminating any conflict. In France, this was the case of successive constitutional amendments and the enactment of Title XV of the Constitution, more particularly of Article 88-1, the interpretation of which was the basis for the indirect assertion of the principle of the primacy of EU law within the constitutional review of the proposed Treaty establishing a Constitution for Europe.<sup>76</sup> The refusal of the Constitutional Council to review the legal acts transposing European directives,<sup>77</sup> with the sole exception of those that are incompatible with the principles inherent in the French constitutional identity,<sup>78</sup> also highlights the adaptation of national legal systems to the founding principles of European law.

The internal primacy of European law is a *sine qua non* condition of the EU's international normative power.

66. Law No. 2016 - 1691 of 9 December 2016 on transparency, the fight against corruption and the modernisation of economic life, known as 'Sapin II'.

67. Club des juristes, Report - For a European compliance law, November 2020. Accessible via: [https://www.leclubdesjuristes.com/wp-content/uploads/2020/11/compliance\\_FR\\_def\\_WEB.pdf](https://www.leclubdesjuristes.com/wp-content/uploads/2020/11/compliance_FR_def_WEB.pdf)

68. Article 83.1 of the Treaty on the Functioning of the European Union.

69. Article 4 of the Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office.

70. Article 2 of the Treaty on European Union.

71. Article 7 of the Treaty on European Union.

72. CJEU, Case C-791/19, 15 July 2021, *Commission v. Poland*.

73. C. Chagnoux, 'La justice polonaise défie l'UE sur la primauté du droit européen', *Les Echos*, 7 October 2021.

74. Statement by President Von der Leyen, 10 May 2020. Accessible via: [https://ec.europa.eu/commission/presscorner/detail/fr/STATEMENT\\_20\\_846](https://ec.europa.eu/commission/presscorner/detail/fr/STATEMENT_20_846)

75. Constitutional Council, Decision No. 2021-940 QPC of 15 October 2021, *Air France*.

76. Constitutional Council, Decision No. 2004-505 DC of 19 November 2004, para. 12.

77. Constitutional Council, Decision No. 2004-496 DC of 10 June 2004, *Loi pour la confiance dans l'économie numérique*, para. 9.

78. Constitutional Council, Decision No. 2006-540 DC of 27 July 2006, *Law on copyright and related rights in the information society*, para. 19.

### 3. The relevance and limits of normativity as an instrument of power in the 21<sup>st</sup> century

Beyond the obstacles and threats mentioned above, there are more fundamental questions about the drawbacks, sustainability and limits of EU's position as an international normative power.

Among the drawbacks, the first is the criticism that Europe is using regulation as a stop-gap measure to counter the technological and economic successes of the US and China. One naturally thinks here of the American reactions to the European Commission's offensives against Big Tech through competition law and taxation. Although Europe has now scored points in these two areas in international and US fora, the idea that normative power cannot make up for the European technological and industrial weakness remains valid.

A second and more damaging drawback for Europe is the risk of the EU imposing virtuous rules on itself and on its businesses and citizens without being followed by its closest competitors, resulting in distortions of competition to its own detriment. Take the international sanctions regime, or, an even more relevant example, the climate transition and the strategic battle underway over the taxonomy of corporate extra-financial information. The European choice of 'double materiality' for the assessment and reporting of the environmental footprint<sup>79</sup> and the consideration of all issues of corporate social responsibility (CSR) contrast with the international approach, which favours simple materiality and climate aspects alone. This will handicap European companies by subjecting them to more stringent requirements.

The sustainability of the European normative influence in the international sphere is also uncertain, as the relative economic and demographic weight of the European Union and its domestic market shrinks compared to the rise of large emerging countries, led by China and India.

Since the size of the potential market is the primary incentive for international businesses to comply with the standards governing that market, they are likely to prefer to apply the less demanding standards of a larger market.

Finally, one may wonder whether a strategy of power (or strategic autonomy) based on the norm as a substitute for force does not participate in a historical tendency of the European project to define itself by its values and its virtue to the detriment of its interests, and thereby to deny itself any geopolitical awareness and affirmation. This tendency is laudable and was relevant in the liberal and internationalist moment of the last decades of the 20<sup>th</sup> century, when the European integration could hope to serve as a model for world governance. But the turn of the 21<sup>st</sup> century unfortunately dashed these hopes and marked the return of geopolitics and power politics, a regression that the EU was slow to perceive, and of which it has only very recently begun to draw the consequences. This delay is undoubtedly not accidental, since the European geopolitical assertion depends on the resolution of the differences, contradictions and conflicts of interest between its Member States, which have so far hindered its attempts to build a common foreign policy and defense.

Let there be no mistake: normative power is essential in the 21<sup>st</sup> century, where technological advances, particularly in artificial intelligence and biotechnology, increasingly require legal and ethical safeguards. Europe has a key role to play in defending its humanist values against Chinese authoritarianism and US economic liberalism. But it will only be able to do this if it integrates further, strengthens its industrial and technological potential, and acquires a strategic mindset and military capability.

79. Simple materiality is defined as the analysis of the impact of environmental, social and governance (ESG) risks on the company ('outside-in'). Double materiality combines the analysis of ESG risks on the company ('outside-in') and the analysis of the company's impact on the environment and society ('inside-out').



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## Digital Sovereignty, European Strength and the Data and Cloud Economy – *in varietate concordia*

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The journey towards the emergence of a strong Europe (or, to use the well-known French expression, of a *Europe puissance*), is understood to be a critical topic by the Member States, the European Commission and the European Parliament. In this context, the European strength in the digital sphere is of utmost importance. Indeed, at a time when the European Commission proposes a new round of regulations on “contestable and fair markets in the digital sector” and publishes its 2030 Digital Compass<sup>1</sup> on the European way for the Digital Decade, which recommends engaging in multiple multi-country projects (e.g., on a pan-European data processing infrastructure), European digital sovereignty will be a major issue for the upcoming French Presidency of the European Council.

Admittedly, there are major discrepancies in the way in which the concept of European digital sovereignty is understood across the EU, including in France and Germany. Against this background, this article, written jointly by a German academic and a French IT professional, will aim to propose a new path forward towards the consolidation of European strength in the digital sphere, based on the example of the successful launch of the Gaia-X European Association for Data and Cloud AISBL.<sup>2</sup>

In the last two years a Franco-German team, supported mainly by the two Ministers of Economy, was able to set up an association which counts today more than 300 members, including large European users and all significant European, American and Chinese cloud service providers. Its governance system is built in compliance with the DG Competition requirements, while the composition of its board of directors is restricted to companies that are headquartered in Europe, association and academic institutions. Gaia-X is open to all those who share its

basic values and underlying principles.

This successful experience can prove to be useful, considering the new EU-wide initiatives. Indeed, the European Recovery and Resilience Plan dedicates 20 percent of its overall budget of 750 billion euros to Digital Transformation and proposes a new tool to pilot the Digital Decade, the so-called Digital Compass, including a new governance structure and “a mechanism to organize with Member States those Multi-Country Projects that are necessary for building Europe’s digital transition in critical areas”. In this context, the setup of the Gaia-X Association can be seen as an inspiration, perhaps even a blueprint, for a mechanism enabling Member States to successfully select the strategic projects to be financed, relating both to data spaces and to infrastructure.

### 1. Digital Sovereignty vs Strategic Autonomy

The Gaia-X project has its roots in Industrie 4.0, i.e., the intelligent networking of machines and processes for industry with the help of information and communication technologies. Indeed, it quickly became clear that data sovereignty and trusted data sharing based on cloud services was needed to seize the innovation potential that Industrie 4.0 brings about. Gaia-X was initiated as a response to the massive shift of the German automotive industry, amongst others, towards the storage of data on US-based cloud platforms provided in particular by Amazon, Microsoft, and Google, which was always accompanied by a certain anxiety about data and cloud sovereignty.

Cloud platforms enable business growth, both through data-driven innovation scenarios and due to the flexibility gains and cost reductions compared to traditional data centers. But, looking beyond the automotive sector, the situation in Europe, when it comes to cloud computing, is characterized by two series of figures.

First, only 26% of European companies are using the cloud, with respectively 21% in France and 20% in Germany. These figures compare to more than 60% adoption of cloud services in Scandinavia and more than 50% in the US. Not using cloud computing bears the risk of undermining the competitiveness of the European industry, from a costs perspective as well as in terms of a more limited flexibility and agility when it comes to leveraging innovative business models. Doctolib,<sup>3</sup> a startup setting up a platform between patients and doctors, for example, would not have been able to organize 15 million appointments in January 2021 without relying extensively on cloud services. Indeed, cloud platforms enable data sharing between several partners of a value chain and help overcoming the traditional company-specific silos data are typically buried in.

The second figure reflects the origin of cloud service providers, which are for more than 70% American and Chinese companies, with only one European company in

1. See European Commission (2021), 2030 Digital Compass: the European way for the Digital Decade, Brussels.

2. See <https://www.gaia-x.eu/>.

3. See <https://www.doctolib.fr/>.

the national top 3 of a country, i.e., OVH in France.

The main reasons inhibiting a faster adoption of cloud computing in Europe have been identified: portability, interoperability, and data sovereignty. Portability means the ability to switch from one cloud service provider to another at a minimum cost for applications, data, and infrastructure. Interoperability targets the ability to exchange data between companies using different cloud service providers. Data sovereignty refers to the self-determination of data holders with respect to their data, i.e., their ability to share data together with “terms and conditions” specifying and limiting the authorized uses of the data.

Industry actors have now launched major data spaces projects aiming to enable data sharing, for instance between the major automotive manufacturers, part manufacturers and equipment manufacturers in Germany with CATENA-X, or between aircraft manufacturers and airline companies with Skywise. The creation of data spaces is in progress in many other domains: smart farming, health, manufacturing, energy, finance, energy, mobility, smart city, all falling under a well-articulated plan regrouping the main stakeholders.<sup>4</sup>

The European Digital Decade’s ambition of “75 percent of European enterprises having taken up cloud computing services, big data and Artificial Intelligence” by 2030 is but another way of saying that data and cloud in Europe should be properly used by 75% of European businesses in 2030.

The dilemma of digital sovereignty<sup>5</sup> vs strategic autonomy<sup>6</sup> can now be clearly stated: what is the best path for European businesses to benefit from the industrial data economy? Shall we create a European service provider able to compete with American hyperscalers? Or shall we achieve strategic autonomy in the most critical sectors such as automotive, health and energy, by following a multi-cloud strategy, using a combination of cloud service providers including non-European ones, provided they respect the rules in term of portability, interoperability, and data sovereignty?

France has tried the first option in 2012 with Numergy and Cloudwatt, launched by SFR and Orange with the support of the French government; the programs were

terminated in early 2015 with no buy-in from users.

At the end of 2021 several countries (in particular France, Germany and Italy) initiated trusted cloud services for both the public sector and sensitive domains, where cloud penetration is given the highest priority and where non-European cloud technologies are accepted provided they are fully operated by European companies (e.g., Orange, Deutsche Telekom).

For the rest of the industry, the way forward is a combined push/pull scheme where pull is created by the incentives of data sharing within data spaces, and the push is a combination of cost and flexibility attractiveness, and the relaxation of obstacles with respect to portability, interoperability, and data sovereignty.

The pandemic has suddenly accelerated the digital transition by bringing an unprecedented amount of funding through a brand-new distribution mechanism relying on country recovery and resilience plans.

In this context, Gaia-X can be seen as pathway to leverage resources in Europe to strengthen its digital sovereignty and, at the same time, benefit from open collaboration in a multilateral innovation environment.

## 2. The Role of Recovery and Resilience Plans in the European Member States

The Recovery and Resilience Facility (RRF) provides grants of an aggregate amount of up to 338 billion euros and loans of an aggregate amount of up to 390 billion euros. EU countries have submitted national RRF Plans that describe the reforms and public investments projects they plan to implement with the support of RRF.

In each plan, countries have presented green and digital components which must reach at least 37% and 20%, respectively, of the overall amount. The major economies in Europe met this requirement. As a result, 25% of the funds received by France, i.e., 10.3 billion euros, are earmarked for digital projects, this figure being of 14.7 billion euros (52%) for Germany, 55.9 billion euros (29%) for Italy, 20.6 billion euros (29%) for Spain, 3.7 billion euros (22%) for Portugal, for a total of 136.6 billion euros (i.e., 28% of the total funding) at the EU level.<sup>7</sup> Most of the 136 billion euros will be spent on digital projects over the coming 5 years, with an overall industry priority on transportation, energy and construction.

This plan is entirely unprecedented, due to two factors. First, the amount of funding to be spent over the coming 5 years. Second, the plan has a peculiar governance system: each Member State has the responsibility of its strategic direction and execution, with the European Commission having defined the broad objective for the digital decade and taking a “checks and balances” responsibility for its implementation.

4. See [https://gaia-x.eu/sites/default/files/2021-08/Gaia-X\\_DSBC\\_PositionPaper.pdf](https://gaia-x.eu/sites/default/files/2021-08/Gaia-X_DSBC_PositionPaper.pdf)

5. Digital sovereignty refers here to the application of the principles of sovereignty to the fields of information and communication technologies. It has often been understood through the lenses of the development and implementation of computer system alternatives to those governed by US laws (operating systems, messaging, search tools,...). Nowadays, the scope of concept is further increased by referring to ‘data’ sovereignty rather than digital sovereignty, thus pointing to the self-determination of the data holder regarding the use of personal and industrial data (rather than the nationality of the tools used to process data).

6. Following up on the conclusions of the European Council of December 2013, we propose to define strategic autonomy as the capacity of the European Union to defend Europe and act militarily in its neighborhood without being dependent on the US. Initially used in the context of the shaping of defense strategies, the concept of strategic autonomy today encompasses the economy, the energy sector and digital technology. In addition to ensuring a ‘level playing field’, which is the responsibility of DG Competition, the objective of strategic autonomy is to ensure that the EU is not heavily dependent on the US in strategic areas.

7. European Union countries’ recovery and resilience plans-Bruegel Institute July 14, 2021. Some countries have not submitted their RRF plans when these figures have been collected (as Nederland) explaining the gap between 136,6 B€ and the expected 150 B€ for Digital.



### 3. The case for a digital transformation with 150 billion euros of funding over the next five years

The target of 75% of European businesses using cloud services, big data and artificial intelligence by 2030 is leaving some flexibility for the intermediate milestone in 2025. We suggest setting the target at that date at 50%, which is already exceeded in Scandinavia and is estimated to be the level reached today in the US.

The Digital Compass, mentioned earlier, describes several multi-country projects currently under discussion under the RRF among which:

“Building a common and multipurpose pan-European interconnected data processing infrastructure, to be used in full compliance with fundamental rights, developing real-time (very low latency) edge capacities to serve end-user’s needs close to where data is generated (i.e. at the edge of telecom networks) designing secure, low power and interoperable middleware platform for sectoral uses, and enabling easy exchanges and sharing of data, notably for Common European Data Spaces”.

It is too early to have a precise picture of the articulation of the RRF country’s plan, but we can already see the major pillars of the action plan for data and cloud:

- **Infrastructural:** a major effort dedicated to European cloud service providers to prepare the edge cloud era made possible by the proliferation of 5G. This endeavor among other topics is addressed by the Important Project of Common European Interest (IPCEI), currently under preparation.

- **Domain-specific business innovation:** multiple industry specific data spaces efforts dedicated to the creation of several coordinated ecosystems in the major industries covered under the RRF: transportation, energy, construction, manufacturing, agriculture. The effort is threefold. First, creating the ecosystem ahead of evidencing the benefits of data sharing. Second, building the industrial data platforms by agreeing on data sharing mechanism. Third, preparing the methodology and process to build data spaces. These efforts have started with transportation - Skywise (Airbus and 130 airline companies) - and Automotive - Catena-X (BMW, Mercedes, Volkswagen, amongst others). Public funding as RRF will be useful only if the relevant industry is taking the lead while cloud adoption progresses. The success of data space endeavors is still difficult to measure, requiring better investigations of the economics and incentive systems of data sharing.

- **Regulation and Transparency:** Removing the hurdles with respect to portability, interoperability and data sovereignty, while contributing to new digital regulations (Digital Service Act, Digital Market Act and Data Governance Act). The only way for this third effort is an articulated consensus between users, European cloud service providers and international service providers. The European Commission is intending to set up a European Cloud

Rule Book, which can be inspired by policy rules that are already agreed upon.

The unprecedented challenge is to coordinate and implement this action plan with “many cooks in the kitchen”, i.e., the countries with their RFFs, the European Commission (monitoring and measuring), industrial partners (creating data spaces certainly not at country level but at least at European level), the European cloud service providers (investing jointly into the next generation edge cloud), the European Commission and the European Parliament (preparing the new round of regulations), and US and Chinese players (attracted by a doubling of the cloud market in Europe but not ready to give up easily the competitive advantages they have gained in the consumer market).

What makes the situation in Europe so special? In the US, for example, it seems to be commonly agreed that Google or Microsoft are legitimate to build the next generation of health platforms. This option seems impossible in Europe. Furthermore, in the US no one expects General Motors and Ford to form an Alliance to share data as we see it happening in CATENA-X. In China the jury is still out with the new round of regulations in preparation to favor the “Common Prosperity”.

### 4. Regulation vs innovation: finding the balance between protection and openness

In the Common Good Summit organized in May 2021 by Jean Tirole, a panel discussion included both the Economics Nobel Prize winner Bengt Holmström and Commissioner Thierry Breton. The MIT professor stated the opinion that because Europe is a collection of countries, it prefers to regulate instead of innovating, a view contested by the Commissioner.

Everyone in Europe agrees that the regulation of digital consumer markets came too late, after the GAFAM took an undisputed lead. Therefore, regulating industrial data sharing and cloud use is seen as urgent, before dominant positions are taken.

This endeavor will be challenging from a legal point of view. Establishing data spaces might be seen as creating a cartel in the two main cases of data sharing, i.e., sharing between competitors, like HERE<sup>8</sup> in automotive data collection (Audi, BMW and Daimler), and sharing between value chain partners, like Skywise (Airbus, Easyjet, United Airlines). Similarly, the setting up of common practices (leading to potential industry standards) in the use of clouds for portability, interoperability and digital sovereignty is severely regulated by DG Competition, which aims to ensure a fair competition for any provider operating legally in the common market.

To accelerate this process, a combination of regulatory

8. Here is a company owned by the three major German automotive manufacturers and Intel that provides mapping and location data related services to individual and companies using data collected through connected cars of manufactured by the partners.

sandboxes releasing temporarily restrictive regulations, plus the systematic use of ex-ante compliance mechanisms appears to be necessary. In other words, the best practices agreed upon during the sandbox period must be adopted by providers in their offerings at their initiative.

### 5. A Federated software and data infrastructure across Europe

When addressing Europe's digital sovereignty at the "Digital Gipfel" 2019 in Dortmund, the German Chancellor Angela Merkel raised the point that Europe should have the ambition to be "capable of it all on its own". Europe should strive to not only regulate, but, more importantly, to build the software and data infrastructure for the single European market by itself.

However, experience shows that a simple "follower strategy" might not be the wisest approach to achieve this goal. Europe must find its own architectural way when it comes to the design of a software and data infrastructure, because digital sovereignty - along with portability and interoperability requirements regarding data and services - is the embodiment of fundamental European values. A fair balance between the interest of the individual data holder and the legitimate interest of the community to make use of existing data (e.g., for healthcare purposes, not only in times of the current pandemic situation) is at the center of the debate about how to design Europe's data economy. Balancing individual and common interests leads to an infrastructure design different from those currently proposed by private US or Chinese platform providers. The case for a more "democratic" design of cloud platforms is supported by recent developments regarding infrastructures for scientific and research data. For instance, the European Commission promotes the European Open Science Cloud, while the US is planning a "shared research infrastructure for Artificial Intelligence researchers and students".<sup>9</sup>

There is agreement among all stakeholders that Europe's data and software infrastructure must prevent the emergence of centralized power with respect to data. This is remarkable, insofar as it requires blocking network effects from leading to a "winner takes all" situation. In fact, the infrastructure architecture must be designed in a way that prevents monopolistic effects from happening while at the same time utilizing network effects for maximum adoption of cloud services.

Europe's infrastructure design is a federated one. It does not require central data storing, processing or distribution functionalities. Instead, the infrastructure is formed by distributed nodes in a data and service network. Nodes can either provide or use resources such as data. Providers remain independent and self-determined regarding their data and other resources; the network is open and non-dis-

criminatory and both users and providers trust each other.

This is achieved through the establishment of four so-called 'federation services'. First, a 'federated catalog' functions as a registry of all resources available in the network. Catalog entries comprise descriptions of the very resources (such as data and services) as well as policies to which the services adhere (e.g., GDPR) and conditions under which the resources can be used by other participants in the network. Second, 'sovereign data exchange' allows for the definition, exchange, processing and monitoring of data usage policies. These can be understood as the terms and conditions of the data economy. Examples are limitations to the number of read actions on the data, the prohibition to further distribute the data, the obligation to use the data only in a certain geographic area etc. Third, the 'identity management' ensures trust between providers and users in the network. Finally, 'compliance services' ensure the adherence of services to regulation as well as to self-defined claims as articulated, for instance, in their self-description.

The federation services facilitate the emergence and operations of data spaces. Data spaces are a data integration concept which does not require consolidation of data in one central place, nor the use of one single database schema. In contrast, data integration is achieved on a semantic level and data redundancies are possible. Thus, the natural design of data spaces effectively matches the federated nature of Europe's approach to a data and software infrastructure.

Besides supporting data sovereignty and the interoperability and portability of data, a federated data and software infrastructure is also more flexible than central platform approaches. Nodes in the network can vary in scope, size, and function. They can be large cloud data centers, but also small edge cloud services which run on Internet of Things devices, next to an individual production line or also in a car, for example.

Such a multi-cloud landscape would also match varying requirements along the value chain. In precision medicine, for example, data would be collected at the 'edge' i.e., close to personal healthcare devices, then processed on large cloud platforms with more computing resources and, finally the data analysis results would be distributed back to the individual data and service consumer while adhering to trust and data sovereignty standards.

A compliance and labelling framework as envisioned by Gaia-X enables the control and governance of services that respect the federated software and data infrastructure principles. Compliance and labels are tightly interwoven. Labels are a means to achieve the desired level of trust without having to inspect lengthy and difficult to find service credentials, while compliance refers to the process of going through and validating the set of automatically enforceable rules to achieve the minimum level of self-description compatibility in terms of file format and

9. See <https://www.federalregister.gov/documents/2021/07/23/2021-15660/request-for-information-rfi-on-an-implementation-plan-for-a-national-artificial-intelligence>.

syntax, cryptographic signature validation, attribute value consistency and attribute value verification.<sup>10</sup>

## 6. Towards a roadmap for data and edge cloud in the context of the Recovery and Resilience Plan

Europe should create a vision that would render the topic of data sovereignty irrelevant in a decade, i.e., a plan that would enable data sovereignty to quickly become a reality for all cloud services which are offered and used in the single European market.

A roadmap towards this vision must rest on a set of strategic measures. First, it must be understood that Europe's way in the platform economy stands in contrast to usual evolutionary paths. Platforms which are controlled by one keystone company (such as hyperscaler platforms) follow a path consisting of platform development, then adoption by various sides (providers, users, complementors) and finally scale-up. In the case of Europe's federated data and software infrastructure the adoption of the idea comes first, prior to the development of the platform. Furthermore, the process is not managed by one single agent, but rather an entire ecosystem consisting of multiple stakeholders. That has enormous potential regarding cloud adoption but is slow when it comes to design and development. Thus, the infrastructure design should not only focus on developing software services, but also define a certifiable standard that can be adopted by third party developers. The deliverables of Europe's journey to a federated data and software infrastructure must therefore be threefold and comprise a design specification, an open-source software implementation and a means to test and certify adherence of services to the specification.

Second, Europe should embrace the variety and diversity of the future cloud service landscape in the single European market, which will be characterized by large cloud data centers on one hand, and a higher number of small edge cloud services on the other. The former will also in future be dominated by large platform providers mainly from outside Europe, which is why Europe should have a strong interest that its certifiable cloud standard is adopted by those platform providers. The latter, i.e., edge cloud services, is a market segment where Europe has large potential to achieve significant market shares on its own. Europe is good when it comes to Industry 4.0, the Internet of Things and embedded systems - which are all closely related to edge cloud computing. Thus, strategic funding and investment measures (such as the IPCEI for Cloud Edge Infrastructure and Services) should focus on the edge. It is therefore important that Europe is open for collaboration with non-European partners when it comes to setting certifiable standards and focuses on European edge cloud service providers when it comes to investing money from the recovery plan.

Third, as mentioned briefly before, Europe should fol-

10. See Gaia-X (2021), Gaia-X Architecture Document, 21.09 Release, Brussels, and Gaia-X (2021), Policy Rules Document, 21.04 Release, Brussels.

low a clear open-source software (OSS) strategy regarding its data and software infrastructure. OSS is a trust anchor in itself, because the source code is open for everyone to read and contribute. Thus, "black boxes" are avoided. Furthermore, it allows the activation of the many which is an appropriate reaction to the fact that in Europe there is no one single agent which is both willing and capable of investing the resources required to build a competitive alternative to hyperscaling platforms. Apart from that, the "for all" nature of an infrastructure matches the fundamental governance and development principles of OSS. Moreover, the open approach to the data and software infrastructure contribute significantly to Europe's overall OSS strategy, which embraces principles such as re-use, sharing, security and open innovation processes.<sup>11</sup>

Fourth, Europe must foster the adoption and scale-up of its federated data and software infrastructure. The federated nature prevents "centers of data gravity" from developing, but still the infrastructure follows network effect principles. The more demand for data resources is created, including by public agents as users of cloud services, the more attractive it will be for data providers.

Finally, Europe should not limit its efforts to the passing of new regulations, but should also embrace the notion of "compliance by design". The federated software and data infrastructure must be designed in a way that it allows the automated testing and monitoring of service compliance to standards and regulations.

Europe sits on a treasure of data. A federated data and software infrastructure is a mandatory prerequisite to be able to leverage this data treasure for its own benefit and to make sure not to become a colony which will be exploited in the digital space.

## 7. The pioneering approach of Gaia-X: achieving legitimacy in formulating the need for a strategic autonomy

The Gaia-X project was initially announced at the aforementioned "Digital Gipfel" in Dortmund in October 2019. The first task of the Franco-German team was to agree on a common position paper (in line with the joint announcement of Peter Altmaier and Bruno Lemaire) describing the objectives of Gaia-X. The paper was published in February 2020<sup>12</sup> - exactly on the day before the publication by European Commission on the European Strategy for data.<sup>13</sup> The position paper identifies as key objectives the second and third pillars identified in section 3.

On June 4, 2020, a group of twenty-two companies (eleven French, eleven German) consisting of seven user companies, eleven cloud service providers, two academic

11. See European Commission (2020), Open Source Software Strategy 2020 - 2023 (Think Open), Brussels.

12. See [https://www.bmwi.de/Redaktion/DE/Downloads/F/franco-german-position-on-gaia-x.pdf?\\_\\_blob=publicationFile&v=4](https://www.bmwi.de/Redaktion/DE/Downloads/F/franco-german-position-on-gaia-x.pdf?__blob=publicationFile&v=4)

13. See European Commission (2019), European Strategy on Data, Brussels.



institutions and 2 industry associations announced their intention to create a not-for-profit association under Belgian law to implement the objectives of Gaia-X. The summer of 2020 was then dedicated to establishing the article of associations and setting up the technical basis of the association, i.e., policy rules, architecture of standards and reference implementation. The main hurdle was to forge a consensus vis-à-vis the non-European cloud service providers: welcoming them as members but restricting the board to representatives of European companies. By mid-September the association was created as an AISBL under Belgian law, requiring a royal decree for the effective creation at the end of February 2021.

To gather the community that has formed around the shared vision of cloud and data sovereignty, a first Gaia-X summit was organized in November 2020, attracting more than 4500 participants. Users sent top executives to explain how they intended to create data spaces. Most of the European cloud service providers and all the major US service providers presented their expectations and positions. As from March 21, the board, composed of one representative per original member, was created and the CEO and CTO were recruited. By that time more than two hundred companies have declared their intention to become members of Gaia-X coming from around twenty countries.

It was also important to secure the buy-in from European countries. Thus, it was decided to create national hubs to regroup national players and, in particular, to build local ecosystems of users. At the end of 2021, there were already fourteen hubs in most of the large European countries, with a tight connection with the local governments; this proves to be essential in the multi-country approach chosen for the digital decade. Gaia-X is now taking up operations with a new board elected early June 2021, including representatives of seven European countries and a clear 5-year strategy endorsed by Member States through their participation in national hubs and the government advisory board. Non-European Hubs are also in preparation.

Gaia-X takes part in Member States' strategy by contributing both to the creation of Platforms such Catena-X (which indicated that it intends to use and adhere to the Gaia-X standards), as well as well as for the launching of the aforementioned "trusted cloud" strategies.

The French Secnum cloud strategy announced in May 2021 makes explicit reference to Gaia-X.<sup>14</sup> This strategy authorizes the GAFAM to license their software to French suppliers, the latter being able to operate the software in their own sovereign clouds. Gaia-X supports this approach, which should be generalized at European level

14. The announcement states: 'Why Gaia-X? The fluidity of the cloud market must not be hampered by technical difficulties linked to the change of supplier or to the vertical integration of solutions. As such the government fully supports the GAIA-X association and the architecture of standards that it will implement. Thus, European companies will be able, thanks to GAIA-X, to compare, select and build cloud solutions with the assurance that their data will remain under their control by making possible to change cloud provider in a simplified way'.

with the upcoming launch of EUCS (European Cybersecurity Certification Scheme for Cloud Services) aimed at harmonizing the certification principles of the different member states.

## 8. Gaia-X in the context of Europe's AI strategy

The success of Gaia-X will hopefully help achieve the objective of having 50% of European businesses contributing to data spaces and using cloud services by 2025. This is a first necessary step, which needs to be complemented by a similar effort in data analytics and artificial intelligence for the industry sectors.

In this respect, France and Germany had two separate initiatives: "*Grand défi*" in France and "*Plattform Lernende Systeme*" in Germany. At the end of 2020, it was decided to join their efforts to produce a Franco-German position paper: "Speeding up Industrial AI and trustworthiness", presented at a conference in March 2021.<sup>15</sup> The landscape has many similarities with the one of Gaia-X: difference between AI for consumers and industrial AI, necessary adoption by users, dominance of US and Chinese players, growing maturity of the topic giving a key role to academics. The multi-country scheme is in preparation and the RRF funding is also dedicated to AI.

Access to industrial data is critical for the development and adoption of AI in industrial domains. The creation of data spaces is a necessary first step, which enables multilateral cooperation between different ecosystem members. Many domains, such as healthcare or material science, require, in addition to that, the combination and integration of industrial with scientific data. Significant innovation potential can be realized through bridging these data domains, which so far often exist independently from each other. Gaia-X supports this endeavor by considering data usage requirements from both realms. This may well be one of the reasons why both industrial companies and academic organizations are widely represented in Gaia-X.

## 9. Towards a blueprint for European innovation ecosystems

The next four years are crucial for the Digital Transformation of the European industry. The importance of defining an industrial strategy has often been pointed, but there are contrasting approaches in different countries to the respective roles of industry actors and governments in its implementation.

The European Commission is initiating a new scheme with the "Digital Compass", leaving to Member States the responsibility of designing their recovery plans with (overall) ten years objectives. The data and cloud strategies are explicitly mentioned as an area where this "multi-stakeholder" picture will be applied. By design, a European strategy for data and cloud cannot be implemented

15. <https://cris.vtt.fi/en/publications/franco-german-position-paper-on-speeding-up-industrial-ai-and-trustworthiness>



separately in each country, since efficiency gains are linked to economies of scale and economies of scope.

Therefore a coordination between Member States is required, relying on certain agreed principles, i.e., (i) a combined approach of "top-down" standard setting and support of "bottom-up" data spaces initiative, (ii) a multi-dimensional public-private partnership relying on the combined involvement of the European Commission / Member States, providers / users, European / international technologies, (iii) clear provisions that support from recovery plan can only be received when the agreed standards are used and implemented.

At the initiative of industry actors, associations similar to Gaia-X AISBL should be formed to express "the voice of the industry" and orchestrate the multi-stakeholder process by establishing both a forum for each relevant industry (health, automotive, energy...) and national hubs.

The underlying rationale of our proposal is, we believe, a fundamental European value, i.e., the power of sharing. The sharing will be either organized by international companies ready to spend what it takes to pump-prime sharing (as it has happened in the consumer market) or industry actors themselves taking the unique opportunity of the recovery plan supported by European governments.



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## Will the Digital Markets Act allow Europe to Regain Power over the Big Tech? Probably not right away

### 1. The sources of Big Tech power

In the 1950s the EU adopted a competition law that is still in force. In the 1990s, we began to see the emergence of the consumer Internet, which led to the spur of individual and entrepreneurial initiatives. In 2001, twenty years ago, the EU adopted the eCommerce Directive. Now we spend most of our time online on sites owned by about three commercial groups. Our Internet terminals are essentially driven by two operating systems, one of which is ultra-dominant. The market capitalization of these companies is unparalleled in the history of the economy, enough to send people into space or pursue unbridled transhumanist dreams.

How is the EU positioning itself in the face of web domination that is essentially American and perhaps soon Chinese but less probably European? The EU is positioning itself on a familiar field: that of legal standards, in the hope of being able to tame economic actors like no other. Failing to be a player in the competition, Europe dreams of being a referee and tries to preserve its principles of diversity, healthy competition, and respect for its democratic principles.

By adopting the eCommerce Directive twenty years ago, Europe, following in the footsteps of the United States, positioned itself in the regulatory arena in this emerging global competition. The objective was not to tame the giants, but rather to encourage the development of online services and to allow everyone to seize the available opportunities. In this sense, the eCommerce Directive established a very liberal regime, favourable to web actors, whether commercial or not. This regime is based in particular on two principles: the internal market clause, which prevents any Member State from adopting more restrictive rules on the regulation of online actors; and the principle of reduced liability for hosts, i.e., a very large proportion of online actors whose content is generated by users.

Some see this liberal regime as one of the keys to the domination of a handful of American actors over the online economy. Google, Facebook, Amazon and Apple have come, through very different strategies, to rule a part of our lives. Their power has become immense, and no regulatory tool has been able to challenge this state of affairs. Competition law has not succeeded in taming the exercise of their market power any more than did data protection law (but this is not its purpose).

The companies in question have built ecosystems based on dominant digital platforms and have abused and are abusing their market power to lock them in. Each of the Big Tech has created a specific business model based on a core activity: search engine (Google), social network (Facebook), sale of books and then online goods (Amazon), a particular terminal (Apple). They have developed from so-called “structuring” platforms, relying on economies of scale and significant network effects, “in the form of oil spills”, and with more and more activities and services, be they provided by the Big Tech or by an increasing number of third-party companies building on their developments. They have done so in various ways: marketplaces, advertising agencies, application stores, setting technical standards, etc.

The common objective of these very high-quality services is to encourage the user to remain in an ecosystem of services. If necessary, the use of behavioural sciences by these actors enables them to create mechanisms that are sometimes denounced as generating confinement if not addiction (polarisation of opinions, dissemination of false information). On social networks in particular, the maximization of user engagement is constantly sought, through the instantaneous and permanent personalization of the newsfeeds. From a more economic point of view, it is a question of multidimensional locking strategies using acquisitions, leverage effects, temporary free access, collection, and exploitation of metadata, etc.

Algorithms, i.e., computer code, are used to set the rules for the organization of these ecosystems. Everyone is at the same time the judge, the jury, and the executioner. The Big Tech companies have become the private regulators of all the economic actors who offer services via their digital infrastructure: merchants using Amazon’s marketplace, Apple’s application developers, advertisers, digital media, and all those who make a living from advertising or simply from their presence on Google, Booking or Facebook. This private regulation defines in particular the way in which economic value will be shared between the involved actors.

It is no longer acceptable that the opacity of these lines of code becomes the opacity of the rules and laws that govern ecosystems in practice. More than ever, it is time to acknowledge that Code is indeed Law. It’s high time we stopped repeating this formula in an incantatory manner and started drawing all its implications from a regulatory standpoint.

## 2. A shared observation

Considering the aforementioned developments, competition law has largely been unable to deal with these situations of economic domination. With its standard of proof and the tools it currently has at its disposal, it has been difficult for European competition authorities to deal with cases of free services or, more broadly, two-sided markets.<sup>1</sup> Competition authorities also face an asymmetry of information. Finally, it is difficult for competition authorities, because of their position, to impose relevant remedies.

To remedy this structural – and by no means individual or circumstantial – shortcoming, the European Commission, under the leadership of Commissioners Margrethe Vestager and Thierry Breton, has initiated a major legislative project aimed at regulating the dominant actors in the digital economy. This initiative has resulted in two texts: the Digital Markets Act and the Digital Services Act. The first deals with the economic aspects of online platforms. The second aims to regulate both the commercial and societal aspects of the moderation function of online platforms. These two proposals were published in December 2020, and together aim to complement and partially replace the existing regulatory framework, which is dominated by the logic and principles of non-regulation instilled by the eCommerce Directive.

The DMA and the DSA are the result of a combination of factors, and both intend to respond to an analysis and general objectives that we share. First, private actors have been able to become essential thanks to the exceptional quality of their services. This monumental growth has taken place at a time when economic, political, and academic actors were showing a certain lack of understanding of the economic dynamics at work. Absent other externalities to consider, innovation could only be perceived in a positive light, and the actors who showed appreciation for these innovations did the best they could with the available methods. This led to the failure of previous policies that relied on the two abovementioned pillars: competition law and the reduced liability regime resulting from the eCommerce Directive, i.e., a self-regulatory regime for actors through their own code.

This analysis is echoed in part in whereas 10 of the DMA: *“This Regulation pursues an objective that is complementary to, but different from that of protecting undistorted competition on any given market, as defined in competition-law terms, which is to ensure that markets where gatekeepers are present are and remain contestable and fair, independently from the actual, likely or presumed effects of the conduct of a given gatekeeper covered by this Regulation on competition on a given market.”* One should pay particular attention to the reference to contestability and fairness

1. These are platforms that bring together customers of different kinds and price the services of both markets so that both markets develop. For example, the free service granted to some customers is financed by advertising funded by advertisers. Competition law very often uses tools based on prices and their variations, which become ineffective as they stand.

challenges, which do not as such fall within the objectives of competition law. In this case, it is a question of ensuring value sharing, which is an objective other than that of competition law and which is a useful complement to it.

As for the DSA, the proposed mechanism is essentially a supervisory mechanism for content moderation. The DSA will not be discussed below, but it is regrettable that it is not linked to the economic aspects of the operation of platforms covered by the DMA. Indeed, if we agree on the fact that the content problems observed on platforms are largely due to the economic model developed, why not use economic regulation to achieve the objectives aimed at protecting against harmful content?

If we focus more specifically on the DMA, how is it supposed to enable the European Union to regain control over the Big Tech? The methodology deployed in the proposed regulation is broken down into three stages, which we will present briefly before identifying some of their shortcomings. Unfortunately, the proposed regulation is flawed in many respects, which does not mean that things will not improve. The crafting of a suitable regulatory framework takes time.

## 3. A myriad of actors unnecessarily involved

The first step in the methodology set out in the DMA is to identify the relevant actors. For this purpose, the regulation creates a new concept, that of «gatekeeper». In short, this concept is intended to identify the key actors in the digital economy other actors depend on to carry out their own activities. Platforms that meet certain qualitative (type of service) and quantitative (turnover and number of users) criteria are presumed to be gatekeepers. The targeted actors must be essential platform services providing services such as online intermediation, search engines, video sharing, social networks, advertising, etc. From a quantitative point of view, the criteria are set in terms of annual European turnover (6.5 billion euros), capitalisation (65 billion euros) and number of users (45 million active monthly users in Europe). Platforms that do not meet these criteria could still fall under the scope by reference to other criteria (size of the company, number of companies dependent on it, the latter's possible captivity, effects of scale, etc.).

One can note here that, unlike the logic that guides the pre-emption of abuses of dominant positions or pro-competitive regulations in areas such as the telecoms, the market share criterion is absent. This avoids the difficult exercise of defining market shares.

At this stage, it is regrettable that the DMA does not address ecosystems and therefore the way in which technical architectures serve business models. If we want practices to change and value sharing to evolve, we need to give the right incentives to the actors. This will not be the case if we do not deal with the economic models as a whole, if we do not work on the algorithms to explain them and understand their effects on behaviour, if we do not include questions relating to advertising or if we exclude browsers

from the overall analysis (which is the case as it stands).

In fact, the risk is that, contrary to the initial objective, too many actors are regulated by the same set of regulations. This leads to a double risk: fighting too many battles at once and not tackling what makes the Big Tech strong.

#### 4. The inappropriate use of the regulatory approach

Next, the so-called “unfair” practices that the draft regulation intends to prohibit are explicitly identified, subject to suspension, exemption and possible updating by the Commission. Strangely, the listed obligations resemble for the most part cases more or less dealt with by the Commission in various procedures initiated by DG Competition or the European competition authorities (parity clauses, combination of data from different services, exclusivity, more favourable treatment, etc.). Other obligations specifically concern the behaviour of certain actors, such as those applicable only to operating system suppliers.

This unravelling and willingness to surgically strike at particular behaviours is probably the most important apparent shortcoming: the DMA uses a regulatory logic based on strict prohibitions essentially controlled by the Commission. This is clearly sub-optimal in markets driven by innovation and rapid change.

On the contrary, the DMA should have followed a regulatory logic based on the pursuit of general objectives supported by a flexible arsenal at the disposal of regulatory authorities. In this sense, a pro-competitive regulatory approach such as that successfully implemented in sectors such as the telecoms would probably have been more beneficial. Such regulatory frameworks intervene in relevant markets when competition law alone is deemed insufficient. From a methodological standpoint, they then allow the involvement of the economic actors in the definition of both the identified problems and the appropriate remedies (transparency, non-discrimination, data sharing or separation, interoperability, etc.).

#### 5. Regrettable centralisation of enforcement

Lastly, the draft regulation provides for a procedural enforcement framework. It is contemplated that it will be carried out mainly through market investigations. The Commission will be empowered to identify cases of non-compliance and to penalise gatekeepers by means of fines and periodic penalty payments. In order to ensure that the Commission can fully use its powers, it can request to be granted access to data held by platforms. A European Advisory Committee is also set up.

The observed problems are reflected in the projected organization chart. Firstly, and in view of the public announcements, it is highly likely that the human resources will be inadequate (80 people in 2025). To confront these giants, there is talk of a few dozen people within the Commission, whereas the sectoral regulatory authorities (such as ARCEP in France) or the European competition

authorities have thousands of staff throughout Europe.

Just as concretely, the ambiguity of the DMA lies in the fact that the organization in charge of its application within the Commission does not figure as such. The text is in fact carried by DG COMP and refers to “three lead DGs”: internal market (DG GROW), digital services (DG CNECT) and competition protection (DG COMP).

Separating the enforcement of the DMA from the application of competition law would have made it possible, on the contrary, to bring into play a fruitful dialectic between the two, such as that which exists between the national competition and regulatory authorities. In the case at hand, however, the risk is that of a paralysis.

In an alternative system, it could be contemplated that, around a central core clearly identified within the Commission and independent of the DG COMP, the striking power of the national regulatory authorities could be used to collect national complaints, possibly evaluate them, refer them higher up and ensure a follow-up of the practices and deployed algorithms. As far as algorithms are concerned, the Commission does not give Europe the means to turn the tide and ensure adequate control. It is only possible to request information on a case-by-case basis.

On the contrary, what we probably need is a global and systematic access to understanding the operating rules deployed by platforms. In this sense, initiatives such as the creation of the *Pôle d'expertise de la régulation numérique* (Peren) in France should be supported. By setting up teams dedicated to understanding how algorithms work, this entity attached to Bercy<sup>2</sup> is probably an embryo of what should be developed and generalised in Europe, and not only within administrative authorities. Academic teams and even NGOs could share these objectives. The overall goal is to evaluate the functioning of algorithms and their impact on consumers and businesses alike. The understanding of their objectives regarding this or that criterion and their links with economic models, and the uncovering of possible biases will probably require regulated and continuous access to certain data, as well as knowledge of all software updates. These are skills that could also benefit the aims of the DSA.

Applied to both the DMA and the DSA, these proposals seem to us to be in line with the conclusions to be drawn from the hearings and analyses that have taken place in France and in Europe following the most recent revelations about the operation of certain social networks. And we can hope that the European regulatory framework will be oriented towards this type of practice. In the meantime, it is highly likely that the proposed texts will enable us already, and despite all their shortcomings, to move towards a better state of affairs than the prevailing one. It is then up to the national and European public authorities to make the best of them and to make all necessary improvements considering the experience gained in the meantime.

2. Editor's note: the French Ministry of Economy and Finance.





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## Designing a Common European Business Law

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It is apparent for anyone who cares to look that, in the legal sphere, European integration is far from being complete<sup>1</sup>. There are indeed multiple areas where the effort to craft a common body of European law must be improved, or even deepened, so that one day the rules governing the conduct of business are truly uniform within the single market or, at least, within the euro zone.

Aiming to test the relevance of this intuition, the *Association Henri Capitant*<sup>2</sup> set out to draw up an inventory of the *acquis communautaire* in business law. The resulting trilingual inventory, published under the title *La construction européenne en droit des affaires : acquis et perspectives* (Lextenso, 2016), provided a deliberately synthetic assessment of the European Union's contribution in twelve fundamental areas of business law: internal market law, e-commerce law, corporate law, secured transactions, enforcement procedures, insolvency law, banking law, insurance law, financial markets law, intellectual property law, labor law and tax law. Curiously, no one seems to have undertaken such a project before. Its main lesson is simple: insofar as 'European' business law is concerned, everything remains to be built. The project has certainly given rise to stimulating criticism,<sup>3</sup> but its diagnosis does not appear to have been seriously contested.

Hence, an (inevitable) shift in the analysis towards an initiative met with great support from lawyers hailing

from various horizons: a project for a European Business Code.<sup>4</sup> In a way, this project is but the latest instance in a long history, which clearly suggests that the crafting of a common commercial law contributes to the structuring of the business exchanges as well as of the political community itself. In the past, the fairs of the Middle Ages played an important role in fostering the emergence of a Europe of traders: we still find their traces in the law governing payment instruments, in the severity of the old insolvency procedures, and the importance of the *pacta sunt servanda* principle with respect to the trade of goods. Moreover, as Reiner Schulze pointed out in 2016, to take just a few examples: "[i]n Germany, the codification of commercial law during the 19<sup>th</sup> century largely preceded the birth of the Civil Code - by almost four decades in the case of the German Commercial Code. In Spain, the Commercial Code even came into being sixty years earlier. At the moment when these national markets were emerging, a Commercial Code was perceived as a compelling necessity, to facilitate trade and strengthen the economy. Traders and businesses needed a Commercial Code to be able to overcome the old borders within the new national "internal market" of the time.<sup>5</sup>

This article will strive to contribute to this project, by first setting forth the arguments in favor of a European Business Code (1), explaining the way in which the idea was received in political circles (2), and addressing some of the questions arising in connection to its practical implementation (3).

### 1. The reasons

A European Business Code would be extremely useful. Indeed, there are multiple arguments in favor of such a project, be they of a legal (A), economic (B) or political (C) nature.

#### 1.A. Legal reasons

What can be called 'European' business law clearly suffers from a major lack of accessibility and intelligibility. There is no better proof than the attempt to consult the "Eur-Lex" website<sup>6</sup> - whose very aim is to ensure that European Union law is "accessible" - a difficult and frustrating experience for anyone wishing to get a grasp of European business law. The "summaries of EU legislation", intended for a non-specialized public, are "classified in 32 fields of action (*sic!*)".<sup>7</sup> However, these fields of action are deeply fragmented, with more than half of them falling under the ambit of business law. In particular, the entry "Business" is all but useless, since it merely refers

1. This article is a revised version of the author's contribution in french to the *Mélanges en l'honneur du Professeur Michel Grimaldi*, Lextenso, p 373 and following.

2. *Editor's note*: the Association Henri Capitant is a scholarly organization aiming to contribute to the promotion and modernization of the legal systems falling in the civil law tradition. It was established in 1935 by a group of legal scholars from several francophone countries, and now counts more than 55 countries around the world, making it the leading international network of legal scholars from civil law countries. The Association is also the editor of the first international and bi-lingual journal devoted to civil law legal systems ([www.henricapitant-lawreview.org](http://www.henricapitant-lawreview.org)).

3. See, in particular, L. d'Avout, 'L'étonnante initiative en faveur d'un code européen des affaires', JCP G, 2019, 559 ; L. d'Avout, 'La France et l'Allemagne en quête d'un droit des affaires commun', JCP E, 2019, 1276.

4. See, P. Dupichot, 'Du Brexit au Code européen des affaires', Dr et patr., 2016, n° 262 ; 'Vom Brexit zum Europäischen Wirtschaftsrecht', ZEuP, 2017, n° 2, p. 245 et s. ; L. Bélanger, 'Un code européen des affaires, le droit au cœur de la consolidation de l'Europe', JCP, 2017, 790.

5. See, R. Schulze, 'Initiative pour un code européen des affaires', speech at the CNB, 1 July 2016.

6. <https://eur-lex.europa.eu/homepage.html>.

7. <https://eur-lex.europa.eu/browse/summaries.html>.

incompletely to other fields of action (“Internal market”, “Competition”, “Foreign trade”, “Taxation”, “Customs”). This situation is all the more regrettable since the accessibility and intelligibility of the law is, at least in the eyes of the French lawyer, an objective of constitutional value.<sup>8</sup>

The European Union seems to be becoming aware of these shortcomings. On April 13, 2016, an inter-institutional agreement was concluded between the Commission, the Council and the European Parliament, under the title “Better Law Making”, which aims to improve the way the EU legislates and to ensure that EU legislation better serves citizens and businesses. It should make the EU legislative process more transparent, more open to stakeholder input and easier to understand. It will also help to assess the impact of EU legislation on small and medium-sized enterprises, local industry and the general public. The spirit of the agreement is also reflected in the European Commission’s “Better Regulation” initiative, which aims, among other things, to enhance the quality of European legislation.<sup>9</sup> However, these agreements and programs tend in particular to limit the number of new regulations and directives, rather than to order the existing ones in a logical manner; as such, they often highlight the principles of subsidiarity and proportionality.<sup>10</sup>

Indeed, the perimeter and scope of the European legal integration have always depended on the distribution of competences pursuant to the Treaty on the Functioning of the European Union (TFEU). Thus, the *acquis communautaire* is naturally stronger in the area of competition law – which falls within the exclusive competence of the Union – than in areas where competence is shared and subject to the principles of subsidiarity and proportionality (the internal market, for example) or, *a fortiori*, in the area of taxation, which is still subject to the unanimity rule.

This fragmentation of competences has been a powerful brake on the adoption of uniform substantive rules; therefore, the project of a common business law achieved profoundly heterogeneous results in various areas: it is rich in some (the market, electronic commerce, industrial property, companies, etc.), but patchy in others (security, enforcement, banking operations, taxation, etc.).

### 1.B. Economic reasons

More than sixty-three years after the signing of the Treaty of Rome, it becomes stranger every day that the 27 Member States trade with each other under the empire of fragmented business laws all while using, for 19 of them, a common currency.

The well-known term “common market” is ill-suited to

describe a trading area in which there are still significant disparities between national business laws. To give just two well-known examples, corporate tax rates vary by a factor of three between Member States, and there is no denying that social legislation differs greatly. As a result, Member States sometimes compete with each other – rather than presenting a united front to other countries – and law shopping is encouraged.

But, understood in a broad sense, business law sets the rules of the commercial game. As President Giscard d’Estaing has rightly pointed out: “[b]usiness law is a powerful vector of economic, fiscal and social convergence. This convergence is essential to the consolidation of the Euro, which is today the backbone of the European construction. (...) this law, which governs the daily life of businesses, has not been sufficiently taken into account by European leaders”.<sup>11</sup> Indeed, these hundreds of thousands of small, medium and large companies are the driving forces of the European economies, and their interests underpin the need for a higher European wide convergence. They are the primary source of wealth creation, growth and employment and must evolve in a harmonized legal, tax and social environment, insofar as they operate within a unified monetary area, with free movement of goods, services, capital and labor.

For this reason, it is high time for the single currency to be coupled with a unified core of business law. The latter could help Member States gain valuable economic growth, and be a vector of wealth for European companies. It would greatly facilitate the development of intra-community trade by encouraging small and medium-sized businesses to trade across borders with greater security and confidence. It bears noting that, compared to trade between federated states of the United States of America, trade between Member States of the Union is still very weak.<sup>12</sup>

A quick look around suggests indeed that there is hardly any large trading area without a corresponding uniform legal framework. In this respect, the European Union is unfortunately far from being a leader in this respect. Linguistic and cultural barriers do not explain everything; so, a unified base of business law would greatly contribute to improving the “functioning of the internal market” within the meaning of article 26 TFEU.

### 1.C. Political reasons

Europe is in the grip of doubt these days: shaken by the Brexit, shaken by migration and by the health crisis, it is the victim of the economic awakening of China and is bowing to the technological superiority of the US. The role of the Big Five in the global economy both paralyzes and fascinates it... Unless one nurtures an anti-European feeling

8. See, Cons. const., 16 Dec. 1999, DC, n° 99-421 – Cons. const., 27 July 2006, DC n° 2006-540.

9. [https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how\\_en](https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how_en).

10. See for example, the communication of the Junker’s Commission, ‘Améliorer la réglementation : de meilleurs résultats pour une Union plus forte’, 14 septembre 2016, COM/2016/0615.

11. See, V. Giscard d’Estaing, foreword to *La construction européenne en droit des affaires : acquis et perspectives*, Lextenso, 2016.

12. See, K. Head and T. Mayer (2002), ‘Non-Europe: The Magnitude and Causes of Market Fragmentation in the EU’, *Review of World Economics*, 2(136): 285-314

for other reasons, it is apparent that the European project badly needs a new source of meaning and inspiration.

Within the borders of the EU, it is important to show that Europe is interested in its entrepreneurs and businesses. Indeed, with the notable exception of the rules concerning competition, electronic commerce and industrial property, the European integration of business law has not paid sufficient attention to the daily practice of EU traders and businesses (VSEs and SMEs) and, more generally, of those who are neither bankers, nor insurers, nor consumers.<sup>13</sup> If the latter are indeed fundamental, their recurrence and omnipresence on EU's legislative agenda dangerously lends credence to the image – dear to Europhobes and the extremes – of a legal system that is far removed from the concerns of very small and medium-sized businesses, and therefore more “financial” than truly “commercial”.

It is most welcome in this respect that the European Commissioner for the Internal Market, Thierry Breton, seems to aim to reorient EU policy. He stated in a major daily newspaper<sup>14</sup> that “industrial policy in Europe can no longer be conducted with the sole aim of reducing prices for the consumer. Our businesses, which are the basis of our jobs, our progress and our sovereignty, must be put back at the heart of our policies (...) there will be a before and an after to the von der Leyen Commission”. It is therefore important to put the EU back at the service of citizens and entrepreneurs, so that it is once again seen as an area of freedom, and not of constraint.

Outside of the European borders, the law of the Union must tend to become a model, a source of inspiration for foreign legislators, of reflection for lawyers of all countries, and of legal predictability for investors. Only on this condition will the EU and its legal system shine and wield worldwide influence. This is undoubtedly a civilizational issue: a law is the incarnation of concepts and values that are the product of a culture and a way of life. Because there is a European civilization, there must be an accessible and intelligible European business law. And yet, although the EU was built through law and based on law, it is hardly a beacon of European civilization in the field of economic exchanges.

## 2. Reception

As a simple initiative of a learned society, the project of a European Business Code appeared to be purely utopian when it was launched.<sup>15</sup> This is no longer the case today: the idea that Europe needs an integrated and codified business law is spreading further with each day. This

idea is increasingly accepted in political circles, not only within the Franco-German couple (A) but also beyond (B).

### 2.A. The Franco-German couple

Rooted in a French initiative, the objective of unifying European business law was met favorably within the Franco-German couple, whose importance for the future of Europe cannot be questioned. In his speech on Europe delivered at the Sorbonne on September 26, 2017, President Emmanuel Macron aimed to rely on this Franco-German engine to call for the integration of business law: “[t]o those who say it is too hard, I say: think of Robert Schuman, five years after a war whose victims’ blood was barely dry. On all the subjects I have mentioned, we can give a decisive and concrete Franco-German impulse (...). Why not set the goal of fully integrating our markets by 2024, applying the same rules to our companies, from business law to insolvency law?” The statement was important: the impetus will be Franco-German or there will be none.<sup>16</sup>

Then, on January 22, 2018, the Bundestag and the French National Assembly adopted a joint resolution advocating for “the completion of a Franco-German economic area with harmonized rules, in particular with regard to corporate law and the supervision of corporate insolvencies.” More recently, a parliamentary report of November 29, 2018, written by deputies Christophe Naegelen and Sylvain Waserman, on the Future of the Eurozone, took up – among four proposals to strengthen the Eurozone – “The European Business Code project” carried by the Henri Capitant Association,<sup>17</sup> recommending that it be given a Franco-German basis.

In the wake of this report, an important “Franco-German Treaty on Franco-German Cooperation and Integration” was signed in Aix-la-Chapelle on January 22, 2019, which reserves an important role to the integration of business law. Article 20 § 1 states: “(1) The two States shall deepen the integration of their economies in order to establish a Franco-German economic area with common rules. The Franco-German Economic and Financial Council shall promote the bilateral harmonization of their legislation, in particular in the field of business law, and shall regularly coordinate economic policies between the French Republic and the Federal Republic of Germany in order to promote the convergence between the two States and improve the competitiveness of their economies.” This Treaty was ratified by Law No. 2019-1066 of October 21, 2019 and replaces the *Élysée* Treaty of January 22, 1963.

The new Franco-German parliamentary assembly, composed of 50 French and 50 German deputies, adopted at its third meeting on February 6, 2020, a “Deliberation establishing a working group on the harmonization of French and German business and bankruptcy law”. It

13. However, the following useful achievements should be mentioned: European Economic Interest Grouping, European Company, European Enforcement Order, European Attachment of Bank Accounts, European Trademark, European Designs, Financial Guarantee Law, VAT base, etc.

14. See, T. Breton, *Le Figaro*, 2 March 2020, <https://www.lefigaro.fr/conjoncture/thierry-breton-l-ue-ne-doit-plus-avoir-pour-seul-but-de-reduire-les-prix-pour-le-consommateur-20200302>.

15. The work leading up to the inventory was conducted from mid-2015 to October 2016; work on a draft Code was initiated in March 2017.

16. See, R. Krüse and F. Riestler, ‘Pour un code européen des affaires’, *Le Monde*, 5 May 2018.

17. See, Ch. Naegelen and S. Waserman, ‘Rapport d’information AN’, 29 Nov. 2018, n° 1453, ‘L’avenir de la zone euro’, p. 85 to 91.



has also “set itself the concrete objective of drawing up a legally binding Franco-German business code”, which is a considerable achievement.

A few weeks after the adoption of the Treaty of Aix-la-Chapelle, a decree dated February 13, 2019 issued by the Prime Minister Édouard Philippe entrusted Valérie Gomez Bassac, a French academic and member of Parliament, with a “temporary parliamentary mission whose purpose is to develop a European Business Code.” After nearly 46 hearings in France and 32 conducted in five major European capitals (Berlin, Brussels, Budapest, Dublin, Rome), Valérie Gomez-Bassac delivered her report on July 8, 2019. In light of the research conducted by the Henri Capitant Association, she notes that “Brexit, as well as the renewal in the European Parliament and in the European Commission offer ample opportunity to move quickly towards the creation of a European Business Code that is legible, demanding and adapted to all types of businesses, and that reflects a real expectation of economic actors throughout Europe; (...) Europe must be an opportunity for all, and the European market cannot be an opportunity only for large groups. To foster the European free trade, everyone must be able to develop their business, regardless of their size.”<sup>18</sup>

## 2.B. Beyond the Franco-German couple

The current reflections described above are fortunately spreading beyond the Franco-German couple.

In its White Paper on the future of Europe, published on March 1, 2017, the Juncker Commission identified, by 2025, a 3<sup>rd</sup> scenario among 5 possible scenarios (entitled “Those who want more do more”), consisting of “a group of countries working together and agreeing on a common ‘business law code’ unifying corporate law, commercial law and related areas, which helps companies of all sizes to operate easily across borders.” And the Commission recalls that it is open to “Member States who wish to do so to move forward together in specific areas” around “coalitions of the willing” agreeing on specific legal modalities of cooperation. This refers primarily to the possibility of resorting to the “enhanced cooperation” mechanism, which has been made more flexible by the Lisbon Treaty.<sup>19</sup> Involving the participation of at least nine Member States, enhanced cooperation can be instituted in all areas of European action, provided that it does not concern an exclusive competence of the EU – as in the case of competition law –, that it makes it possible to strengthen the process of integration of the Union and that it is authorized by the Council of Ministers.

But one could also think of an adoption at the level of the EU itself, at the request of the European Council and therefore of the governments, even if it means facing the unanimity rule. In this respect, it would be mortifying for

the Union if the Franco-German impetus did not serve the objective of integrating the business laws of all the Member States that so desire. France and Germany are only strong when they open a new path, open to other countries, without the risk of appearing to their neighbors as a closed club of two members. It is therefore most welcome that the aforementioned deliberation of the Franco-German Assembly of February 6, 2020 mentions, beyond the concrete ambition of drafting a Franco-German business code, “the objective of codifying the entire European business law” in the longer term. In any event, the coming years will be decisive.

## 3. Drafting

How should such a European Business Code be drafted? It will be up to the governments of the Member States of the Union to decide, if necessary, in favor of such a project and, if so, to decide on the drafting process.<sup>20</sup> We will therefore limit ourselves here to presenting the proposal for a European Code prepared by the Association Henri Capitant in partnership with the *Fondation pour le droit continental*. The elaboration of this project within the Association Henri Capitant is based on codification (A) and is part of a vision<sup>21</sup> of what could be a more integrated European business law (B).

### 3.A. Codification

The choice of codification is due to its intrinsic qualities, described in depth by Michel Grimaldi, who notes that continental law – unlike the common law – is not part of a culture of litigation, and its codification greatly facilitates both material and intellectual accessibility: “material, because it is easier to grasp when it is contained in a statute or in a code rather than when it must be extracted from a set of decisions; intellectual, because it is easier to understand when it is formulated in general and abstract terms rather than when it is wrapped up in the facts of a particular case”.<sup>22</sup>

The codification exercise relies on the drafting of a predictable law, which can be known without any court involvement, and whose application is therefore unexpensive, because it prevents litigation. It is the guarantee of an accessible and intelligible law, responding to a democratic imperative. And it is the vector of a balanced law, that takes into consideration economic efficiency, but knowing how to introduce a reasoned dimension of protection of the weak parties.

20. Even with regard to the draft Franco-German code, the principle of which has been noted (see above, no. 14), the precise modalities for the organization of the work of the “Harmonization of French and German Business and Bankruptcy Law” working group are, to date, unknown.

21. See M. Lehmann, ‘Braucht Europa ein Handelsgesetzbuch?’, ZHR, 181 (2017) 9-42; M. Lehmann, ‘Das Europäische Wirtschaftsgesetzbuch – Eine Projektskizze’, GPR 6/2017, p. 262 et s.; M. Lehmann, J. Schmidt et R. Schulze, ‘Das Projekt eines Europäischen Wirtschaftsgesetzbuchs’, Zeitschrift für Rechtspolitik, 2017, n° 8, p. 225 et seq.; *Le projet d’un Code européen des affaires, 7es Journées franco-allemandes de l’Association Henri Capitant*, vol. 34, ed. SLC, 2020.

22. See, M. Grimaldi, ‘Le droit continental face à la mondialisation’, *Études à la mémoire de Bruno Oppetit*, Litec, 2009, p. 293 et seq.

18. See, V. Gomez Bassac, ‘Rapport sur l’élaboration d’un Code européen des affaires’, 8 juillet 2019, and the related press release.

19. Art. 20 TEU and art. 326 and f. TFEU.



It is sometimes said that codification is a “French specificity” that should not be brought to the level of the Union (at the risk of awakening the demon of Napoleonic conquests, which exported the Civil Code by force of bayonets?). This criticism is surprising, to say the least.

On the one hand, the vast majority of Member States belong to the civil law tradition. Indeed, since the departure of the UK, only three out of 27 belong to the common law tradition: Cyprus, Ireland and Malta, which have only 6.5 million inhabitants out of a post-Brexit total of 446 million.<sup>23</sup> There can therefore be no serious concern that the prospect of adopting a Business Law Code within the Union would disregard “the different legal systems and traditions of the Member States” (Article 67 TFEU). On the contrary, codification could be a marker of a European legal culture, of a way of thinking and writing the law, to give it a rational structure and systematicity that it badly lacks.

On the other hand, the advantages of a codification of business law are so great that the world’s leading economic power, albeit a common law power, has codified its commercial law via the UCC: while an eminent French comparatist has doubted that this is a code in the strict sense<sup>24</sup>, a US jurist readily sees in it the triumph of a Romanist technique of codification, inspired by France, the virtues of which he doesn’t fail to emphasize!<sup>25</sup>

This is to say that it is permissible to dream of the adoption, one day, of a blue and gold Code whose aim will be to increase the legibility of EU law and to give it a new meaning in the eyes of the EU businesses.

### 3.B. The vision

The vision of the Association Henri Capitant is that of a Code, i.e. “all the legal provisions relating to a special subject or collected by the legislator”<sup>26</sup> or, according to the French Legal Vocabulary, “the coherent set of rules governing a subject (...) (generally according to a systematic plan)”.<sup>27</sup> The project might appear at first sight to be impossible to carry out, or to be too time-consuming; it must be, however, a general direction, an objective to

be reached, which should inspire the European legislator in its quest towards “Better Lawmaking”.

The choice is that of embracing the perspective of a European entrepreneur wishing to trade in the EU, in a defragmented internal market, with other businesses. Its scope covers general commercial law,<sup>28</sup> market law, e-commerce law, corporate law, secured transactions, enforcement procedures, insolvency law, banking law, insurance law, financial market law, intellectual property law, labor law and tax law.

The scope of the project might evolve depending to the constraints and priorities of the European legislator,<sup>29</sup> provided that an overall coherence is preserved.

While the nature and content of the work on the project will inevitably differ according to the subject matter, given the heterogeneity of the *acquis communautaire* and the distribution of competences between the Member States and the Union, it is apparent that the areas that have been neglected by the EU up to now (secured transactions, insurance contracts, etc.) would not require simply a rational consolidation, but a truly creative endeavor. The effort of codification-compilation is certainly useful to respond to the lack of accessibility of the law, but it would not be sufficient for the emergence of a truly European market. In particular, it will be necessary to propose new contractual instruments that meet the needs of EU businesses: the need for an adapted corporate form could be met by a new European Simplified Corporation (ESC)<sup>30</sup>; financing needs could be met by a new type of European loan, which could be secured through a Euro-mortgage, a Euro-pledge or a Euro-guarantee; insurance needs could be met through a European insurance instruments, etc.

The work of the Association aims at the elaboration of uniform substantive rules (of “regulations” and not of simple “directives”) likely to wield an influence even beyond the Euro zone. Ideally, such a Code would be fully general, completely replacing national laws and interpreted uniformly by the ECJ.<sup>31</sup> In practice, the form will differ from subject to subject. In the area of anti-competitive practices, and since this is an exclusive competence of the EU, it will be particularly important for the Code to replace national laws, in order to remedy the current overlap of legal regimes. In banking, corporate or secured transactions law, on the other hand, the Codes will not aim to suppress national laws but rather to enrich them with new instruments. It will therefore be necessary, on a case-by-case basis, to consider this articulation of legal

23. See previously, on this question, the reflections of M. Bussani, ‘Faut-il se passer du common law (européen)? Réflexions sur un Code civil continental dans le droit mondialisé’, *RIDC*, Jan. 2010, p. 7 et seq. Comp. the figures of the University of Ottawa study in Étude du Conseil d’État, ‘L’influence internationale du droit français’, La Documentation française, 2001, p. 21 and 22: civil law was then, in its pure state, the system of almost 24% of the world’s population, while only 6.5% of this population lived under a pure common law system.

24. See, D. Tallon, ‘Le Code de commerce uniforme des États-Unis’, *RIDC*, 1971, p. 617 et seq., according to whom the UCC “is not a code and even less a Commercial Code” because, rather than a systematic overhaul of the entire law or a rebirth of commercial law in a common law country, it would reflect an “abdication of lawyers before practice” and a putting together of a series of often pre-existing uniform acts.

25. See, William D. Hawkland, ‘The Uniform Commercial Code and the Civil Codes’, *Louisiana Law Review*, volume 56, Number 1, Fall 1995. Comp. M. Franklin, ‘On the legal method of the uniform commercial code’, 16 *Law & Contemp. Prob.*, 330, 333 (1951), citing the work of the Julliot de la Morandière Commission.

26. See, *Dictionnaire d’E. Littré*, 3<sup>rd</sup> entry.

27. See, *Vocabulaire Juridique de l’Association Henri Capitant*, ed. PUF, Quadriga, 13<sup>th</sup> éd., 2020, See entry ‘Code’.

28. The sales contract has not yet been incorporated into the scope of the project.

29. In particular, the inclusion of social and tax law will not fail to provoke passionate debate. It is nonetheless fundamental to the advent of a single market.

30. Name chosen by the corporate law working group (see our editorial *BJS*, 118q8, June 2018, p 1), in preference to ‘European SAS’.

31. See the penetrating remarks of R. Cabrillac, ‘Un Code européen des affaires, une chance pour la construction européenne’, *D.*, June 13, 2019, No. 15, advocating for a non-optional Code, thus substituting for national laws and whose content could be subject to a preliminary reference for interpretation before the ECJ (art. 267 TFEU).

systems in order to limit their overlap: having recourse to certain guiding principles (derived from national laws and/or the *acquis* without being substituted for them) could then be a median and realistic path. The permeability of the various provisions of a European Code to contractual freedom will also vary. The actors will often have to accept the imperatives of competition law or tax law. But they will have the freedom to choose or not to choose a new European instrument and thus, if necessary, to put these new tools in competition with those provided for by national law: the ESC will thus not drive out the SAS, the SARL, the GmbH or the BV, but it may overshadow them.

## Conclusion

The adventure will readily seem impossible. But did Seneca not say that “it is not because things are difficult that we do not dare, but because we do not dare that they are difficult”? France and the States that share the genius of codification have a responsibility to give this precious gift to Europe, to help it triumph over the shocks that are shaking it. Designing a common European business law and ordering it in a coherent and systematic manner would, finally, give a new meaning and direction to the EU as a whole.



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## Seeking a Balance between Perfect Competition and the Fostering of European Industry

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When Emmanuel Combe, Vice-President of the French Competition Authority, writes that ‘competition policy is, in its own way, a minimalist form of industrial policy’,<sup>2</sup> he underlines the conceptual ambivalence between two types of economic policies: while the former is based on rules aimed at improving market efficiency for the benefit of consumers, the latter is based on political and competitiveness considerations.

Although these two types of policy do not appear to be incompatible from the outset, the Treaty on the Functioning of the European Union (TFEU) nevertheless endorses a form of subordination of industrial policy to competition policy. Indeed, the obligation imposed on the European Union and the Member States to accelerate the adaptation of industry to structural changes should not, however, lead to ‘distortions of competition’.<sup>3</sup> Thus, the discussions, sometimes heated, on the need for the European Union to embrace a realistic approach in a globalized economic environment come up against a body of rules whose status is ‘quasi-constitutional’.<sup>4</sup> The vetoing of the Siemens/Alstom merger by the European Commission has given a new voice to the advocates of a more assertive European industrial policy.

The implementation of the European Union’s competition policy is essentially entrusted to the European Commission by Articles 101 to 109 of the TFEU, under the supervision of the Court of Justice of the European Union and is based on three main aspects: (i) the fight against anti-competitive practices, (ii) merger control, and (iii) state aid control. It is these last two instruments that crystallise

the whole debate and could, in our view, benefit from getting some industrial policy coloration.

The introduction of merger control in the early 1990s must be seen in light of the objectives of creating an internal market and fostering European integration, which were initially intended to ensure a balance between the different interests that co-existed within the European Union. Mergers between companies wishing to establish themselves in several European countries could, in some cases, be detrimental to consumers if they resulted in higher prices, a reduced choice of products or hindrance to innovation.<sup>5</sup> Prior control of such operations thus ensured that the positive effects of European integration were not undermined.

The control of state aid is an original instrument, specific to the European Union and introduced by the Treaty of Rome, which also appeared essential in the context of the construction of the common market in that it made it possible, from the end of the 1960s, to prevent Member States from replacing customs duties with subsidies to protect their own companies from competition.

The first observation that can be made is that these two instruments, often presented as being exemplary, were created to govern competition between Member States, in the context of the European integration. But it is from a comparative and more global perspective that the nature and, sometimes, the rigidity of these controls are now called into question. Admittedly, the supporters of a pure and hard competition policy would argue that it ensures stronger legal security, because taking account industrial issues could open the door to political and economic considerations. But why wouldn’t part of the analysis focus on this type of considerations? For example, why not question the consistency of European rules on cartels with the presidential objectives of the ‘France 2030’ plan, in which no less than ten industrial sectors are strongly encouraged to foster joint projects between competitors? Although several adjustments are under discussion,<sup>6</sup> the absence of substantial changes to competition rules since the time of the founding treaties results in the European Union not being sufficiently equipped to respond effectively to the challenges raised by the emergence of certain types of economies, particularly digital ones.

While the lack of homogeneity in the application of competition rules at the global level puts European companies at a definite competitive disadvantage on the international scene (1), the European Union is now showing a

1. The author warmly thanks Louis Bouyala, lawyer, for his valuable contribution.

2. E. Combe, ‘Politique industrielle : oui, mais avec de la concurrence’, *L’Opinion*, 19 May 2020.

3. TFEU, Article 173.

4. Fondation Robert Schuman, ‘Politique de concurrence et Politique industrielle : pour une réforme du droit européen’ (report), January 2020.

5. F. Ilzkovitz and A. Dierx, ‘60 ans de politique de concurrence européenne’, *Revue du droit de l’Union européenne*, 2018.

6. In particular, it is anticipated that the Notice on the definition of relevant markets for the purposes of merger control will be revised (Commission Staff Working Document Evaluation of the Commission Notice on the definition of relevant market for the purposes of Community competition law of 9 December 1997, SWD(2021) 199 final). In addition, a proposal for a Regulation to regulate digital markets is under consideration (Proposal of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), COM/2020/842 final).

real willingness to remedy these distortions, though there is still some room for improvement (2).

### **1. Lack of international homogeneity in the application of competition rules: a definite competitive disadvantage for the European Union on the international scene**

A comparison of the rules applicable in the European Union with those prevailing in the United States or China reveals major imbalances in the implementation of competition rules, which ultimately affect the European Union's competitiveness on the international scene. These imbalances materialise in the area of merger control (A), the predictability of which has recently been put to the test by the possibility for the European Commission to examine transactions below the mandatory notification thresholds (B). A more pragmatic approach should be adopted (C), including in the area of state aid control (D).

#### **1.A. The significant cross-jurisdictional discrepancies in the area of merger control**

In China, merger control falls under the scope of the Chinese anti-monopoly law, adopted in 2008, the spirit of which is diametrically opposed to that underlying the European Union's competition policy. It should be noted, for example, that state-owned enterprises, which 'implement the economic agenda of the Chinese government', are excluded from the scope of the law.<sup>7</sup> The Chinese competition authority was also uncritical of the fact that the 2009 merger between two major players in the telecommunications sector, China Unicom and China Telecom, was not even notified.

The imbalance is all the more marked because the preference given to national companies in China is the result of a resolutely protectionist approach. According to a study cited by the Robert Schuman Foundation, between 2008 and 2013, only 15% of mergers notified in China concerned Chinese companies, while 45% concerned non-Chinese companies. Conversely, over the same period, 47% of mergers notified to the European Commission concerned purely European companies, while only 16% concerned mergers between non-European groups.<sup>8</sup>

While the comparison is, admittedly, a caricature, it nonetheless points to the distortions in competition that European businesses can be the victim of when EU's competition rules are applied rigorously. The most emblematic example concerns the railway sector: while in 2015 the Chinese government supported and insisted on the merger between two state-owned groups in order to create the railway construction giant CRRC, the European Commission prohibited, four years later, the merger between Alstom and Siemens, even though it could have created a

'European champion' in the railway sector. The calls from Member States to consider mergers in a global context, which were already being raised in the early 2010s,<sup>9</sup> multiplied on the occasion of this veto.<sup>10</sup>

The comparison with the United States is not encouraging either. The competition policy pursued by the United States, despite being a pioneer in the dismantling of trusts, appears to be less strict than that of the European Union in terms of merger control. First, certain sectors of activity, such as the postal service or companies belonging to regulated sectors, are exempt from the application of competition law. For example, in the sector of telecommunications, the US Supreme Court ruled in 2004<sup>11</sup> and 2009<sup>12</sup> against the concurrent application of competition law and regulatory law. By comparison, in the European Union, there is no comparable impermeability between these two areas of law, with competition law applying concomitantly with regulatory law. Developments over the last twenty years also suggest a trend towards greater flexibility in the application of merger control in the United States: if the emergence of the US digital giants (Google, Apple, Facebook, Amazon) is on everyone's mind, some studies note that the transport, financial and network industries are considerably more concentrated than fifteen years ago, and attribute this phenomenon to a weakening of the 'antitrust' policy during the 2000s.<sup>13</sup>

#### **1.B. The undermining of the certainty of European merger control by European Commission's review of transactions falling below the notification thresholds**

It must be acknowledged that the successive 'merger' regulations of 1989<sup>14</sup> and 2004<sup>15</sup> can confer almost complete legal certainty to undertakings operating within the European Union. On the one hand, the 1989 regulation set notification thresholds expressed in terms of turnover above which merger operations must be notified to and reviewed by the European Commission prior to their implementa-

7. A. Perrot and others, 'Competition policy and the EU's strategic interests', Report of the Inspectorate General of Finance, April 2019.

8. Robert Schuman Foundation, 'Politique de concurrence et Politique industrielle : pour une réforme du droit européen', (report), 2020.

9. J.-L. Beffa, G. Cromme, 'Compétitivité et croissance en Europe : groupe de travail franco-allemand', (report of the Franco-German working group), 30 May 2011.

10. Information report No. 551, by Mr. Martial Bourquin on behalf of the joint information mission on Alstom, submitted to the French Senate on 6 June 2018, 'Faire gagner la France dans la compétition industrielle mondiale' (free translation: Making France win in global industrial competition); Information report No. 449, by Mr. Martial Bourquin on behalf of the joint information mission on Alstom, submitted to the French Senate on 18 April 2018, 'Siemens - Alstom : pour un géant du ferroviaire véritablement franco-allemand' (free translation: Siemens - Alstom: for a truly Franco-German rail giant).

11. Verizon Communications Inc. v. Law Offices of Curtis v. Trinko LLP (02-682) 540 U.S. 398 (2004): 'When there exists a regulatory structure designed to deter and remedy anticompetitive harm, the additional benefit to competition provided by antitrust enforcement will tend to be small, and it will be less plausible that the antitrust laws contemplate such additional scrutiny.'

12. Pacific Bell Telephone Co. v. Linklinecommunications Inc. (No. 07-512) 503 F. 3d 876.

13. French Treasury Department, report No 232, 'Concurrence et concentration des entreprises aux Etats-Unis' (free translation: Competition and Concentration of Undertakings in the US), December 2018.

14. Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings.

15. Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings.



tion. On the other hand, the main criterion of 'creation or strengthening of a dominant position',<sup>16</sup> which can lead to not take into account real risks arising from certain operations, has been supplemented by a more appropriate analysis of the substantial lessening of competition.<sup>17</sup>

The recent rise of the digital economy has, however, brought to light certain transactions that are sensitive from a competition standpoint; in fact, very often, acquisition targets that are acquired for substantial amounts achieve close to no turnover and therefore fall below the notification thresholds (so-called 'killer acquisitions').

In guidelines detailing the application of a new mechanism known as Article 22 (of Regulation 139/2004), which in practice only allowed Member States to 'refer' transactions falling within the national notification thresholds to the European Commission for examination, the European Commission has stressed that transactions which may be referred are those for which the turnover of at least one of the undertakings concerned 'does not reflect its actual or future competitive potential', giving the example of 'a new entrant that has substantial competitive potential and has yet to develop or implement a business model that generates significant revenues'.<sup>18</sup> Thus, even transactions falling below the notification thresholds can in theory be reviewed if they fall within the above-mentioned fuzzy criteria.

This new practice, which began with the acquisition by the US company Illumina of Grail, an undertaking active in the field of cancer blood tests, has a profoundly detrimental effect on legal certainty, insofar as the use of this tool gives the European Commission the power to carry out a so-called ex-post control of transactions up to six months after they have been carried out, which may lead it to intervene with respect to transactions that have already been closed.

This mechanism should also be seen in conjunction with the provisions of the draft Digital Markets Act (the draft regulation on platforms in the digital sector), which provides for an obligation on gatekeepers to inform the European Commission of any transaction 'involving another provider of core platform services or of any other services provided in the digital sector',<sup>19</sup> irrespective of whether the European merger control thresholds are exceeded.

Thus, the original balance between the search for a competition model with a high degree of legal certainty aiming to preserve free and undistorted competition in the internal market and the need for economic pragmatism, on a case-by-case basis, appears particularly fragile.

### 1.C. The European Commission's substantive review of transactions is stricter than that carried out by its counterparts

In most jurisdictions, merger control is carried out *ex ante*, i.e., the competition authorities conduct a prospective analysis of the competitive effects of the transaction on the basis of a file notified prior to the transaction. Within this framework, the authorities may, when competition problems are identified, condition their clearance decision to 'remedies', which can be either structural (essentially asset disposals) or behavioural (such as changes in contracts, access to technology or the severance of links with competitors).

Where the European Commission stands out from its counterparts is in its greater tendency to make merger approvals conditional on remedies of a structural nature and thus, at times, to render meaningless the synergies that a merger between two companies could have created. In one of its sets of guidelines, the European Commission stresses that only structural remedies allow to 'prevent, durably, the competition concerns which would be raised by the merger as notified, and do not, moreover, require medium or long-term monitoring measures'.<sup>20</sup> Thus, less than 20% of the transactions conditionally approved by the European Commission in 2017 and 2018 were subject to behavioural commitments, compared to around 80% in China over the same period.<sup>21</sup> Beyond the fact that this approach imposes strong constraints on European companies and can lead to irreversible consequences in case of poor market anticipation, since 2010, the divestiture of strategic assets to remedy competition concerns has been carried out in nearly 50% of cases to the benefit of non-European competitors.<sup>22</sup> This means that many assets, often of high quality, have left the European industry as a result of a merger often intended to strengthen the industry. The Commission is also regularly criticised for not taking sufficient account of the efficiencies resulting from the transactions and, *a contrario*, for overestimating the potential detrimental effect on competition. Thus, in 2016, in the telecommunications sector, the European Commission authorized the combination of the third and fourth largest operators in the Italian telephony market, on the condition that the divested assets allowed a new operator to enter the market. The Commission has thus authorised the move from four to three operators on this market... on condition that the remedies imposed allow the entry of a fourth operator.<sup>23</sup> One might therefore question the economic relevance of a magic number of telecom operators per Member State.

16. Article 2 of Council Regulation (EEC) No 4064/89 of 21 December 1989.

17. Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004/C 31/03).

18. Commission guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases, 31 March 2021.

19. Article 12 of the Proposal for a Regulation of the European Parliament and of the Council on fair and competitive markets in the digital sector, 15 December 2020.

20. Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004.

21. Report of the Inspectorate General of Finance 'Competition policy and the EU's strategic interests', Anne Perrot et al, April 2019.

22. *Ibid.*

23. European Commission decision of 1 September 2016, *Hutchinson 3G Italy/Wind/JV*, COMP/M.7758.

In this respect, we concur with the French Senate's views that the structural remedies imposed on undertakings are too burdensome and would leave them with the following dilemma: either to give up on mergers or to do so at the cost of divesting too many assets, undermining their ability to fully compete with their international competitors.<sup>24</sup>

#### 1.D. The competitiveness gap resulting from an unprecedented review of state aid measures

The differences in economic governance between the European Union, China and the United States are more radical when it comes to granting public subsidies to undertakings. Indeed, European law establishes a general principle of prohibition of state aid, which is rarely shared by its trading partners in other countries. However, the distortions of competition here are not quite of the same nature as in merger control: state aid raises competition problems when some governments subsidise their domestic undertakings to protect them from foreign competition, or grant aid to attract foreign investors.

In the West, it is common knowledge that the Chinese state unreservedly supports its industrial flagships, through subsidies, sometimes hidden, state bank loans or equity investments. For example, the 75 billion dollars in aid received by Huawei from the Chinese state has enabled it to become the world's leading equipment manufacturer and to develop its 5G telecommunications network. More generally, recent European studies show that 80% of the subsidies received by a sample of Chinese companies would not have been declared compatible with European regulations on state aid.<sup>25</sup>

Across the Atlantic, the concept of state aid is simply not studied and does not meet any particular legal qualification. Some scholars explain this phenomenon by the specific characteristics of common law, which is not fundamentally interested in public property and the common good.<sup>26</sup> Thus, the exceptional aid of nearly 50 billion dollars granted in 2008 to the car manufacturer General Motors and the nationalisation that accompanied it would probably not have been compatible with the provisions of the TFEU relating to state aid, particularly in view of the strongly competitive automotive industry.

In the European Union, state aid is prohibited by way of principle, although this principle is not absolute: state aid may be declared compatible with the internal market on the basis of sectoral derogations, rescue and restructuring objectives, or when it is social in nature or contributes to an objective of general interest. The European Commission's use of state aid rules to pursue a form of industrial

policy has long appeared timid and has been more akin to a desire to preserve entire sectors of the economy when they were under threat. We recall, for example, the approval of aids granted to a total of 112 European banks during the 2008 financial crisis, the simultaneous authorisation of six support mechanisms in the electricity sector to guarantee security of supply in six Member States in 2018, or more recently the approval of France's plan to grant the airline Air France up to 7 billion euros in liquidity support.

On the whole, whether it is a question of merger control or state aid, international comparisons reveal the distortions of competition that European companies can face at the global level, which are at the origin of the re-current criticisms addressed to the European Commission by certain Member States.

#### 2. Recent developments in EU competition policy: state of play and prospects for improvement

In the wake of the veto on the Siemens/Alstom operation, there has been a very strong movement of criticism of the European Commission and its chronic 'allergy' to the emergence of the famous 'European champions', and even more so of 'national champions'. While it is now necessary to reflect on the virtues of taking industrial issues into account in merger control, and some avenues of reflection are presented below (A), there are already signs of recent developments, albeit unequally convincing, undertaken at the European level to take account of competitiveness considerations (B).

##### 2.A. The need to take account of industrial issues in merger control

The Siemens/Alstom case was particularly significant because it was a major transaction for the European industry. According to the European Commission, the asset divestiture proposals made by the parties were not commensurate with the competition concerns identified, since such divestitures would not have enabled a buyer to compete fully with the new group resulting from the merger. Although this decision seems to be based on a rigorous analysis of the competitive situation on the relevant markets, in particular on the absence of short-term entry by Chinese players and the presence of certain European competitors on the rail signalling market, the total failure to take account of European industrial issues has shocked economic and political observers, some of whom have described this decision as a 'gross error'.<sup>27</sup>

There is therefore increasing pressure from the political class for the law to be more supportive of the industry in merger matters. Such tensions resurfaced in the context of the announcement of the merger between TF1 and M6 in France. While the government declared that it

24. Information report on behalf of the Economic Affairs Committee and the European Affairs Committee on the modernisation of European competition policy, Submitted to the French Senate on 8 July 2020.

25. State aid support schemes for RDI in the EU's international competitors in the fields of Science, Research and Innovation, Bird & Bird, November 2015.

26. Fondation Robert Schuman, 'Politique de concurrence et Politique industrielle : pour une réforme du droit européen' (free translation : Competition and Industrial Policies : for a reform of European law), 2020.

27. Remarks by Bruno Le Maire, French Minister of the Economy, Finance and Recovery, 'Alstom-Siemens : Le droit européen de la concurrence doit se renouveler', *Le Monde*, 5 August 2019.

‘needs strong groups in the private audiovisual sector’<sup>28</sup> and that the *Conseil supérieur de l’audiovisuel* (the French broadcasting authority) was pleased that certain players were ‘getting into shape’<sup>29</sup> to face the US digital giants, the former President of the French Competition Authority considered that ‘it is complicated to even contemplate such a transaction’, adding that ‘with 70% of the market share in the field of audio-visual advertising, this operation, in principle, seems impossible.’<sup>30</sup>

How can these two theoretically incompatible objectives be reconciled? One way of reconciling compliance with competition rules and the consideration of industrial issues could be to advocate for (i) a relaxation of the European Commission’s policy when imposing remedies, and (ii) the need for a more dynamic approach to relevant market definition.

The pitfalls of behavioural remedies, such as access obligations, non-discrimination, licensing of industrial property rights, as opposed to structural remedies, are that they entail cumbersome monitoring and can potentially be unsuitable for future market conditions, which partly explains the European Commission’s reluctance to make them its preferred instrument. It is nevertheless essential to acknowledge that almost 50% of the assets sold in the context of structural remedies are sold to non-European players.

A first option could therefore be to make greater use of behavioural remedies, while requiring that they present solid guarantees of effectiveness, as the French Competition Authority does for example, even if it means allocating more resources to monitoring such remedies, and require that they be revised in the event of changes in the initial competition data. A second option could be to make the acceptance of behavioural remedies conditional on the implementation of structural remedies if the former fail after a test period. In practice, it would be only if the behavioural remedies are *ultimately* no longer able to remedy the competition concerns identified that the European Commission should ‘trigger’ the implementation of the proposed structural remedies.

As for the equally fundamental step of delimiting the relevant markets, i.e. the product and geographic perimeter on which the competitive analysis is carried out and which makes it possible ‘to identify those actual competitors of the undertakings involved that are capable of constraining those undertakings’ behaviour and of preventing them from behaving independently of effective competitive pressure’,<sup>31</sup> the European Commission would gain by adopting a more dynamic approach.

To date, sectoral analyses have been conducted almost exclusively in connection with merger notifications. However, the inherently evolving nature of markets requires them to be studied on a more regular basis, following the example of the French Competition Authority, which publishes numerous ‘opinions’ in which large-scale markets such as transport, energy, telecommunications and, more recently, FinTechs are studied in depth. Such an initiative would enable the European Commission to assess the competitive dynamics of ‘new’ markets in greater detail and thus improve the quality of its prospective thinking when analysing the competitive effects of a transaction. Companies would gain in clarity because they would be able to anticipate the analyses that the European Commission could undertake in the event of a merger on one of these markets.

## 2.B. Encouraging but insufficient recent developments

While the recent developments in the treatment of subsidies from third countries and state aid rules seem appropriate, a regime of control of foreign direct investments (‘FDI’) is still struggling to emerge at European level.

### - An appropriate response to foreign public subsidies

In October 2020, the Council of the European Union stressed the need for an ambitious European industrial policy to make the EU industry more sustainable and globally competitive. In the conclusions presented on 16 November 2020, the European Commission was asked to update its industrial strategy, taking into account the changing competitive landscape.<sup>32</sup>

This is what the European Commission did on May 5, 2021, when it also published a proposal for a regulation on foreign subsidies distorting the internal market.<sup>33</sup> Among the new tools proposed to effectively address this phenomenon, the European Commission suggests the introduction of a notification procedure to examine operations involving ‘financial contributions’ granted by public authorities of non-EU countries, provided that these contributions (whose definition is similar to that used by Article 107 of the TFEU for state aid control) have exceeded 50 million euros over the previous three years. This new mechanism, which covers all third countries, including China and the United States, would be superimposed on the traditional merger control mechanism and would be subject to individual review.

This is a strong proposal, currently under discussion in the European Parliament, which takes into account the real risks of distortion of competition in the internal market, and which could moreover be likely to remedy the pitfalls of previously adopted measures. Indeed, this proposal follows the adoption of a regulation in 2016 which mo-

28. Remarks by Roselyne Bachelot, French Minister of Culture, 31 August 2021.

29. Remarks by R.-O. Maistre, President of the Conseil supérieur de l’audiovisuel. *Les Echos*, ‘Les pouvoirs publics voient d’un bon œil la fusion TF1-M6’, 8 September 2021.

30. Comments by Isabelle de Silva, former President of the French Competition Authority: ‘TF1-M6, Gafa, lobbies : les dernières confidences de la présidente de l’Autorité de la concurrence’, *L’Express*, 11 October 2021.

31. Commission Notice on the definition of the relevant market for the purposes of Community competition law, (97/C372/03), 9 December 1997.

32. Council of the European Union, ‘A recovery advancing the transition towards a more dynamic, resilient and competitive European industry’, 16 November 2020.

33. European Commission Press Release, ‘Commission proposes new Regulation to address distortions caused by foreign subsidies in the Single Market’, 5 May 2021.



dernised the European Union's anti-subsidy mechanism, notably by giving the European Commission extended powers of investigation. Nevertheless, two years later, while Chinese foreign investment in France increased by nearly 86%, mainly in the industrial sector,<sup>34</sup> the European Union criticized the complexity of the investigations, their length and the thoroughness of the investigation.<sup>35</sup>

The effectiveness of this control, however, presupposes that foreign companies are transparent about the subsidies they receive. In this respect, the European Commission's power to impose substantial fines in the event of failure to notify (up to 10% of the company's total turnover) should be a sufficient deterrent.

*- Convincing developments in the field of state aid*

The European Union seems to be on the right track regarding state aid. The modernisation of the control mechanisms enabled it to better target aid towards activities that contribute to growth and competitiveness, while better balancing the positive and negative effects of the granted aid. Various general block exemption regulations have made it possible to considerably broaden the scope of cases in which notification is not required,<sup>36</sup> while another has set a *de minimis* threshold below which the granted aid is not subject to the provisions of the TFEU.<sup>37</sup> Moreover, the European Commission's actions seem to be increasingly aligned with the European Union's industrial strategy. For example, the new revised guidelines on regional state aid dated 29 April 2021 aim to consider the new political priorities linked to the European 'Green Deal'.<sup>38</sup>

In response to the increasing calls to foster EU's industrial strategy, the European Commission has recently started using the so-called Important Projects of Common European Interest (IPCEI) tool. This tool, which since the ratification of the TFEU has enabled it to declare IPCEIs compatible with the internal market,<sup>39</sup> had remained largely unused. It was through a communication dated June 2014<sup>40</sup> that the European Commission sought to encourage the use of IPCEI, presented as projects making a 'very significant contribution to the economic growth, employment and competitiveness (...) of the Union' and located in areas

as varied as electronics, energy or transport.

Confronted with the prolonged inertia of the Member States in the face of a tool which they had nevertheless requested, the European Commission took the initiative of identifying in 2018 three strategic value chains: microelectronics, high-performance computing and batteries, to which were subsequently added, among others, autonomous and connected vehicles, medicine and personalised health. Thus, with a view to pursuing an 'integrated industrial policy in the era of globalisation',<sup>41</sup> nearly €1.75 billion in aid was granted in 2018 to an IPCEI concerning microelectronics under the French Nano 2022 plan. More recently, the European Commission approved the project, common to twelve Member States, to pay nearly €3 billion in aid to support research and innovation in the entire battery value chain.<sup>42</sup> By putting the legal tools at its disposal at the service of the Union's strategy, the European Commission is showing encouraging pragmatism.

*- Timid proposals for foreign direct investment*

Although not strictly speaking a matter of competition rules, the control of foreign investment is an important aspect of the European Union's competitiveness on the international scene. In this area, the lack of a centralised mechanism leads to a fragmentation of control within each of the Member States, to the detriment of the preservation of the Union's strategic interests.

In view of these shortcomings, a Regulation establishing a framework for screening foreign direct investment in the Union was adopted in March 2019.<sup>43</sup> The objective of this regulation is to provide a European framework for the screening of foreign investments from third countries, by instituting in particular (i) procedures for cooperation between the Member States and the European Commission with regard to foreign investments likely to undermine security or public order and (ii) the possibility for the European Commission to issue non-binding opinions when it considers that projects of interest to the European Union are likely to be affected.

While this harmonisation is welcome, in that it creates an embryo of co-operation at Community level, it is regrettable that the most essential aspect, namely reciprocity in screening between the European Union on the one hand and third countries on the other, has not been addressed in the regulation. For example, the situation in the European Union is incomparable with the severity of the foreign investment screening mechanism in the United

34. Baker McKenzie study, Chinese FDI in Europe and North America 2018, January 2019.

35. Report of the Fondation pour l'innovation politique, Europe in the face of American and Chinese economics nationalism: foreign anti-competitive practices, November 2019.

36. Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the TFEU; Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the TFEU.

37. Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the TFEU to *de minimis* aid.

38. Guidelines on national regional aid (2021/C 153/01), 29 April 2021.

39. Article 107(3)(b) of the TFEU.

40. Communication from the Commission, Criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest (2014/C 188/02).

41. Communication from the Commission, Criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest (2014/C 188/02).

42. Press Release, European Commission, 'State aid: Commission endorses €2.9 billion public support from 12 Member States for a second pan-European research and innovation project covering the whole battery value chain', 26 January 2021.

43. Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for screening foreign direct investment in the Union.



States, which is the responsibility of the Committee on Foreign Investment in the United States (CFIUS). First, the criteria for CFIUS to examine the compatibility of a foreign investment with national security are excessively broad: the transactions covered are those with 'any foreign person' that could result in 'control of a U.S. business'. Second, CFIUS' jurisdiction was extended in 2020 to non-controlling foreign investments where, for example, sensitive personal data or the so-called 'critical' infrastructure is involved, without further clarifications. Finally, this mechanism sends the final decision to the highest level, namely the US Presidency. This is how President Donald Trump stopped certain investment projects, such as the takeover of IBM's laptop section by the Chinese company Lenovo.

From our point of view, it would be desirable for the European Union to centralise the filtering of foreign investments, which could present interesting complementarities with the mechanism for controlling subsidies from third countries.

In any case, the strengthening of the European Union's competitiveness in this area can only be achieved through the adoption by its counterparts of a level playing field, or at the very least comparable rules.

### Conclusion

There are multiple calls for changes in the implementation of the European Union's competition rules. The economist Bruno Alomar thus considered in 2017 that 'the evolution of the European Union over the last twenty years is unquestionably marked by a shift in the cursor, to the benefit of law and to the detriment of politics, in particular with regard to the core of European competences: competition'.<sup>44</sup> In the context of the important industrial issues we will encounter in the future, it is urgent to also think of competition tools as means of conquest outside of the European Union and to ensure that European companies cease to be good pupils in a world in which industrial and political considerations now override the competition ones.

44. 'La concurrence et l'Europe : droit ou politique', *La Tribune*, 18 May 2017 (free translation).



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## The Future of the Banking Union after the Pandemic

Almost a decade ago, the creation of the Banking Union in the midst of the euro crisis was hailed as the confirmation of the deepest commitment of the Member States to European integration. The transfer of supervisory powers to the ECB was meant to tackle the crisis by enabling risk-sharing with regard to the banking sector, which would have been the first time ever in the single market. Eventually, it did not materialise, and risk-sharing remains the impediment to the completion of the Banking Union as intended. The single banking market has not integrated, if anything, to its potential. Today, risk-sharing features prominently as the main component of the European response to yet another existential crisis, the pandemic emergency. This contribution aims in this context at relating the discussion about the future of the Banking Union with that of the whole Union after the pandemic. They are inextricably linked as contingent on the development of a European stabilisation capacity to safeguard integration and its achievements. In turn, such capacity requires enduring risk-sharing, which has been continuously elusive in the history of European integration. Member States are keen to share the benefits of integration but reluctant to share its risks and costs. Therein lies the question for its future.<sup>1</sup>

### 1. Origins

At the Euro Summit of 28 June 2012, the leaders of the euro area were confronting an existential crisis for the Monetary Union. Successive measures to address the sovereign debt crisis since the financial assistance to Greece two years before had failed to halt contagion across Member States. The contagion had now spread to Italy and Spain, as the interest rates of their national debt reached unsustainable levels. It gave rise to fears

that further financial assistance was becoming unfeasible and that sovereign defaults could follow. At dawn of 29 June, a short but convoluted statement announced the most consequential move in European integration since the Maastricht Treaty was signed in 1992: the transfer of the national competences of banking supervision to the ECB. It was the first pillar of a Banking Union.<sup>2</sup>

According to the statement, the decision of the Euro Summit aimed at breaking the vicious circle between banks and sovereigns. This had arisen out of the widespread rescue of the banking sector with public funds since the great financial crisis of 2008, which created a mutual dependence between the soundness of banks and the finances of Member States. The way forward would be to allow the European Stability Mechanism (ESM) – which was created as an intergovernmental organisation outside the Treaty to provide assistance to Member States – to recapitalise directly euro area banks.<sup>3</sup> Since the ESM is owned by all euro area Member States, there would be joint liability for rescuing banks. It would thus avoid worsening the finances of those Member States with an undercapitalised banking sector. This represented a momentous step towards risk-sharing, which previously seemed anathema in the Monetary Union. It created however a dilemma between addressing the crisis and preventing “moral hazard” on the part of banks and their respective Member States, which could conceivably lack the incentives to make the most out of European funds. The answer was that European liability then required European control. Accordingly, the Euro Summit decided that the ability of the ESM to directly recapitalise banks was dependent on the establishment of a Single Supervisory Mechanism (SSM) involving the ECB. A European authority would have the mandate to supervise the banking sector in the interest of all Member States and respective taxpayers. There was thus a quid pro quo: risk-sharing among Member States implied the loss of national sovereignty over the banking sector.<sup>4</sup>

The significance of this move in European integration cannot be underestimated. It aimed at addressing one of the main flaws of the framework of both the single financial market and the Monetary Union. The great financial crisis of 2008 first laid bare this flaw: despite the deeper financial integration since the introduction of the euro in 1999, there were no powers to safeguard financial stability

1. Opinions expressed are those of the author and not necessarily those of the ECB. Parts of this contribution recall arguments made extensively in Pedro Gustavo Teixeira, *The Legal History of the European Banking Union* (Hart Publishing 2020).

2. Euro Summit, Statement, 29 June 2012, available at [www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/ec/131359.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/131359.pdf).

3. The establishment of the ESM in 2013 was preceded by an amendment to Article 136 TFEU, which enabled the Euro Area Member States to establish a mechanism to safeguard the stability of the euro area by granting financial assistance subject to strict conditionality. This amendment confirmed the compatibility of the ESM with European law, including the bail-out prohibition, as the Court concluded in the *Pringle case* (case C-370/12). See, Alberto de Gregorio Merino, ‘Legal Developments in the Economic and Monetary Union during the Debt Crisis: The Mechanisms of Financial Assistance’ (2012) 49 Common Market Law Review 162–164.

4. On the initial concept of the Banking Union, see Jean Pisani-Ferry and Guntram Wolff, ‘The Fiscal Implications of a Banking Union’ (Bruegel 2012) Bruegel Policy Brief.

at the European level. All the crisis prevention and management functions remained at the national level, including banking supervision, lender of last resort by central banks, deposit insurance schemes, and the capacity to recapitalise banks with public funds. Member States resisted any transfer of powers to the European level which could impinge on their national fiscal sovereignty. As a result, when the great financial crisis hit European shores, Member States rescued their domestic banks with public funds and ring-fenced their markets, ending up by renationalising the single financial market. The crisis thus exposed the illusion that the single market was a positive sum game, where only benefits were shared with no risks or costs for Member States, their citizens, depositors, the economy, and fiscal resources.<sup>5</sup> Similar dynamics were at play in the sovereign debt crisis. The so-called “no bail-out clause” under Article 125 of the TFEU was interpreted as preventing any risk-sharing in the Monetary Union. As a disciplinary device, Member States were solely responsible for their finances and for safeguarding the financial stability in their jurisdictions. This helped create the vicious circle mentioned above between banks and sovereigns, which fuelled the euro crisis. The Monetary Union was left without stabilisation capacity at either the European or national levels, which provoked an existential crisis.<sup>6</sup>

The preservation of the euro thus required European solutions. The Banking Union, a permanent and complete transfer of powers close to the core of national sovereignty, emerged then out of the existential need for risk-sharing among Member States. As Luuk van Middelaar has put it, Member States coupled a decision to address the crisis in the short-term – the direct recapitalisation of banks by the ESM – with a long-term commitment to European integration: the creation of the Banking Union.<sup>7</sup>

## 2. Risk-Sharing

The foundation of the Banking Union was the transfer of banking supervision competences to the ECB. It was based on an enabling clause of the Treaty – Article 127 (6) of the TFEU – which reflected the compromise at the time of the preparatory works of the Maastricht Treaty not to combine central banking and supervision in the ECB, but to leave open that possibility in the future. The activation of this clause defined the “genetic code” of the Banking Union. It implied the centralisation of exclusive competences in an independent European authority, which applies and enforces directly European law. Its legal acts are subject to the direct jurisdiction of the European Court of Justice and have thus primacy over national authorities and laws. This blueprint for the exercise of banking su-

pervision by the ECB was followed for the second pillar of the Banking Union, a Single Resolution Mechanism (SRM) with a Single Resolution Board (SRB) as its European authority. Given the different legal basis – Article 114 of the TFEU – the SRB was established as a European agency, which requires the involvement of the Commission and Council in its decision-making.<sup>8</sup>

The change operated by the Banking Union involved, therefore, enclosing the banking sector within a European institutional and legal order detached from national competences. This implied, in turn, the Europeanisation of the banks subject to the jurisdiction of the ECB and the SRB. The part of the single banking market within the Banking Union was unified as a result. This has several implications, including the end of the relationship between home- and host-country authorities, as competences are centralised in European authorities. Most importantly, Member States can no longer intervene either to protect or rescue their respective banking sectors.<sup>9</sup>

Given that risk-sharing was the main rationale for the Banking Union, how does it then operate within it? The straightforward answer is that the original quid pro quo did not materialise as initially envisaged: there was no transition from the Member States’ liability for the banking sector to European liability. The possibility that the ESM could recapitalise banks directly was not utilised and later discarded. Instead, the regime introduced by the Bank Recovery and Resolution Directive, and reflected in the Regulation establishing the SRM, provided the framework for private – rather than public – risk-sharing.<sup>10</sup> The use of public funds to rescue banks became effectively prohibited. Banks which are failing or likely to fail are mandatorily subject to resolution, if the SRB considers that there is public interest. Otherwise, the banks are subject to liquidation. Once a bank enters into resolution, it is mandatory in nearly all cases to bail-in its shareholders and creditors. In other words, the liabilities of the bank are cancelled by a decision of the SRB in order to recapitalise the bank. For this purpose, it was the first time that European law provided instruments to an authority to affect private property rights. The SRM also comprises a Single Resolution Fund to finance the resolution actions by the SRB. It is supported by annual levies imposed on banks and not by public funds. Therefore, the Banking Union operated a shift towards the privatisation of risks in the banking sector. The possibility of Member States

5. On the management of the financial crisis in Europe, see Teixeira (n 2) 135–149.

6. For an account of the rationale of the “no bail-out clause”, see Vestert Borger, *The Currency of Solidarity* (Cambridge University Press 2020) 114–129. On the constitutional implications of the crisis, see Agustín José Menéndez, ‘The Existential Crisis of the European Union’ (2013) 14 *German Law Journal* 453, 453.

7. See, Luuk van Middelaar, *Quand l’Europe improvise: Dix ans de crises politiques* (GALLIMARD 2018) 96–100.

8. On the controversial use of Article 114 of the TFEU as the legal basis for the SRM, see Tomi Tuominen, ‘The European Banking Union: A Shift in the Internal Market Paradigm?’ (2017) 54 *Common Market Law Review* 1359, 1374–1377.

9. On the mechanics of Article 127 (6) of the Treaty, see Teixeira (n 2) 223–225. On its history, see Harold James, *Making the European Monetary Union: The Role of the Committee of Central Bank Governors and the Origins of the European Central Bank* (Belknap Press of Harvard University Press 2012) 313–317.

10. The only narrow possibility left under the Bank Recovery and Resolution Directive (Article 32.4) for a state to inject public funds in a bank is the so-called “precautionary recapitalisation”. It is enabled outside the resolution process for those banks deemed solvent by the supervisory authority, but which require capital to address hypothetical future losses as determined by the adverse scenario of a stress test.

intervening to stabilise markets was replaced by making market participants liable for the risks of an integrated market. The prohibition of public bailouts removed the mutual dependence between banks and Member States.<sup>11</sup>

Together with the resolution regime under the SRM, it was intended that risk-sharing would also take place through a European Deposit Insurance Scheme (EDIS), the third pillar of the Banking Union. A EDIS would aim at ensuring equal treatment among depositors throughout the Banking Union, independently of the national location of banks and deposits. It would thus also sever the remaining link between banks and Member States since deposits remain protected by national schemes with divergent features. This implies that, depending on the level of protection at the national level, the soundness of banks remains somewhat correlated to their location. Moreover, it also implies that the implicit value of deposited euros may vary within the Monetary Union across Member States, as demonstrated by the Cypriot and Greek banking crises where capital controls and restrictions on deposits were imposed. Accordingly, EDIS would mutualise the risks regarding the loss of deposits in the Banking Union. However, the prospect of its establishment has faced significant obstacles from Member States. Even though EDIS would be filled by contributions from banks, the main concern is that it could lead to the transfer of funds between Member States and create moral hazard. Funds originating from sound banks could end up being used to cover deposits from weak banks, which could in turn reduce their incentives to reduce risk-taking.<sup>12</sup>

Thus, the Banking Union moved away from its original rationale of enabling joint liability of Member States. The legal and institutional Europeanisation of the banking sector did not lead to public but to a form of private risk-sharing in the form of the resolution regime of the SRM. This was justified by several reasons, notably the political will to prevent further public bailouts after the extensive rescues during the great financial crisis, as well as the preservation of national fiscal sovereignty and avoiding moral hazard among Member States. Any form of mutualisation of risks, which could entail the distribution of funds across Member States, thus remains an obstacle to further integration as confirmed by the difficulty in setting up the EDIS so far. This is revealing of the far-reaching interpretation of the bail-out prohibition under Article 125 of the TFEU. It is fundamentally why the Banking Union remains incomplete and has not led to a truly integrated European banking sector: risk-sharing is still elusive in European integration.<sup>13</sup>

### 3. The Legitimacy Question

The main argument against risk-sharing between Member States is that it would mean a profound transformation in the integration process. It would imply accepting the reallocation of budgetary funds from one Member State to another. This presupposes, not only the strengthening of political integration, but also new sources of supranational democratic legitimacy to underpin such use of funds. It would therefore require a new social contract among Member States beyond the current Treaty. Until then, the argument goes, only regulatory/technocratic competences, without impacting on public funds, could be transferred to the European level.<sup>14</sup>

In this context, the Banking Union represented a step forward in the integration process: the transfer of competences which – albeit regulatory/technocratic in nature – were previously close to national sovereignty, given their implications for the banking sector and economy of Member States. Therefore, the exercise of European banking supervision and resolution powers potentially would have, more than ever before, a distributive impact for Member States. This institutional novelty raised the question of how to make the exercise of such powers legitimate on a continuous basis. The answer provided by the founding regulations of the SSM and the SRM was to anchor the legitimacy of the Banking Union on the combination of several mechanisms.<sup>15</sup>

The first was to narrow the scope of the powers of the ECB/SSM and the SRB as much as possible to the application and enforcement of European law. Except for organisational purposes, the ECB/SSM and the SRB have no generic regulatory powers. Moreover, there are legal safeguards obliging the ECB/SSM and the SRB to consider both European and national interests in their decisions. For example, Article 1 of the SSM Regulation sets as an objective of the ECB's supervisory tasks to contribute to financial stability both in the Union and in each Member State. This implies that the judicial review of supervisory and resolution decisions is an important source of legitimacy of the Banking Union.<sup>16</sup>

The second related mechanism was to provide the ECB/SSM and the SRB with a strong institutional independence equivalent to that of the ECB's monetary policy. They cannot seek nor take instructions from any European

11. See, Karl-Philipp Wojcik, 'Bail-in in the Banking Union' (2016) 53 Common Market Law Review 91, 106–112.

12. For an early proposal for EDIS, see Daniel Gros and Dirk Schoenmaker, 'European Deposit Insurance and Resolution in the Banking Union' (2014) 52 Journal of Common Market Studies 529, 529.

13. In this sense, see M Draghi, 'Risk-reducing and risk-sharing in our Monetary Union', 11 May 2018, available at [www.ecb.europa.eu/press/key/date/2018/html/ecb.sp180511.en.html](http://www.ecb.europa.eu/press/key/date/2018/html/ecb.sp180511.en.html).

14. On the obstacles to fiscal integration in the Monetary Union, see Alicia Hinarejos Parga, 'Fiscal Federalism in the European Union: Evolution and Future Choices for EMU' (2013) 50 Common Market Law Review 1621, 1633–1641.

15. For an analysis, see Gijsbert Ter Kuile and Willem Bovenschen, 'Tailor-Made Accountability within the Single Supervisory Mechanism' (2015) 52 Common Market Law Review 155; Rosa M Lastra, 'Accountability and Governance Banking Union Proposals' (Amsterdam : Duisenberg School of Finance 2012) DSF Policy Paper 30 8–9.

16. See, Recital (56) and Article 1 SSM Regulation, and Recital (24) and Article 6.3 and 6.5 SRM Regulation. On the legal safeguards as a legitimacy mechanism, see also the findings of the German Constitutional Court in its Banking Union judgement, BVerfG, Urteil des Zweiten Senats vom 30 Juli 2019, 2 BvR 1685/14, Rn. (1–320), available at [www.bverfg.de/e/rs20190730\\_2bvr168514.html](http://www.bverfg.de/e/rs20190730_2bvr168514.html).



an institution, national government or authority, or any other public or private body. Supervisory and resolution decisions should be based on technical expertise in line with European law, thus not reflecting political and distributive choices. As in the case of monetary policy, the transfer of competences from the national to the European level is, in itself, a reason for the independence of a policy function. Supranational powers cannot be exercised to the benefit of any Member State or group. It is particularly so regarding policies with potential distributive effects like banking supervision and resolution which required before the Banking Union a proximity to national political institutions. Otherwise, they lose credibility and at the limit may lead to disintegration. The Banking Union thus led to the insulation of banking supervision and resolution from both national and European politics as a source of legitimacy.<sup>17</sup>

The third mechanism consisted of creating, for the first time, a framework of multi-level accountability for the exercise of European competences: the ECB/SSM and the SRB are directly accountable to the European Parliament and the Council - in line with the principle that accountability for the exercise of European competences is at the level of the EU institutions - but they are also obliged to report to national parliaments. National parliaments are thus involved in the regular monitoring of the functioning of the Banking Union. The recitals of the SSM and SRM regulations justify their role due to the potential impact that supervision and resolution decisions may have on public finances, institutions, and the markets in Member States. Accordingly, the distributive effects of banking supervision and resolution in individual Member States justify a closer connection than before between the exercise of European competences and national political institutions.<sup>18</sup>

Together, these three mechanisms are the main sources of legitimacy of the Banking Union, which may be characterised as being largely an “output legitimacy”: the exercise of competences by a public authority is legitimate if it demonstrates that it has delivered the results intended by the legislator.<sup>19</sup> In this sense, European banking supervision and resolution are legitimate policy functions to the extent that they comply with European law, their respective decisions are based on expert judgements independent from politics, they provide explanations on policy outcomes to the European Parliament and Council, and also report to national Parliaments on their activities. The aim is to mitigate concerns about the distributive implications of ECB/SSM and SRB decisions at both the European and national levels.

17. See, Article 19.1 SSM Regulation and Article 47 SRM Regulation. On the concept of supervisory independence, see Michael W Taylor, Marc G Quintyn and Silvia Ramirez, ‘The Fear of Freedom : Politicians and the Independence and Accountability of Financial Sector Supervisors’ *IMF Working Papers* WP/07/25 34 et seq.

18. See, Recital (56) and Article 21(3), SSM Regulation, and Recital (43) and Article 46(3), SRM Regulation.

19. On this concept, see Joseph HH Weiler, ‘In the Face of Crisis: Input Legitimacy, Output Legitimacy and the Political Messianism of European Integration’ (2012) 34 *Journal of European Integration* 825.

Arguably, such mechanisms only provide an incomplete answer. Output legitimacy is not sufficient to provide a lasting basis for risk-sharing between Member States, which also requires democratic control as an “input legitimacy”: in other words, the setting-up of European political structures to underpin such risk-sharing. Therefore, the future of the Banking Union, including the development of risk-sharing instruments such as EDIS, will require arrangements which ensure a broader legitimacy. Until then, the Banking Union will remain primarily based on these sources of legitimacy and thus incomplete.<sup>20</sup>

#### 4. The Response to the Pandemic

Following the sovereign debt crisis, the European response to the pandemic emergency in early 2020 represented another steppingstone in risk-sharing among Member States. At the summit of 21 July 2020, the European Council agreed on a Next Generation EU (NGEU) programme to support the recovery of Member States. The Council then adopted an exceptional financial assistance mechanism to address the economic and social consequences of the pandemic, as an expression of solidarity among Member States, and based on Article 122 of the TFEU. It included a European Union Recovery Instrument to be financed up to an amount of 750 billion euros. It authorised the Commission to borrow the necessary funds through the issuance of bonds in financial markets. Under the NGEU, this amount comprises 390 billion euros of grants and 360 billion euros of loans to Member States. The programme is exceptional and temporary. It is limited to supporting the recovery from the crisis and is subject to conditionality as to the objectives that Member States may pursue with the funds. Moreover, the access to EU funds is subject to the condition that Member States are found to be compliant with the “rule of law”.<sup>21</sup>

Along with this European fiscal response, the ECB enacted in March 2021 a Pandemic Emergency Purchase Programme (PEPP), which reached in June 2021 an envelope of 1,850 billion euro.<sup>22</sup> In the context of the Banking Union, the ECB/SSM adopted for the first-time centralised decisions to address a crisis. It took several supervisory measures to ensure that the banking sector would contin-

20. On the weaknesses of the democratic legitimacy of the Banking Union and arguing that accountability cannot compensate for it, see Christoph Möllers, ‘Some Reflections on the State of European Democracy with Regard to the Banking Union and the ECB’ in Stefan Grundmann and Hans-W Micklitz (eds), *The European Banking Union and Constitution : Beacon for Advanced Integration or Death-Knell for Democracy?* (1<sup>st</sup> edn, Hart Publishing 2019) 213–218; Mark Bovens and Deirdre Curtin, ‘An Unholy Trinity of EU Presidents?: Political Accountability of EU Executive Power’ in Christian Joerges, Damian Chalmers and Markus Jachtenfuchs (eds), *The End of the Eurocrats’ Dream: Adjusting to European Diversity* (Cambridge University Press 2016).

21. See, 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. For a critical reflection, see Paul Dermine, ‘The EU’s Response to the COVID-19 Crisis and the Trajectory of Fiscal Integration in Europe: Between Continuity and Rupture’ (2020) 47 *Legal Issues of Economic Integration* 337.

22. On the legal dimension of PEPP, see Annelieke AM Mooij, ‘The Legality of the ECB Responses to COVID-19’ (2020) 45 *European law review* 713.

ue to fund the economy. The measures included allowing banks to use capital and liquidity buffers, providing capital and operational relief, and restricting the distribution of dividends to shareholders to increase their capacity to absorb potential losses. The ECB/SSM estimated that such measures would enable banks to potentially finance the economy with up to 1,800 billion euro of loans.<sup>23</sup>

The European response to the pandemic thus stands in sharp contrast to the management of the sovereign debt crisis. Instead of being largely based on intergovernmental arrangements outside the Treaty, as was the case previously, the assistance to Member States is now provided directly by the Union through the institutions and provisions of the Treaty. The “no bailout clause” of Article 125 of the TFEU was not considered – as it was for the sovereign debt crisis – an impediment to tackle the crisis at the European level within the Treaty.

In this context, the European Union Recovery Instrument provides significant risk-sharing between Member States. The EU bonds will be serviced by the EU budget, which implies that all Member States will contribute to it. Furthermore, such risk-sharing has also significant redistributive effects. The funds will be made available in the form of both grants and loans to Member States. The allocation key used for their distribution is asymmetric among Member States, depending on the impact of the pandemic on their respective economies and national incomes. In other words, the financial assistance under the NGEU is geared towards the most impacted and more vulnerable Member States. Similarly, as mentioned above, the actions of the ECB, both as central bank of the Monetary Union and banking supervisor of the Banking Union, had considerable economic and financial impact, further reinforcing the overall response.<sup>24</sup>

The pandemic emergency has thankfully not turned into a repeat of the dynamics underpinning the sovereign debt crisis, notably the fragmentation of the single market and the vicious circle between the soundness of sovereigns and banks. The fact that there was a resolute fiscal, monetary, and supervisory response by European institutions was arguably decisive in this respect. The NGEU programme funded by European debt assuaged concerns about the capability of Member States to cope with the consequences of the pandemic, and without putting into question the sustainability of national finances. The PEPP programme of the ECB ensured the continued transmission of monetary policy and equally favourable financing conditions to the economy across the euro area. And the centralised supervisory measures of the ECB/SSM enabled banks to act more as shock absorbers

rather than amplifiers, as was the case previously, and provided a level playing field among banks, preventing stigma related to their place of origin. All in all, it appears that decisive risk-sharing and actions at the European level made a difference compared to the management of the sovereign debt crisis. In this context, it is revealing that there was no recourse to the intergovernmental ESM to issue European debt, and that Member States have not taken up the loans made available by it at the time of writing.<sup>25</sup>

This leaves the question of whether, and to what extent, the response to the pandemic implies an irreversible step of the Union towards risk-sharing. The very large issuance of European bonds under the NGEU from 2021 until 2026, using a wide range of maturities of up to 30 years, and to be repaid until 2058, certainly represents an extensive commitment to a common sovereign safe asset: a financial asset which is low risk, highly liquid, and largely disentangled from the sovereign risk of individual Member States.

The advantages of such an asset are that it provides long-term, stable, and low-cost funding to the economic and social recovery, while being a concrete political symbol of the solidarity between Member States. At the same time, it supplies the Monetary Union and the single market with what is missing to underpin financial integration compared to the United States, i.e., a genuine European safe asset for investment, storing of value, and pricing benchmark for riskier assets. Albeit temporary and justified by an unprecedented emergency, this demonstrates the feasibility and the value of a safe asset in providing stability for the Union in its various dimensions: economic, financial, social, and political.<sup>26</sup>

## 5. The Future of the Banking Union

The Banking Union is the most advanced form of European integration with a unified system of law, institutions with exclusive competences and enforcement authority, subject to judicial review by the Court, and accountable to the Parliament and the Council. It operated a ‘fusion of markets’, whereby market participants are indistinguishable by their origin and subject equally to European law. Its emergence confirms the supranational nature of European integration, as described by Jean Monnet: “to adopt common rules which our nations and their citizens pledge themselves to follow, and to set up common institutions to

23. For the justification of the ECB’s supervisory measures, see Andrea Enria, ‘An evolving supervisory response to the pandemic’, 1 October 2020, available at [www.bankingsupervision.europa.eu/press/speeches/date/2020/html/ssm.sp201001\\_1-ef618a5a36.en.html](http://www.bankingsupervision.europa.eu/press/speeches/date/2020/html/ssm.sp201001_1-ef618a5a36.en.html).

24. See the analysis of the potential redistributive effects of the NGEU by Clemens Fuest, ‘The NGEU Economic Recovery Fund’, CESifo Forum 22 (1) (2021) 3.

25. On the role of the ESM in the response to the pandemic, see Menelaos Markakis, ‘The Reform of the European Stability Mechanism: Process, Substance, and the Pandemic’ (2020) 47 *Legal Issues of Economic Integration* 350, 376–382.

26. On the features and motivation for a European safe asset, see the report by the European Systemic Risk Board, ‘Sovereign bond-backed securities: a feasibility study’, January 2018, available at [www.esrb.europa.eu/pub/task\\_force\\_safe\\_assets/shared/pdf/esrb.report290118\\_sbbs\\_volume\\_1\\_mainfindings.en.pdf](http://www.esrb.europa.eu/pub/task_force_safe_assets/shared/pdf/esrb.report290118_sbbs_volume_1_mainfindings.en.pdf). For a comparative analysis of the possible models for a safe asset, see Sebastian Grund, ‘The Quest for a European Safe Asset—A Comparative Legal Analysis of Sovereign Bond-Backed Securities, E-Bonds, Purple Bonds, and Coronabonds’ (2020) 6 *Journal of Financial Regulation* 233.

ensure their application".<sup>27</sup> However, although it is a creation of European law, its legal and institutional construction is not sufficient by itself to maintain integration.<sup>28</sup>

The paradox of the Banking Union is that, even though risk-sharing stood at its origin, it is now the main obstacle for its completion. Nearly ten years after the Euro Summit of 28 June 2012, the Banking Union remains incomplete. Despite the centralisation of banking supervision and resolution competences under European law and institutions, the full features of a single banking market have not yet been achieved. Although the resilience of the banking sector has improved, there is still considerable market segmentation along national borders. The disintegration since the great financial crisis of 2008 has not been significantly reversed. For example, the share of exposures of banks to counterparties in other Member States within the Banking Union has hardly changed since its creation. There is also limited consolidation between banks based in different Member States. And banking groups continue to expand their business through subsidiaries rather than through branches and the direct provision of services, as intended by the single passport introduced as early as 1993. The implication is that the capital and liquidity of banks is still largely retained in the Member States where they operate, rather than being freely transferrable across the Banking Union. This questions the centralisation of banking supervision and resolution, which aimed at eliminating the home- and host-country frictions to integration. The whole potential of a single banking market is thus untapped.<sup>29</sup>

Thus, the future of the Banking Union rests on effective risk-sharing mechanisms. The first one is the establishment of EDIS as its third pillar. The European mutualisation of deposit insurance would remove one of the potential hindrances to the free flow of capital and liquidity of banks across Member States' jurisdictions. The protection of deposits would no longer relate to a bank having sufficient capital and liquidity at the local level. Moreover, as indicated above, it would further detach the soundness of banks from Member States, given the uneven dependability of national deposit insurance schemes.

The second risk-sharing mechanism would be the emergence of a permanent European safe asset. Banks are linked to the Member State of their location since they are obviously exposed to developments in the economy, and because they typically hold national sovereign debt

as their safe asset. They remain thus vulnerable to adverse developments in sovereign risk, which can increase their funding costs, affect their profitability, and ultimately their sustainability. A European safe asset - such as the EU bonds issued in the context of the NGEU - would therefore enable banks to reduce their exposure to purely national risks and diversify their balance sheets. The stability of the banking sector would no longer be correlated to that of individual Member States. In other words, it would be the conclusive step to economically and financially "Europeanise" banks beyond the legal dimension operated by the Banking Union. The original objectives of the Euro Summit of 28 June 2012 would finally be fulfilled.<sup>30</sup>

### Conclusion: European Integration beyond the Pandemic

What can this brief analysis of the Banking Union bring to the understanding of the wider European integration process?

There was a succession of three epochal crises in Europe in little more than a decade: the great financial crisis in 2008, the sovereign debt crisis starting in 2010, and the pandemic emergency starting in 2020. The management of these crises can be depicted as an evolutionary - learning by doing - process. In the first one in 2008, there was no risk-sharing among Member States or meaningful actions at the European level. All competences for safeguarding financial stability remained national. As a result, the single banking market quickly disintegrated as Member States took uncoordinated measures and ring-fenced their respective jurisdictions to contain contagion, with arguably all remaining worse off compared to a European response. The ensuing sovereign debt crisis was managed through a piecemeal approach, as it intensified towards more and more coordinated actions and risk-sharing among Member States. Such approach was however largely based on intergovernmental and temporary arrangements outside the Treaty, a combination of national solutions, including the setting-up of the ESM. This reflected the reluctance of Member States to commit to any permanent European stabilisation capacity. Such hesitation arguably magnified the crisis over time until it reached its peak. The start of the Banking Union with the transfer of supervisory competences to the ECB was then justified to enable the direct recapitalisation of banks by the ESM, which eventually did not come to pass. Finally, the so far effective response to the pandemic was by contrast fully based on the actions of European institutions within the Treaty, including risk-sharing with redistributive effects among Member States.

27. Excerpt from a quote from Jean Monnet of the Joint declaration adopted by the Action Committee for the United States of Europe, Bonn, 1st and 2nd June 1964, FJME, AMK 16/6/210. See, Gilles Grin, 'Shaping Europe: The Path to European Integration According to Jean Monnet' (Jean Monnet Foundation for Europe 2017) Debates and Documents Collection Issue 7 12.

28. On the original supranational intentions in the drafting of the Treaty of Rome, see Julio Baquero Cruz, *What's Left of the Law of Integration?: Decay and Resistance in European Union Law* (Oxford University Press 2018) 13-14.

29. For an overview of the challenges to the Banking Union, see Andrea Enria, 'How can we make the most of an incomplete banking union?', 9 September 2021, available at [www.bankingsupervision.europa.eu/press/speeches/date/2021/html/ssm.sp210909-18c3f8d609.en.html](http://www.bankingsupervision.europa.eu/press/speeches/date/2021/html/ssm.sp210909-18c3f8d609.en.html).

30. On the arguments for a European safe asset to promote and safeguard financial integration, see Vítor Constâncio, 'Completing the Odyssean journey of the European Monetary Union', 17 May 2018, available at [www.ecb.europa.eu/press/key/date/2018/html/ecb.sp180517.en.html](http://www.ecb.europa.eu/press/key/date/2018/html/ecb.sp180517.en.html); and the report by the European Systemic Risk Board, 'Sovereign bond-backed securities', 2017, available at [www.esrb.europa.eu/pub/task\\_force\\_safe\\_assets/html/index.en.html](http://www.esrb.europa.eu/pub/task_force_safe_assets/html/index.en.html).

There are many lessons to draw from this sequence of approaches to crisis management. The most apparent is that European integration is not sustainable without being underpinned by a stabilisation capacity. Until then, integration will be incomplete and can be reversed rather suddenly. Paradoxically, since this fact is only apparent with a crisis, integration will then progress from one crisis to another. It takes a threat for Member States to realise that in order to reap the benefits of integration, they must then share its risks and costs. It is in this sense that European integration is inherently crisis prone.<sup>31</sup>

The setting-up of a true stabilisation capacity, however, cannot be merely underpinned by output legitimacy, which has been the dominant mode in the integration process thus far, including regarding the Banking Union. As integration deepens in the Union, there will be more and more redistributive implications across Member States. Depoliticised technocracy will likely not be sufficient to justify them, particularly during crises.<sup>32</sup> And if such implications are not construed as fair and legitimate, it will give rise to contestations and ultimately the rejection of the European project.

Accordingly, further sources of supranational democratic legitimacy need to be explored for the future of the Union. This corresponds very much to the blueprint already depicted in the Van Rompuy Report of 2012 titled “Towards a Genuine Economic and Monetary Union”, and also the Five Presidents’ Report of 2015 on “Completing Europe’s Economic Monetary Union”. These reports envisage over time a Union comprising an Economic Union, a Financial Union, and a Fiscal Union, which would be underpinned by democratic accountability.<sup>33</sup> Ultimately, however, an integrated Europe cannot be insulated from democratic politics. Political integration between Member States will likely become the end-destination.

Therefore, this contribution may well conclude with another quote by Jean Monnet hinting at his intuition on the ultimate form the Union might take: “marché unique - monnaie unique - fédération”.<sup>34</sup>

31. On this constitutional transformation process, see Edoardo Chiti and Pedro Gustavo Teixeira, ‘The Constitutional Implications of the European Responses to the Financial and Public Debt Crisis’ (2013) 50 *Common Market Law Review* 683.

32. See in this sense, Jürgen Habermas, *The Lure of Technocracy* (Polity 2015) 9–16.

33. See, ‘Towards a Genuine Economic and Monetary Union, Report by President of the European Council Herman Van Rompuy’, 26 June 2012, available at [consilium.europa.eu/media/21570/131201.pdf](http://consilium.europa.eu/media/21570/131201.pdf); and ‘The Five Presidents’ Report: Completing Europe’s Economic and Monetary Union’, 22 June 2015, available at [ec.europa.eu/info/publications/five-presidents-report-completing-europes-economic-and-monetary-union\\_en](http://ec.europa.eu/info/publications/five-presidents-report-completing-europes-economic-and-monetary-union_en).

34. Quote from ‘Note de réflexion de Jean Monnet’, USA, avril/mai 1952, FJME, AMM 3/3/6. See, Grin (n 27) 27.





Brad Smith • President of Microsoft

## Shaping the Rules of our Digital Future: is the EU on the Right Track?

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By all accounts, one of the leading concerns of EU regulators today is to foster an economy that is both innovative, and sustainable. But let us start with an assessment of the problem: the EU is still arguably a powerhouse when it comes to innovation, but a very rapidly declining one, with very few big tech companies originating here, and generally 85% of growth happening outside. As President of Microsoft, one of the leading global Big Tech companies, you should probably have an opinion about this issue: looking at the EU over the past decades, what went wrong, and what does our future look like to you?

To answer your question, I would like to first note that there really are two different aspects of the technology sector that people often miss or fail to put together. The first one is what people look for: something that is called a tech company, that looks like a tech company, a counterpart of Apple, Microsoft, Google or Facebook. But this is a relatively short list, even globally, and it obviously is a much shorter list yet in Europe. This doesn't mean that they do not exist: think of SAP, which continues to be a global leader, Spotify, which is the world's leading audio streaming and media services provider, or Ericsson, which proved to be strong year in and year out. But then there's the second part of the technology sector, which really refers to the use of technology by every other industry.

What will always be important for Europe, and every other economy really, is to encourage the development of the tech sector, but then also use its technology solutions to foster innovations and the competitiveness in the other industries it has a strong foothold in.

Now I do think that to foster the tech sector, one needs to strive to create a healthy ecosystem for the creation of new businesses. Technology is a sector where companies are born and then grow quickly; indeed, unicorns are sometimes only 3 to 5 years old. In this respect, I should note that we observe across Europe more of a spirit of innovation and entrepreneurialism now than ten years ago.

It suffices to visit, for instance, the Web Summit in Lisbon to witness what a centre of creativity looks like. When I visit our accelerators in places like Berlin or London, or indeed Station F in Paris, I see that the European economy is much healthier now. New businesses will emerge from these initiatives.

If you ask what was wrong in the past, my answer would be that 30 years ago, creative people in Europe felt like they had to leave Europe if they wanted to build a new business. This is no longer the case, and this change is certainly the source of long-term strength.

But I also think that it is important for Europe to stay focused on the second aspect of the technology sector as well. The economic strength of Europe in the world really derives from a wide number of industries, in which European companies have deep domain expertise. Think for instance of the pharmaceuticals or the chemical industry, machine tools or manufacturing processes. It is important to keep in mind that every one of these industries are being transformed by digital technology and the use of data.

And what about the second aspect of EU's 'Fit for 55' and other policy objectives: fostering an economy that is also inclusive and sustainable? On the sustainability side, for instance, the EU has recently launched multiple initiatives aiming to foster a tech / digital industry that participates in "addressing the main challenges of our time", while also making sure that technology "serves the people and adds value to their daily lives". What is your assessment of these initiatives – is the EU likely to strike the right regulatory balance? And what is the role of Big Tech in this respect?

Mostly I would say that EU's regulatory agenda is going in the right direction. There will always be some issues that will strike some, perhaps including us or me personally, as more challenging, or problematic. There are always a lot of details that require a lot of thought. But if you look at the European commission's agenda, it is very ambitious, it is very broad and I think it is focused on the problems that matter, that concern consumers and businesses in Europe and indeed consumers and businesses around the world.

We at Microsoft believe that technological innovation has a direct role to play, not only in driving economic growth, but also in the other two aspects, supporting greater sustainability and helping shape more inclusive communities. Our Tech Fit 4 Europe pledge outlines the opportunity we see here. We need: trustworthy tech, in line with the rule of law, tech enabling green growth, in support of Europe's energy transition, and responsible tech that empowers Europeans to control their data and benefit from their data.

I think that Europe is already a more inclusive society than most, but obviously every society constantly faces new challenges from this perspective. I believe that digital inclusion, in particular, refers to the objective of ensuring

that everyone has access to broadband devices and skills. Europe today is in a better shape than most places in the world when it comes to broadband coverage, but there are still pockets in some rural parts of Europe where it is not yet ubiquitous or inexpensive, and the pandemic has highlighted a more pronounced digital divide that we can no longer ignore. Not everyone has access to inexpensive devices yet.

In this respect, technology companies have the resources and expertise to help bridge this divide. For instance, Microsoft is working to bring free broadband access to disadvantaged students in multiple parts of Europe, and we continue to make accessibility a priority for our products and services, for instance through our Microsoft Airband Initiative. We have also recently launched an “Open Data Campaign”, to help address the looming “data divide”. This campaign directly contributes to Europe’s digital transformation efforts by helping organizations of all sizes realize the benefits of data and the new technologies it powers – something President von der Leyen has pointed out can be a “powerful engine for innovation and new jobs”.

Perhaps even more importantly, digital skills need to be expanded. Indeed, as digital transformation brings socio-economic changes in the labour market, there is no doubt that education and lifelong learning will be critical to build workers’ resilience. Ensuring that everyone can benefit from the economic opportunities in the new digital economy should be a key priority for Europe, and the focus for schools and programs should really be on the development of both technical and soft skills to empower people to benefit from the opportunities today’s digital world has to offer. According to some studies, 42% of Europeans still lack the digital skills required by the labour market. The EC is fully aware of the problem and has proposed a new European Skills Agenda as well as a “Pact for Skills”, mobilizing stakeholders to create better training opportunities. Here again, we believe that technology companies can play an important role. Take the example of the AI school that Microsoft has recently opened in France, which offers the opportunity to 24 students from a variety of backgrounds to embark on a free, intensive seven month-course, during which they learn invaluable AI development skills, followed by 12 months of employment at participating companies. This could be a model of what technology companies can do. Or take LinkedIn Learning, which provides a means for people to bridge the gap between the skills they have and those they need in order to create new job opportunities for themselves.

When it comes to sustainability, it seems clear to me that what Europe must focus on is to make digital technologies as a whole more sustainable. Technology companies can play an important role in this respect; indeed, we at Microsoft have committed to be carbon negative by 2030, water positive by 2030 and zero waste by 2030.

The first priority in this respect is to ensure that all of

our data centres are using green energy. But technology companies alone cannot control the outcome here. Like other users, our data centres and our offices around the world simply plug into the local grid, consuming energy from a wide variety of sources. What we can do is to influence the way in which we purchase energy, and our existing commitment to execute power purchase agreements equivalent to 100% of our energy needs by 2025 has already positioned Microsoft as one of the largest purchasers of renewable energy in the world. Going forward we will be innovating our energy purchasing contracting to help bring more zero carbon energy onto the grid and move more high carbon intensity energy off the grid. But the grid is not the only infrastructure that Microsoft can help decarbonize: through new digital tools we can also assist our customers in decarbonizing their own operations and infrastructure, and this is indeed the motivation of our Microsoft Cloud for Sustainability initiative.

A second aspect is that we also have to focus on making our services more energy efficient, our devices easier to recycle, with less carbon impact in terms of the emissions that result from the components and the like they go into it.

**You have recently stated, in your capacity as President of Microsoft, that Big Tech companies have to assume the responsibility for the world that their technologies helped create. You have also voiced support for the EU initiatives on the regulation of digital ‘gatekeepers’ or intermediaries. But what is, in your opinion, the main societal concern and worry with these companies today, and what kind of regulation seems appropriate?**

Certainly, when one focuses on the market, and not the other issues that we have just discussed, there is an understandable and even a natural focus on the role of gatekeepers that in effect create bottle necks in the economy. The history of competition law shows that this concern is actually a recurring theme. We saw it for oil and steel companies, and for railroads, telephones, as well as for computing. The essence of the problem is that when there is a very small number of companies with very large economic power, these companies in effect stand between other businesses and their customers and consumers. So, when these other businesses have to go through this layer or gate to reach their customers, concerns about undue economic influence can arise.

Taking a step back and putting the debate in a broader historical perspective, the issues around companies like Google are really just the latest chapters in a long story that has chapters before it on Microsoft and IBM and AT&T and US Steel and Standard Oil and others as well. Indeed, we, at Microsoft, have been part of this story as well. A lot of the antitrust cases against Microsoft in the 1990 and the early 2000s were fundamentally focused on a concern that Windows, for example not only was a gateway, but also enabled us to be a gatekeeper and potential bottleneck for new services, for instance new media play-

ers, consumer email services or browsers.

Today, businesses, software developers, content creators, advertisers, retailers, or others, increasingly rely on a handful of platforms to reach their customers. In other words, the platforms intermediate their customer relationships and set the rules of the market. The question therefore is whether the digital gateways look like bottlenecks. App stores might fit the profile. An app store, almost by definition, is among the most quintessential of examples: it is like a tunnel that all of the apps have to flow through, and the tunnel has become a bottleneck for the digital economy, with app stores on popular mobile operating systems sometimes unfairly burdening app developers and excluding innovative apps. So, I think it's appropriate that regulators are now taking steps to clear the bottleneck, clear out the blockage that this model has created. Digital advertising is another area where an enormously elaborate web of technology and contractual practices have created not just a gate but a real bottleneck between people who want to purchase advertising and people who have advertising inventory to sell, be it in the area of search ads, display ads, and on the Internet as a whole.

But what regulators concluded, correctly in my view, is that the issues raised by gatekeepers today need solutions both in competition law and in new types of laws and regulations. This is why we support the latest efforts by the EU to adopt forward-looking regulation (e.g., the proposed Digital Markets Act) to ensure that these gatekeepers operate fairly and do not undermine the ability of others to compete. Very often, competition cases begin before regulators have a clear sense of the remedy they want to pursue. What is different this time is that the remedy is clear. There are clear regulatory measures, and we understand that some of these will likely also be applied to our products like Windows. But regulators have a set of measures they want to see in place, they know that they want this to apply to all the digital gatekeepers so they certainly face a choice: either spend a decade and bring a number of different competition law cases, which are going to move slowly, to finally get to the last chapter of the book after the equivalent of several hundred pages of reading, or just go directly to the last chapter a lot faster. I think that the second option is the one that regulators are likely to prefer, and I think that it is indeed important to address these issues rapidly.

**And yet, the proposed DMA was met with a lot of criticism, both by businesses and in the academia. Some argue that it actually tackles the wrong problem by trying to improve the competition potential of gatekeepers' business users through data sharing, rather than promoting competition from other tech giants and complementary products and services. Microsoft, on the other hand, has been vocal in supporting the EU approach – why is that?**

I think that two separate questions need to be distinguished: what is the problem regulators want to tackle, and what is the appropriate solution?

The problem, in my view, is that intermediaries with significant market power are able to in effect distort the market and get in the way of a healthy growth opportunity for businesses that want to get their products and services to their customers, consumers or other businesses. Sometimes this power manifests itself through prices that are monopolistic in economic terms: this is part of the debate arising around app store pricing. Other times it is reflected in their capacity of self-preferencing, and I definitely think that there are examples of such behaviour. A third aspect of the problem is gatekeepers being able not only to create bottlenecks, but actually to blockages thwarting market growth. For example, when you force all purchases to be made in an application and deny businesses even the possibility to inform their customers that they can also purchase the goods or services elsewhere, when you put restrictions on the ability of people to create and offer subscriptions services for a portfolio, then you are really cutting back on the natural growth of the market.

So, the problem is multifaceted and once this is recognised, it is easier to understand that the solution should be multifaceted as well. The solution may or may not involving the sharing of data with business customers. But I do think that it's likely to involve drawing some clear lines and putting some practices out of bounds because they do more economic harm than good.

This has also been true for Windows historically. A variety of rules have been imposed on Microsoft that we still follow today, that aim to ensure that we don't create an inappropriate or undue preference or blockage when it comes to products like browsers, music subscription or email services. As a result of various court orders, undertakings, and voluntary principles, Windows is an open platform, and the interfaces used by Microsoft's own software products are open, documented, and available to others. Indeed, the ecosystem enabled by Windows has allowed many leading digital platforms and online services to connect with their users and get a foothold. And look at the services that are popular on Windows right now: the most popular browser is from Google, the most popular music service is from Spotify, the most popular consumer email services is from Google. So, the approach has proven effective in preventing what people were concerned about, that Microsoft could create a preference for its own services in a way that would thwart the opportunities for others. Exactly the same concerns abound today.

But there may be something new about the concerns that we have today. Maybe what the public concern is about this time around is that gatekeepers might stifle the competition in the marketplace of ideas, rather than in the marketplace itself: more political concerns and less purely economic ones.

I think that there are multiple public concerns at the same time, as is apparent from the wide variety of regulatory fields that are rapidly emerging concerning technology companies.

First there is market regulation and competition, the one field we talked about. Then there is digital safety, which is what you refer to in your question. This is a prominent problem in Europe and in almost all of the world, and it does indeed involve some of the same companies that we've talked about. But the issues that we care about from this perspective are quite distinct. In fact, even when it comes to digital safety, we face a multifaceted challenge: we need to protect children, we need to protect against online terrorism and violent extremism, we need to think about hate speech or the spread of disinformation.

But then there is a third concern, which is privacy. Cybersecurity is a fourth. Increasingly, we're also seeing a distinct field, the latest evolution of say telecommunication and connectivity regulation as a fifth. We're seeing a set of national security rules in some places including protection for critical infrastructures, that is a sixth area of concern. And I think that we will also see the emergence of a set of sustainability-oriented regulations as a seventh field.

On any given day, there are seven to eight regulatory fields addressing technology companies. And each regulatory field is a drastically different phenomenon and, to some degree, responds to a different problem.

**On a different topic, Microsoft has recently voiced support for the EU's drive towards a "European digital sovereignty". Microsoft has also stated that "Europe is uniquely positioned, with its history and traditions, to get digital sovereignty right". But what is digital sovereignty all about, and why do you think that Europe can really deliver on its promise?**

Territorial sovereignty as we know it everywhere in the world today was really created in Europe; it came out of the peace of Westphalia and it spread around the world, and I think that Europe is in an excellent position to address the digital sovereignty concerns of the 21<sup>st</sup> century for a couple of reasons.

First it understands the issues well. As I meet with European officials and governments, it is apparent to me that they do have a good grasp of the problem they want to solve. With respect to digital sovereignty, for them it really often comes down to three things: how they protect their national security, how do they protect the privacy and rights of their citizens and how they promote more economic opportunities for their own citizens and businesses. And certainly, enabling Europe to transition to its 'digital decade' requires secure and trusted digital infrastructure and services allowing European businesses and citizens to harness the value of their data. So, Europe has a clear interest in retaining control over its data, and 'digital sovereignty' refers to this self-determination.

I think that Europe is also well-positioned because it's really been at the forefront, especially for the last 30 years, of the evolution of the concept of sovereignty itself, enabling nations to both retain their sovereignty and

collaborate across borders in new ways. The EU is almost certainly the world's best example of a successful model for both retaining sovereignty and setting common rules, and even a common currently transgressing territorial borders. Digital technology, obviously and by definition crosses borders, it does so globally unless a government is able to stop it.

So, with that understanding of the problem and that capacity to foster cross border collaboration, there is a lot that the European governments can work with and build on. This is why we believe that Europe is and will remain at the forefront of this issue. By leading with a rules-based approach, Europe can truly build on digital technology to reap the benefits of the digital economy without compromising on its commitment to competitive and open markets.

**Your answer leads us to the question of the role that the EU could play as a global standard-setter in shaping the future of the digital economy. Indeed, major jurisdictions seem to face deep disagreements about the way in which the digital economy is to be regulated, resulting in an increased role for unilateral regulatory action. But, as Anu Bradford has recently pointed out, in many areas EU regulatory actions enjoy a "Brussels effect", which is due to a unique combination of market forces. Microsoft is a leading example of a company that has decided to apply stringent standards unilaterally set by the EU (e.g., on privacy) to all markets. How do you explain this effect? And do you expect it to last, while the role of standard setter is, naturally, also claimed by other jurisdictions, and especially China, following Xi Jinping's recent 'crackdown' on Big Tech?**

I think that there indeed has been an important and strong "Brussels effect". The European Union, with the leadership of the European Commission, has been very successful in setting norms and even detailed guidelines and regulations that have been applied in Europe and influenced the rest of the world. If you take the GDPR, the regulation spread rapidly around the world in part because there wasn't really any alternative or competing model. So, Europe had the first mover advantage of proposing a model that technology companies rapidly implemented. And it really set the terms of the debate everywhere: any conversation about privacy anywhere would probably start in the first five minutes with a conversation about the GDPR.

The "Brussels effect" is still really significant, but I also sense that the world is changing. And as we look to the period from now to the 2030s, the decade will likely be different from what we have experienced in the past. I think what's important to recognize today is that there are more governments considering similar regulatory proposals or at least the same topics simultaneously. This is very different from the situation of the GDPR, debated roughly a decade ago. Now, take the DMA or the DSA, or any other proposal in Brussels, and you are going to find multiple other jurisdictions debating the very same topics. Indeed, we have entered a new area of international relations for technology regulation, with a more diverse, multipolar



and multifaceted world. The UK has rapidly emerged as a major regulatory force, with London and Brussels really working on similar sets of issues. You see similar actions in the US, very rapid action in China. Those are perhaps at the moment before largest countries where we're seeing regulatory initiative, and I think India easily could join them. But then there is number of other countries as well that are very influential in part because they move quickly and they have capability, for instance Australia, South Korea or Japan, three more countries that are exercising enormous influence. Take South Korea. Its Parliament has already adopted a law on the regulation of app stores, while the EU is continuing to debate the DMA.

So, we are now entering a different era, and I think that the goals that regulators think about should change as a result. The real goal for technology regulation now is to get the balance right, to encourage tech companies to exercise more responsibility and to implement new steps that will ensure that technology is subject to the rule of law. Regulators like being leaders and setting standards, and this is a good thing, but increasingly what we see is more collaboration between regulators and governments across borders. The Brussels effect of the 2030s may not look like the one in the past, i.e., adopting standards and watching others debating the proposal, but talking with other regulators before moving together in concerted actions.

One of the things that is striking to me today is that if I have a conversation with, for instance, a prime minister in one part of the world, they often mention that they had a conversation that same day with the prime minister in another part of the world on that same topic. Today, ideas are moving around and the key to wielding global influence is no longer in waiting until the proposal is ready and suggesting that everyone else copy it, but in being very collaborative and a real thought partner for other governments. And this is indeed what I witness in Brussels, in Paris, in Berlin, in London, in Washington and so on and on.

#### **But not in Beijing?**

The interesting thing in China is if you look at the list of issues, it's exactly the same. If you look at the list of regulatory proposals that are emerging, sometimes they are the same, sometimes they are different. The approach to regulation can vary and is the reflection of the core values and goals of each government.

In this respect, Europe has a natural advantage because European values have so often spread around the world. Everywhere, people and governments talk about their own values, but frankly, if I have a conversation in the US about American values, most of them will be values that were born in ancient Greece, moved to either France or England, and then crossed the Atlantic in the 1700s. To my mind, this gives reason for hope.

I think that European values are fundamentally humanistic, and are the values embraced the most of world's

democracies. Therefore, a world where Europe is not only advancing its own regulatory proposals but doing so in ongoing collaboration with other parts of the world will likely lead to more consistent technology regulation and the enshrining of values that are, for me, timeless, to an ever-evolving technology sector.

**What your answer seems to point to is the need for collaboration especially between 'likeminded' jurisdictions, which raises the question of the relationship between the US and the EU. Clearly, the two still have more in common than driving them apart and share a lot of the values you talked about. One could expect that, on these issues and you would expect that, on these issues, the two would more easily fall in line. But this doesn't seem to be the case now: businesses must deal with the implications of the ECJ Schrems II ruling, and it is unclear whether a convergence is on the horizon. Microsoft, for its part, has recently launched a strong call for a "transatlantic technology alliance", as a path forward for cooperation on democracy, trust and fairness in the digital economy. What is this initiative about, and are you optimistic about the near future?**

In fact, in many ways, I would say that we probably have had more of a transatlantic alliance in area of technology than we sometimes realize or talk about. Maybe there is just a lot that we take for granted, maybe we take too much for granted. There are clearly much more similarities than differences between Europe and North America including the US. There are also some differences. Obviously, there are also differences. For instance, the EU is more comfortable with regulation and less comfortable with letting the market regulate itself, while in the US the opposite is true. But if you look closer to the policy proposals today, coming from the Biden administration, the legislation coming out of the House judiciary committee, and so on, the discussions are actually remarkably similar. Even if on one side of the Atlantic a company is a gatekeeper and on the other side it is an essential trading partner, what regulators are worried about is the same thing: potential bottlenecks in the digital economy.

Challenges arise, on the other hand, when one gets to the issues of privacy, or privacy and national security. We've been in this cycle since 2013 with the Snowden disclosures, with new questions emerging every few years, culminating in the privacy shield being replaced by a safe harbour regime. In 2021, we urgently need a new transatlantic solution.

In my opinion, the path forward is difficult only because people get so absorbed by the differences that they fail to appreciate that similarities are much more important. We urgently need to define some common ground and a compromise, and it should be a matter of weeks or months, because we cannot afford to keep waiting. Coordination on technology governance is thus essential to the future of the transatlantic relationship and is necessary to enable the EU and the US to lead the way towards global regulatory standards.

The technology alliance can begin with identifying our common principles, guided by our shared commitment to democratic values and the responsible use of digital technologies. But much more needs to be done to build public trust in digital technologies, particularly when it comes to the AI and open data. We are encouraged to see that the US administration engages with the EC's legislative proposals on AI, and hope that this might be a foundation for future regulatory cooperation. But the transatlantic alliance must also reinforce our common commitment to open markets, allowing the businesses on the two sides of the Atlantic to grow and thrive. In this respect, more work needs to be done to implement a sustainable solution for transatlantic data flows, to counter the uncertainties created by the Schrems II decision. Ideally, a US-EU agreement would pave the way for a consensus on the movement of data across borders among trusted democratic allies and partners around the world. Another area where more work is needed is in defining common principles for digital trade and rules making technology supply chains more secure and resilient; here again, an alliance between the EU and the US might allow them to jointly advance principles in multilateral forums like the WTO. But for any of this to succeed, industry actors and the civil society must also be involved in the process to develop the new principles, norms and regulations. At Microsoft, we believe that this is a shared responsibility.

**Another issue on which pushing for international multi-stakeholder cooperation seems to be necessary and pressing, and one it is well known that you have a strong personal interest in, is cybersecurity and cyberwarfare. Indeed, there seems to be today a strong political call for greater international coordination on defining the oversight framework of the use of digital technologies in cyberwarfare, as well as the promotion of violent and terrorist content (take, for instance, the Christchurch Call and the even more recent Paris Call). What are, from your personal perspective, and the perspective of a global company such as Microsoft, the main challenges in this respect today? Is the existing international normative framework (e.g., the Geneva conventions) fit for the job, and what other actions need to be taken in your view?**

I think that we need to recognize that we are currently dealing with three types of cyber threats that are probably more connected than we realize. The first one is nation-state attacks, which tend to be attacks against other governments as well as critical infrastructure and the tech companies, either for espionage purposes or for the potential disruption of an economy, as we in effect saw in Ukraine in 2017. The second is ransomware attacks, which at one level are being advanced for money by criminal organizations, but fundamentally flourish because certain governments allow them to prosper. If governments were more willing to enforce their ransomware would be much more difficult to achieve. And the third is disinformation, where we should be especially concerned about foreign governments sponsoring disinformation campaigns. This

third aspect is potentially the most existential threat to democracy. Indeed, a democracy requires that people at least share a common understanding of facts, before arguing about their opinions, about what those facts mean. When disinformation fuels a fundamental disagreement about basic facts, democracy itself is at risk.

When these three are put together, the first thing to recognise is that threats are actually coming from a handful of countries. We do see Russia, China, Iran and North Korea as the four countries that give rise to most concerns. And it is obvious that we need to strengthen our defences in response. The nature of these defences might vary, but it all starts with better threat detection, so that we can identify these attacks, alert everyone and respond quicker. A variety of measures exist that, we know, can thwart many or most of these threats, especially the more traditional cybersecurity and ransomware attacks. There are cybersecurity 'best practices' that need to be implemented and taken seriously. In my view, part of it goes back to one of the first topics we discussed, which is digital inclusion: one of the challenges we face today is the shortage of skilled people in the workforce to help us with cybersecurity needs. We really need to focus on training initiatives in this area.

But ultimately, the answer to these challenges rests on the foundations of the rule of law. But the concepts underpinning the rule of law need to also evolve to stay up to date with the new challenges raised by cybersecurity, and this is why we see new security laws and digital safety initiatives becoming increasingly important. International law and global norms are of utmost importance here.

Insofar as we cannot yet have global norms absent a universal consensus, we badly need a coalition of the willing, an alliance of world democracies working together. It is very encouraging in this respect to see the French government and Paris itself playing the important role of beacon on the hill, so that other democracies find their way to a more common solution. I think that the Paris Call of 11 November 2021 has been very important, with its nine broad guiding principles. Among these, I believe that we should especially focus on the third one, i.e., defending the electoral processes, because it is the newest and it is fundamental for the protection of institutions that are necessary for any democratic society to function properly.

One last important point to note is that we need to recognize that in the 21<sup>st</sup> century, multilateralism will only be successful if it takes the form of multistakeholderism. The great vision of President Macron, supported by other leaders such as Prime Minister Jacinda Ardern, and so many others, has been to recognize that the issues raised by digital technologies sometimes almost uniquely require that governments, the civil society and businesses be brought together. It shouldn't be forgotten that cyberspace in reality consists of real space, owned and operated by individuals or companies in the private sector, and not by govern-

ments; just think of data centres or undersea cables. This might appear to be an issue relating to large corporations, but the truth is that cyberspace extends into all of our homes, it is literally carried around in our pockets in the form of our smartphones. So, all of us are concerned, and

all of us need to work together. If our only strategy is to bring together the world governments, we risk falling very short and failing at our mission. We clearly need to rely on an approach where we ask each stakeholder in our societies to do its part, and to do it well.

*Interview by Anda Bologa, Mathéo Malik and Vasile Rotaru*



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## Climate Justice in Europe: The Growing Role of Courts

With the Green Deal, the Climate Law, the European taxonomy, the 14 directives either new or to be modified, Europe has undoubtedly taken the measure of the scale of the climate challenge and initiated a profound legal reform to adapt the texts to the objectives that have been set, that is, to reduce greenhouse gas emissions by 55% by 2030 compared to 1990. Certainly, some would have liked the target to be more ambitious and rise to 65%, as Germany or Britain have decided. But the gap is already very large and will require much more profound transformations than those that most of our fellow citizens are considering today.

This is not in fact a half-hearted measure but a transformation of the whole of Society so that the expression “ecological transition” commonly used seems somewhat inappropriate. Indeed, this is not a transition. The word transition by definition implies going from one point to another, the point of arrival being perfectly known. In this case, the point of arrival is unknown for the good and simple reason that on the one hand, we are in a dynamic which should lead us to 2050 and carbon neutrality and, on the other hand, that the events that are likely to happen by then and even by 2030 will substantially modify the situation. In addition, the term transition contains a form of subliminal message implying that one needs to allow the necessary time; but in reality, the change will be brutal and sudden and the term transition therefore seems inappropriate.

The same is true of the word ecological. If indeed the challenges that must be overcome are those contemporary societies face due to climate change, the 6<sup>th</sup> extinction of species and predictably repeating pandemics, not to mention environmental pathologies, this does not mean that the transformation can be limited to the ecology itself.

Of course, this transformation is ecological insofar as the planetary limits now constitute the alpha and omega

of the organization of our Society, starting with the modes of production and consumption which must adapt to these limits while until now, it is rather the planetary limits that had to deal with unlimited economic growth. However, the subject is not limited to ecology. It concerns the economy, the social, governance, in short: the whole of Society and this is why talking about ecological transition seems somewhat limited.

Either way, the European ambition is undeniable. European involvement in the fight against climate change, and gradually for the adaptation to climate change, is not limited to stating rules or to the provision of billions of euros to finance the transition, even if it is absolutely central. At the legal level, Europe is characterized by a particularly advanced case-law in what is called climate justice (1) which can ultimately lead to changes in the organization of powers (2).

### 1. The flagship role of European judges in climate justice

#### 1.A. Cascading innovations in European case law

Europe is central to the evolution of climate justice. The subject of climate justice is a global subject since nearly 2,000 trials are taking place around the world, in all continents with a fairly rich case law in South America in particular. However, it must be noted that Europe is at the forefront of producing case law, in particular in the area of public law, but gradually, in the area of private law as well.

In terms of public law, the first major decision is European since it concerns the Urgenda case law inaugurated by the Netherlands in 2019. The decision rendered by the Supreme Court of the Netherlands on December 20, 2019 is certainly a landmark decision for multiple reasons. On the one hand, the questions which have been decided go well beyond the Netherlands, on the other hand the legal basis is that of Community law and European treaty law and finally, it has been and still is likely to set an international precedent.

This decision of the Supreme Court, which follows two favorable decisions for the Association Urgenda (which means agenda urgency) first of all reasserts the scientific knowledge relating to climate change and the commitments of States, in particular due to the United Nations Framework Convention on Climate Change and the Paris Climate Accords. The obligations of the Netherlands and the results obtained having been reasserted, the Court decides a whole series of questions of law which answers the objections which were those of the Netherlands but which more generally are those of all the States confronted with the same issue.

First of all, the obligation for a State to “do its share” results from Articles 2 and 8 of the European Convention on Human Rights which, on the basis of the work of the IPCC, set the obligation of reducing at least 25 to 40% of



greenhouse gas emissions by 2020 for the Annex 1 countries to which the Netherlands belongs. The 25% target is therefore considered by the Court as an internationally recognized target to be met by the State. It is of course up to the State to determine the concrete measures to achieve this.

Secondly, the Court considers that Articles 2 and 8 apply, the taking into account of appropriate measures being compulsory if there is a real and immediate risk, that is to say a danger directly threatening the persons involved. With respect to Article 8, it applies and operates for the population as a whole; this obligation includes preventive measures compatible with the precautionary principle clearly reaffirmed twice by the Court and measures of reparation.

Third, the Court responds to the argument that Member States are not individually bound by any obligation by virtue of membership of the European Union. The Court clearly rejects this claim considering that each party is responsible for its “share” and therefore may be held accountable, that is to say, may have to assume its share of responsibility, including in litigation. The low share of emissions from the Netherlands in overall emissions is not taken into account by the Court.

At the procedural level, the Court recognizes the admissibility of the action carried out by the Association by considering that the grouping of interests is effective and efficient, and that it is therefore in conformity with article 2, paragraph 5 of the Aarhus Convention and article 13 of the European Convention on Human Rights.

Finally, the Court underlines the role of the courts, which is based on the fact that the State has a legal obligation which it can be ordered to fulfill, except when Dutch law provides an exemption. The court recalls that although it must not interfere in the making of political decisions as to the advisability of legislation, it is responsible for rendering a declaration of justice which implies that the entity concerned acted illegally by not adopting appropriate legislation.

Following the Netherlands, France has taken steps towards climate justice. The legal basis of the two Grande-Synthe decisions rendered by the Council of State on February 1 and July 1, 2021 differs from that adopted by the Dutch Supreme Court. The Council of State has in fact refused to rely on Articles 2 and 8 of the European Convention on Human Rights, as it has refused to rely directly on the Paris agreements, which amounts to recognizing a human right to climate.

On the other hand, it based its decision on national legislation and on the low-carbon trajectory derived from the commitments made by the Paris agreements, which are binding on the State, to note on the one hand, the climate deficiency over the period 2016-2019, and on the other hand, the inadequacy of the measures taken to re-

main on track towards the goal set for 2030. It should be noted here that the Council of State decision came before the 2030 target was raised from 40% to 55%. The French government has a March 22 deadline to amend its policy.

The Council of State’s decision is interesting not only in that it assess in 2021 the State’s capacity to reach its objectives for 2030 but also in the procedure of injunction used to force the State to take action, even if this injunction procedure, in reality, is not very restrictive since before the payment of a penalty is ordered it generally takes one or two additional court decisions.

The third and extremely innovative decision was devised by the Karlsruhe Court regarding the German climate law. This decision, rendered on April 29, 2021, differs from the previous two in that it is universal in scope.

First of all, the Constitutional Court admits the complaint filed by the citizens but not that of the Associations, considering that the Charter of Fundamental Rights of the European Union does not establish their right to act; it confirms the Dutch position by recalling that the duty of protection imposed on the State by the fundamental law, namely the protection of life and physical integrity, includes protection against nuisances caused by environmental degradation, regardless of the perpetrators and whatever the causes. It includes the duty to protect human life and health against climatic hazards and establishes an objective duty of protection.

The universal scope resides in the reference to the rights of future generations. The Constitutional Court recognizes that the trajectory planned until 2050 does not ensure that the rights and freedoms of the generations living in 2030 can be protected.

The Court also reasserts, as the Dutch Court did, that the fact that greenhouse gas emissions are produced by other States in much larger quantities does not alter the obligations incumbent on the State and that on the contrary, there is a constitutional necessity for Germany to take its own measures. Going further, it rules that Germany should refrain from actions likely to encourage other States to undermine international cooperation.

It also opens up a new perspective by considering that if the fight against climate change does not enjoy absolute primacy over the other interests at stake, the fact remains that any activity likely to lead to the temperature threshold being exceeded can only be justified when strict conditions are met, for instance the protection of fundamental rights.

We can cite, to a lesser extent, a decision delivered in Belgium as illustrating the rise of climate justice in Europe. Indeed, in a decision rendered by the Court of First Instance of Brussels on June 17, 2021, at the request of the SBL Klimaatzaak and 8,400 citizens, supported by 50,000 people, this Court condemned the federal State and the three regions for not having acted vigorously enough

against climate change. However, the Belgian court refused to initiate an injunction procedure considering that this would take it beyond its own competence.

One may add the very unusual admissibility, that is to say without any prior exhaustion of appeal procedures, by the European Court of Human Rights of a request formulated by 30 young Portuguese against 30 Member States of the Council of Europe for not having enacted sufficient measures protecting them against climate change.

Thus, these different decisions draw a completely new landscape for climate justice in which the court is the arbiter of whether States engage sufficiently or not in policies to fight against climate change.

### *1.B. Corporations and climate justice*

Jurisprudential innovation does not stop at the gates of power. It also penetrates businesses. In the 1,800 or 2,000 climate justice lawsuits that exist around the world, a number of them directly target companies either for greenwashing or for false advertising relating to climate action, while a few actions in responsibility have yet to be judged.

In this regard, we must consider the judgment rendered on May 26, 2021 by the Court of First Instance of The Hague in the Shell case; judgment appealed against since then. This Dutch decision, apart from being a first in chronological terms, is also a first in legal terms.

The complaint brought by the Milieu Defensie Association against RDS Holding, the corporation responsible for establishing the general policy of the Shell group comprising more than 1,000 Shell corporate entities, related to the recognition of the illegality of the millions of tons of CO<sub>2</sub> emitted by these entities and aimed to reduce the volume of emissions directly and indirectly by at least 45% compared to the 2019 level by the end of 2030 at the latest.

In this highly commented decision, the court established the holding's responsibility by considering that the adoption of the company's policy did indeed have an influence on CO<sub>2</sub> emissions which contributed to creating environmental damage affecting Dutch residents, that the holding determined the general policy of the group, and that the value chain exerted an influence in terms of policy development in general.

After establishing that it was the holding that bore the responsibility alongside the entities of the Shell group, the court considered that it should reduce its emissions by 45% by the end of the year 2030; that this was an obligation to achieve a fixed result for the activities of the Shell group which concerned not only the commercial relations of the Group but also the end users.

The legal basis retained by the court is an unwritten duty of care in accordance with the Dutch Civil Code. To deduce that this unwritten duty of care should contribute to the prevention of climate change, the court relied on

human rights but also on the soft law approved by RDS such as the United Nations Guiding Principles for Business and Human Rights, the United Nations Global Compact, the OECD Guidelines for Multinational Enterprises.

This is therefore an extremely advanced use of soft law and also of the precautionary principle even if the term is not used since the court refers to the following formula: "in accordance with the scientific and technical understanding of risks where there are threats of serious damage to the environment having regard to the health and safety of persons, one must not invoke the absence of absolute scientific certainty to delay the adoption of effective measures aimed at preventing or minimizing such damage."

Undoubtedly, other actions, particularly in France, call into question the duty of vigilance of companies which derives from the Sapin II statute, but no decision has yet been made on this basis in France.

From this brief summary, it results clearly that European case law has a universal scope due to the reference to the European Convention on Human Rights and therefore to the Universal Convention of Human Rights, to soft law applied throughout the world, and because of the reference to future generations. It is an invitation for a planetary transformation of climate law and climate justice.

The transformations to come also concern the relations between the interests at work and governance.

## **2. New relationships between the different social actors**

### *2.A. A new role for supreme courts*

First of all, it should be noted that this movement for climate justice puts the courts at the center of the debate. For example, the Council of State in the person of its vice president participated in two webinars organized by Yale University to comment on the two Grande-Synthe decisions.

That courts and specifically supreme courts take responsibility for the survival of humanity in the face of climate change is reflected by increasing references to articles 8 and especially 2 of the Declaration of the Rights of Man and by establishing that climate rights are human rights, which has also been established in many jurisdictions in Latin and South America.

The rise of judges is made possible by appeals. These appeals come from extremely varied entities: local communities that complain about the inaction of States, non-governmental organizations defending the environment and more specifically the climate, associations of young people who fear for their future; examples are multiple with admissibility conditions which may vary from one State to another.

Thus, if the French Council of State refuses individual appeal but admits the appeal of associations, the German constitutional court had the opposite reasoning by consi-

dering that the right to life and to a normal family life could only be invoked by natural persons and not associations. Belgium for its part has admitted both. The important point is that plaintiffs whoever they are can be considered admissible so that the decision can be rendered. However, the diversity of the plaintiffs clearly shows that a form of tacit alliance has been formed between judges and civil society defined as non-state actors to ensure the protection of life by maintaining an acceptable temperature level on earth. It is clear that this new alliance, on the one hand, rests on legal bases and on the other hand, would not have been possible without the carelessness of States.

## 2.B. A legitimate new role

One can question whether it is legitimate for judges to exercise legislative functions and to compensate for the inaction of States. However, to speak of a government of judges seems excessive since in reality no norm has been invented in the various case law.

Perhaps, one can consider the case law of the Federal Constitutional Court in Karlsruhe as the most creative or innovative but, one can find in particular in the UNESCO Universal Declaration of Human Rights for Future Generations the foundation of the reference to the said generations. The expression also appears in the Environmental Charter to which the preamble of the French Constitution refers. For the rest, the classic reference is either to the European Convention on Human Rights or to the Paris Agreements, or to the commitments made by the various corporations. The only relatively original feature which undoubtedly shocks States is the fact of considering that a commitment commits a State!

Indeed, political communication often trumps the strictly legal aspect. For many years, States and corporations alike have assumed that commitments only bind those who believe in them. However, case law for a number of years now has established that soft law containing the commitments of the various actors actually bind them. Thus, in the Erika decision, the Court of Cassation considered that the fact that Total did not comply with its internal vetting procedures, which were mere internal rules that in reality only committed Total towards itself, constituted a sufficient basis for establishing the fault and the fault of sufficient gravity to exclude the responsibilities provided for by the convention on civil liability for marine pollution by oil in the event of willful misconduct. This failure to comply with an internal rule was considered willful misconduct on the part of Total.

One can explain this jurisprudential orientation by the increasingly pressing demand of civil society with regard to the carelessness of States which, commitments after commitments do not really translate into action the pro-

mises that are made. The result is a steady increase in greenhouse gas emissions that has absolutely nothing to do with the expectation that the increase in temperature will be limited to 1.5 degree by the end of the century.

Finally, discordant voices are obviously being heard at the internal level about the eternal problem of the government of judges and the allegedly undemocratic nature of the decisions that are taken. We could first of all recall that it is not democratic to refuse to take measures to safeguard the future and the lives of citizens of different States. But above all, the intervention of judges, at the end of an adversarial process during which plaintiffs and defendants have equivalent rights and are forced to prove the arguments they put forward allows us to get out of communication campaigns and false information to stick to the facts.

It is true that this transformation is not without impact on the functioning of institutions and democracy. But at a time when the question of the acceptability of the transformation is more topical than ever, when the difficulties of public participation and of its level of information are obvious, recourse to the courts is eminently democratic and calming.

At the level of the European Union, the Court of Justice of the European Union has not yet had the opportunity to rule on the subject of climate justice. The role played by the European Parliament and by environmental and climate advocates in pushing community policy is undeniable. No doubt the decisions are taken in cooperation which implies an agreement between the Council and the Parliament. But the very dynamic role of the Parliament forces States to accept more than they would have been prepared to accept in the purely national framework. It goes without saying that it will be very interesting to follow the case law of the CJEU when it comes; before that, the European Court of Human Rights will rule on the complaint filed by the young Portuguese. If it established climate rights and a fortiori the rights of future generations, it is of course all Union law that would be affected.

We have entered times of great turbulence and not only in the meteorological sense of the term. The role of States is changing as the financial means of the private sector become enormous, as people rebel in democratic systems, as the content of the demands made on the State changes. In this context, the new balance of power that is being put in place under the aegis of the judge responsible for verifying that the commitments made are kept and that the priority given to life remains is a guarantee of being able to seek stable, acceptable and accepted solutions.





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## Will Europe Set the Sustainability Standard Worldwide?

The European Commission has pointed out that we are increasingly confronted by the consequences of climate change and resource depletion. It therefore wants more investment in 'green' companies and products. In its initial Sustainable Finance Action Plan (SFAP) of March 2018, the Commission states that as the financial sector acts as an intermediary between users and providers of capital, it has a key role to play in this green transition.<sup>1</sup> The SFAP is an integral part of the Capital Markets Union (CMU) Action Plan<sup>2</sup> and must also be seen in conjunction with the broader European climate plans (the Green Deal and the European Climate Law that forms part of it).<sup>3</sup>

The SFAP has the following aims: (i) reorient capital flows towards sustainable investment in order to achieve sustainable and inclusive growth; (ii) manage financial risks stemming from climate change, resource depletion, environmental degradation and social issues; and (iii) foster transparency and long-termism in financial and economic activity.<sup>4</sup>

The action plan translates these aims into ten concrete measures: (1) establish an EU classification system (taxonomy) for sustainable activities; (2) create standards and labels for green financial products; (3) foster investments in sustainable projects; (4) incorporate sustainability when providing financial advice; (5) develop sustainability benchmarks; (6) better integrate sustainability in credit ratings and market research; (7) clarify the duties of institutional investors and asset managers; (8) incorporate sustainability in prudential requirements for financial

institutions such as banks and insurers; (9) strengthen sustainability disclosure, both for investors and for financial supervisors, for example through better integration of sustainability in accounting rule-making; (10) foster sustainable corporate governance and attenuate short-termism in capital markets.<sup>5</sup> In this article I will focus on some of the core elements of the SFAP.

### 1. Taxonomy Regulation

When is a product or business 'green'? That is something we must agree on first. After all, if we in Europe do not have a shared understanding of what is ecologically sustainable, how can we expect to arrange for the supply and demand of green capital to be better matched in Europe? In such a situation, there is the ever-present danger of confusion about terms and even plain deception because activities are presented as greener than they actually are ('greenwashing'). So, it is a good thing that the Commission has decided to give top priority to establishing an EU classification system - or taxonomy - for sustainable activities (Action 1). Nor has Brussels wasted any time, because the Taxonomy Regulation had already been adopted by 18 June 2020.<sup>6</sup>

The Taxonomy Regulation contains uniform criteria for determining whether an economic activity qualifies as environmentally sustainable. The Regulation identifies six environmental objectives: (a) climate change mitigation; (b) climate change adaptation; (c) the sustainable use and protection of water and marine resources; (d) the transition to a circular economy; (e) pollution prevention and control; (f) the protection and restoration of biodiversity and ecosystems.<sup>7</sup> An activity qualifies as environmentally sustainable where it contributes substantially to one or more of the environmental objectives and does not significantly harm any of the other environmental objectives.<sup>8</sup>

But that's not sufficient in itself. Based on technical advice from experts, the Commission is currently in the process of drawing up further rules (Level 2 legislation) which identify the actual activities that can be classified as sustainable. This concerns six series of sustainable activities, each series corresponding to one of the six environmental objectives mentioned above. The first two series were submitted to the public for consultation in November 2020 and correspond to the environmental objectives referred to at (a) and (b) above.<sup>9</sup> The Taxonomy

1. See, COM(2018) 97 final, 8.3.2018, p. 1.

2. See, most recently on the CMU Action Plan: COM(2020) 590 final.

3. See, the Green Deal presented by the Commission on 10 December 2019 (COM(2019) 640 final) and the proposal forming part of it and dated 4 March 2020 for a European Climate Law (COM(2020) 80 final). For an amended and more ambitious proposal for a European Climate Law, see: COM(2020) 563 final (17 September 2020). See also COM(2020) 562 final.

4. See, COM(2018) 97 final, p. 3.

5. See, COM(2018) 97 final, pp. 4-11. See also, COM(2021) 390 final and COM(2021) 188 final. For more about the SFAP or parts of it, see Danny Busch, Guido Ferrarini and Arthur van den Hurk, 'The European Commission's Sustainable Finance Action Plan and Other International Initiatives' in Danny Busch, Guido Ferrarini and Seraina Grünwald (eds), *Sustainable Finance in Europe: Corporate Governance, Financial Stability and Financial Markets* (Palgrave Macmillan 2021)."

6. Regulation (EU) 2020/852 (below: the Taxonomy Regulation).

7. Article 9, Taxonomy Regulation.

8. Article 3, Taxonomy Regulation.

9. The draft regulation and two accompanying draft annexes can be downloaded at: [https://ec.europa.eu/info/business-economy-euro/banking-and-finance/sustainable-finance/eu-taxonomy-sustainable-activities\\_en](https://ec.europa.eu/info/business-economy-euro/banking-and-finance/sustainable-finance/eu-taxonomy-sustainable-activities_en).



Regulation will come into effect in phases: the first two environmental objectives on 1 January 2022 and the other four on 1 January 2023.<sup>10</sup> The further rules are bound to be a source of friction. A while ago it was apparent from a leaked proposal that the European Commission was considering classifying state-of-the-art natural gas power stations as green undertakings to make the funding of new power plants more attractive, much to the astonishment of scientists and environmental organisations.<sup>11</sup> And what about nuclear energy? A nuclear power plant may not emit greenhouse gases, but it does produce nuclear waste.<sup>12</sup>

## 2. Sustainable Finance Disclosure Regulation (SFDR)

An important step will be determining what activities are environmentally sustainable (see section 2, above). Once this has been accomplished, the next step will be to arrange for financial intermediaries (such as asset managers and advisers) to integrate sustainability considerations into their investment policy and advice, and to provide transparency to the investing public about the extent to which they do this (Actions 7 and 9). Many financial intermediaries already did this to a greater or lesser extent, because there has been considerable demand for sustainable investments for some time, but until recently they did not do so on the basis of harmonised rules at European level. This was changed by the new Sustainable Finance Disclosure Regulation (SFDR) on 10 March 2021, when most of its rules became applicable.<sup>13</sup> Incidentally, the term sustainability has a broader meaning in the SFDR than in the Taxonomy Regulation. Under the SFDR a sustainable investment covers all three 'ESG' categories (i.e., environmental, social and good governance objectives), whereas the Taxonomy Regulation relates only to environmental sustainability (i.e., the 'E' factor).<sup>14</sup>

Whatever the case, the SFDR is an important step forward, for harmonised sustainability transparency standards are a dire necessity; indeed, the alternative is not workable. After all, divergent national rules and market practices (i) make it very difficult to compare different financial products, (ii) create an uneven playing field for such products and for distribution channels, and (iii) erect additional barriers within the internal market. This

in turn leads to confusion for investors and is, at worst, plain misleading because financial intermediaries promote their investments as sustainable when in reality they are not (or much less so) (greenwashing).<sup>15</sup> The SFDR requires financial intermediaries to provide sustainability transparency on their website, in periodic reports, in promotional material and in pre-contractual information (at both entity level and product level).

Furthermore, one must distinguish between two key concepts: (i) 'sustainability risks', and (ii) 'sustainable investments'. 'Sustainability risk' is defined as an environmental, social or governance event that, if it occurs, could cause an actual or a potential material negative impact on the *value* of the investment.<sup>16</sup> A 'sustainable investment', on the other hand, is an investment in an economic activity that *contributes* to an environmental or social objective, always provided (a) that the investments do not significantly harm any of the other environmental and social objectives, and (b) that the investee companies follow good governance practices.<sup>17</sup>

Further key concepts are 'dark green' and 'light green' products, and even 'grey' products. Green products either have sustainable investment as their objective (dark green) or they merely aim to promote sustainable investment (light green).<sup>18</sup> A distinction that is in my opinion bound to cause confusion in the market. Grey products neither promote sustainable investment nor have it as their objective, but they are nevertheless caught by the SFDR in the sense that grey products - just like green products - involve reporting on sustainability risks.<sup>19</sup>

But once again, this is not sufficient in itself. Most of the SFDR rules still have to be implemented at a practical level (Level 2 rules). The three European Supervisory Authorities (ESAs) take the lead in drafting these rules, but it is the Commission that adopts them and thus has the final say.<sup>20</sup> Although the drafting work at the ESAs was delayed by the coronavirus crisis, this was remarkably not seen by the European Commission as a reason for recommending that the SFDR itself become applicable at a later date. It was not until 4 February 2021 that the ESAs published their final drafts for the Level 2 rules.<sup>21</sup> The Commission was no longer able to adopt these rules before the SFDR became applicable on 10 March 2021. As an emergency measure, the joint ESAs therefore suggested to the national supervisors on 25 February 2021 that they encourage financial intermediaries to comply with the Level 2 rules

10. Article 27(2) of the Taxonomy Regulation. See also, Christos V Gortsos, 'The Taxonomy Regulation: More Important Than Just as an Element of the Capital Markets Union' in Danny Busch, Guido Ferrarini and Seraina Grünwald (eds), *Sustainable Finance in Europe: Corporate Governance, Financial Stability and Financial Markets* (Palgrave Macmillan 2021).

11. See, <https://nos.nl/artikel/2373904-uitgelekt-plan-brussel-wil-moderne-aardgascentrales-milieuvriendelijk-label-geven.html> (24 March 2021).

12. See, Matthijs Schiffrers, *Kernenergie is de hete aardappel die de Commissie liever nog even doorschuift* (Nuclear energy is a hot potato the Commission doesn't wish to burn its fingers on just yet), *FD* 3 April 2021, p. 33.

13. Regulation (EU) 2019/2088, as later amended by the Taxonomy Regulation (below: SFDR).

14. Article 2(17) SFDR; Article 3 Taxonomy Regulation.

15. See, recital (9) SFDR.

16. Art. 2(22) SFDR.

17. Art. 2(17) SFDR.

18. See, Art. 9 (dark green products) and 8 (light green products) SFDR, respectively.

19. See, Art. 6 SFDR.

20. The three ESAs are: ESMA, EBA and EIOPA.

21. JC 2021 O3.

anyway.<sup>22</sup> To add to the confusion, the three ESAs published a consultation document on 15 March 2021 which again provided for a change to what were termed the ‘final’ drafts of the Level 2 rules published on 4 February 2021.<sup>23</sup> This procedure certainly did not win any prizes for planning, because financial intermediaries hardly had any time to prepare.<sup>24</sup>

### 3. Reliable sustainability-related company information

On reflection, how do financial intermediaries actually get reliable sustainability-related information about the companies in which they invest? The companies themselves will often not have that information available at this early stage.

First of all, there is Action 1 of the CMU Action Plan 2020: the Commission undertakes to propose the setting-up of an EU-wide platform (European single access point / ESAP) to provide investors with ‘seamless access’ to financial and sustainability-related information on companies.

Whatever the case, financial intermediaries are dependent for the time being on third parties who claim to have access to this sustainability-related information. But that immediately raises a further question: how can financial intermediaries be sure that these data are reliable? According to the Dutch Authority for the Financial Markets (AFM), its French counterpart *Autorité des Marchés Financiers* (AMF) and more recently, ESMA as well, providers of sustainability-related information must be regulated under an EU regulation and be subject to direct supervision by ESMA, just as is already the case with credit rating agencies (CRAs) under the CRA Regulation.<sup>25</sup>

Finally, the proposed Corporate Sustainability Reporting Directive (CSRD) will provide for a mandatory disclosure regime for both non-financial and financial

companies (listed or non-listed). The idea is that this will provide financial intermediaries with the sustainability information they need to make informed sustainable investment decisions. It covers both the sustainability impact of a company’s activities as well as the business and financial risks faced by a company due to its sustainability exposures (known as the ‘double materiality’ concept).<sup>26</sup> However, according to the proposal, only large undertakings are covered by the disclosure regime, and, as of 1 January 2026, most SMEs. So micro undertakings are completely out of scope.<sup>27</sup>

### 4. Sustainable finance and the coronavirus crisis

Investors and especially the business community have been hit hard by the coronavirus crisis.<sup>28</sup> As less capital is available due to the current crisis, it follows that less capital is also available for making the transition to a greener society. Implementation of the climate plans is likely to be delayed by the crisis. This is particularly tragic since there may be a link between climate change and the outbreak of pandemics.<sup>29</sup> So a delay in the realisation of the climate plans is actually not acceptable.

However, three more positive notes may perhaps be struck. First, the coronavirus crisis may help us to realise that a video link, despite all its limitations, works quite well, and that it is not always necessary to fly around the world for face-to-face meetings. And, second, the massive state aid provided by governments to their corporate sector gives them the opportunity to impose stringent green conditions, at least in theory. And, last but not least, the EU and its member states can themselves act as providers and users of green or social financing.

Consider, for example, the funding of the EU programme for short-time working and part-time unemployment benefits (Support to mitigate Unemployment Risks in an Emergency, or SURE). SURE is being funded by raising a total of EUR 100 billion from the investing public through social bonds issued by the EU itself, which is an absolute first. By 18 May 2021, the European Commission had already raised nearly EUR 90 billion through the issuance of social bonds in six rounds under the EU SURE instrument. The issues consisted of 5, 10 and 15-year bonds. The great interest showed by investors translated into favourable bond price conditions for the EU. The funds raised were then funnelled to the Member States in the form of loans to help them directly cover the costs associated with financing national short-time working sche-

22. See the Joint ESA Supervisory Statement dated 25 February 2021 (JC 2021 06), which can be downloaded at [https://www.esma.europa.eu/sites/default/files/library/jc\\_2021\\_06\\_joint\\_esas\\_supervisory\\_statement\\_-\\_sfdr.pdf](https://www.esma.europa.eu/sites/default/files/library/jc_2021_06_joint_esas_supervisory_statement_-_sfdr.pdf).

23. JC 2021 22. See p. 57 ff for a consolidated version of the Level 2 rules.

24. It is evident from a letter dated 7 January 2021 from the ESAs to the European Commission (JC 2021 02) that financial intermediaries have a host of questions about the meaning of all kinds of terms used in the SFDR. See for the Commission’s response: <https://www.esma.europa.eu/document/ec-qa-sustainability-related-disclosures>. For more about the SFDR, see, for example, Danny Busch, ‘Sustainability Disclosure in the EU Financial Sector’ in Danny Busch, Guido Ferrarini and Seraina Grünwald (eds), *Sustainable Finance in Europe: Corporate Governance, Financial Stability and Financial Markets* (Palgrave Macmillan 2021). See also the ‘sustainability letters’ from the Dutch conduct-of-business supervisor AFM to the sector of 6 July and 16 December 2020: <https://www.afm.nl/nl-nl/nieuws/2020/juli/duurzaamheidsbrief-aan-sector>; <https://www.afm.nl/nl-nl/nieuws/2020/december/pensioenitvoerders-voorbereiden-sfdr-verordening>.

25. See, ‘AFM/AMF Position Paper: Call for a European Regulation for the provision of ESG data, ratings, and related services’ (<https://www.afm.nl/en/nieuws/2020/december/reguleer-aanbieders-duurzaamheidsdata>). On this subject, see Daniel Cash, *Calls for ESG Rating Agency Regulation Grows Louder in Europe, But Could It Actually Save the Industry?* (<https://financialregulation-matters.blogspot.com/2020/12/calls-for-esg-rating-agency-regulation.html>); ESMA’s letter to DG FISMA dated 28 January 2021 (ESMA30-379-423).

26. See, COM(2021) 390 final, at p. 3. See for the proposal for the CSRD itself: COM(2021) 189 final.

27. See, COM(2021) 189 final, Art. 19a and 29a CSRD, as well as recitals (15) *et seq.*

28. Paradoxically, e.g. the Amsterdam AEX Index is currently reaching an all-time high. Nowadays, this index is dominated by tech companies such as ASML and Adyen, which are precisely the businesses doing well during the coronavirus crisis. Naturally, the ultra-low interest rates are also playing a role.

29. That link was identified, for example, by the European Commission in the *Consultation on the renewed sustainable finance strategy* dated 8 April 2020 (p. 3) ([https://ec.europa.eu/info/consultations/finance-2020-sustainable-finance-strategy\\_and](https://ec.europa.eu/info/consultations/finance-2020-sustainable-finance-strategy_and)).

mes and similar measures in response to the pandemic. On 27 October 2020, the EU SURE social bond was listed on the Luxembourg Green Exchange, a leading platform exclusively dedicated to sustainable securities.<sup>30</sup>

But there's more. During the Special European Council of 17-21 July 2020, the European heads of government managed with great difficulty to reach an agreement on the European multiannual budget (2021-2027) and the Corona Recovery Fund.

The European budget for 2021-2027 amounts to a total of EUR 1,074 billion. More money has been earmarked for innovation, sustainability and climate action. 30% of all budget expenditure must contribute to the European climate target.

In essence, the agreements about the Corona Recovery Fund (the so-called Next Generation EU plan) are as follows. There will be a fund of EUR 750 billion, which will be fully financed by the issuance of bonds by the EU itself. Of the amount thus raised, a sum of 390 billion euros is for grants, and the other 360 billion euros for loans. 30% of all expenditure of the Recovery Fund must contribute to achieving the European climate target.<sup>31</sup>

Countries that receive money through the multiannual budget or from the Corona Recovery Fund (whether in the form of loans or grants) are required to apply the European values of freedom and democracy in practice. They must have independent judges. The European Parliament had tightened up the requirement that the recipients must respect the rule of law. It is common knowledge that in Poland and Hungary the independence of the judiciary is under threat, freedom of the press is at risk and the rights of LGBTI people are being curtailed. These two countries have long threatened to exercise their right of veto to block the multiannual budget and the Corona Recovery Fund, because under the new agreements they could be punished in the future if they fail to adhere to the rule of law. On 10 December 2020, they dropped their opposition after everyone had agreed to a compromise proposal put forward by Germany.<sup>32</sup>

This means that the EU itself will place a sum of at least EUR 225 billion in green bonds to finance the Corona Recovery Fund / Next Generation EU plan and will funnel the money raised in this way to green investments in the form of a grant or loan. Moreover, under the multiannual budget an amount of at least EUR 322.2 billion will go to green projects over the next seven years. It is hoped that

this will provide a boost for the green capital market. On 12 October 2021, the European Commission issued the first NextGenerationEU green bond, thus raising EUR 12 billion to be used exclusively for green and sustainable investments across the EU.<sup>33</sup>

But once again, the green transition will never be able to do without capital from the private sector. Businesses are currently fighting with all their might to keep their heads above water. Although the number of insolvencies is presently at an historical low in many European countries,<sup>34</sup> this is inevitably due to the fact that a large part of the business community is being artificially kept alive by the various rounds of state aid ('zombie' companies). Many people expect a wave of insolvencies across the European Union.<sup>35</sup> This being said, Klaas Knot, president of the Dutch central bank, recently intimated that he was not all that gloomy about the prospects of the Dutch economy.<sup>36</sup> Whatever the case, it is very much to be hoped that in the coming period the struggling business community will recognise just how essential the green transition is and make their contribution.

## 5. Towards a more sustainable world?

As is apparent from the Green Deal and the Sustainable Finance Action Plan (SFAP), the European Union sets the bar high when it comes to sustainability. Indeed, the Commission even considers that progress is not fast enough; for instance, the European Commission has already published a follow-up of the SFAP on 6 July 2021.<sup>37</sup>

But the EU is not an island. Broadly speaking, two contrasting scenarios are conceivable. In a pessimistic scenario, the more flexible or even non-existent sustainability agendas of other geopolitical powers gives them a competitive advantage that is detrimental to the EU. In an optimistic scenario, the EU will set the sustainability standard worldwide.<sup>38</sup> Major institutional investors such as Blackrock and State Street in any event state that they are strong supporters of the sustainability agenda.<sup>39</sup> And some hope is also provided by the fact that the United

33. See, [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_21\\_5207](https://ec.europa.eu/commission/presscorner/detail/en/IP_21_5207).

34. See, <https://www.cbs.nl/nl-nl/faq/corona/regionaal/faillissementen>.

35. See, <https://www.pwc.nl/nl/actueel-publicaties/assets/pdfs/pwc-bijzonder-beheer-barometer-nov-2020.pdf> (Netherlands); Ryan Banerjee et al., *Liquidity to solvency: transition cancelled or postponed?* BIS Bulletin no. 40 (25 March 2021) <https://www.bis.org/publ/bisbull40.htm> (international overview); Federico J. Diez et al., *Insolvency Prospects Among Small-and-Medium-Sized Enterprises in Advanced Economies: Assessment and Policy Options*, IMF (2 April 2021) (<https://www.imf.org/en/Publications/Staff-Discussion-Notes/Issues/2021/03/25/Insolvency-Prospects-Among-Small-and-Medium-Sized-Enterprises-in-Advanced-Economies-50138>) (international overview).

36. See, Marcel de Boer and Joost van Kuppeveld, 'Klaas Knot: Ik ga niet mee in het idee van een tsunami van faillissementen' (I don't buy into the idea of a tsunami of insolvencies), FD 23 March 2021, p. 13.

37. See, COM(2021) 390 final. See also COM(2021) 188 final.

38. See, Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford University Press 2020).

39. See <https://www.blackrock.com/corporate/literature/publication/blk-sustainability-mission-statement-web.pdf> and <https://www.statestreet.com/values.html>.

30. See, COM(2021) 148 final, pp. 9-11; [https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/financial-assistance-eu/funding-mechanisms-and-facilities/sure\\_en](https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/financial-assistance-eu/funding-mechanisms-and-facilities/sure_en).

31. See, [https://ec.europa.eu/info/strategy/eu-budget/long-term-eu-budget/eu-budget-2021-2027\\_en](https://ec.europa.eu/info/strategy/eu-budget/long-term-eu-budget/eu-budget-2021-2027_en). The Corona Recovery Fund (the European Union Recovery Instrument) was established by regulation (see Regulation (EU) 2020/2094 and Regulation (EU) 2021/241). The amount of EUR 750 billion is in 2018 prices. In current prices this amounts to EUR 806.9 billion. See: [https://ec.europa.eu/info/strategy/recovery-plan-europe\\_en](https://ec.europa.eu/info/strategy/recovery-plan-europe_en).

32. See, <https://nos.nl/artikel/2360118-akkoord-over-begroting-op-top-europese-unie.html> (10 December 2020).

States rejoined the Paris climate agreement on 20 January 2021 following a decision by its 46<sup>th</sup> president Joe Biden, although at the time of writing he is having a hard time in getting his ambitious climate plans adopted.<sup>40</sup>

40. See: <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/paris-climate-agreement/>. See also the public statement of John Coates (Acting Director, Division of Corporation Finance, U.S. Securities and Exchange Commission, SEC) dated 11 March 2021 *ESG Disclosure – Keeping Pace with Developments Affecting Investors, Public Companies and the Capital Markets* (<https://www.sec.gov/news/public-statement/coates-esg-disclosure-keeping-pace-031121>). See Richard Kessler, 'COP26 – Joe Biden's climate credibility hangs by a thread as the clock ticks to Glasgow' (<https://www.rechargenews.com/energy-transition/cop26-joe-bidens-climate-credibility-hangs-by-a-thread-as-the-clock-ticks-to-glasgow/2-1-1079730>).





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## The Democratisation of EU Nature Governance: Making EU Nature Law more Effective?

The EU has some of the world's most ambitious environmental laws on its books, but their effectiveness is seriously weakened by non-compliance in practice.<sup>1</sup> Poor implementation is one of the major weaknesses of the EU's environmental policy.<sup>2</sup>

With the UNECE Aarhus Convention (1998), Europe launched an innovative legal experiment, democratising environmental enforcement by conferring citizens and environmental NGOs (ENGOS) with legal rights of access to environmental information, public participation, and access to justice in environmental matters.

At the same time, the European Commission has scaled back its own public enforcement efforts, citing its preference that Member State enforcers should take the lead,<sup>3</sup> and emphasising the important role of civil society as a “compliance watchdog” supporting the European Green Deal, the Von der Leyen Commission's flagship initiative aiming to fundamentally transform the EU into a

carbon-neutral economy by 2050.<sup>4</sup>

Against the background of unprecedented environmental challenges, ongoing declines in biodiversity in Europe,<sup>5</sup> and the EU's 2030 Biodiversity Strategy's aim to improve implementation of the EU's nature laws, there is an urgent need for policymakers to understand whether enabling private environmental governance through the Aarhus Convention is achieving its intended policy outcomes and, if not, the reasons for this. However, there has been surprisingly little systematic empirical research to date on how these innovative legal rights have been working in practice.<sup>6</sup>

This paper summarises the results of a five-year empirical research project, which breaks new ground in mapping the evolution and effectiveness of the EU's environmental governance laws. We examined the effectiveness of the EU's nature governance laws in three Member States over a 23-year period from 1992, the date of adoption of the EU's flagship nature law, the Habitats Directive. Using novel and complementary methodologies, including the coding of over 6,000 nature governance laws, over 2000 surveys and interviews across France, Ireland and the Netherlands, and a behavioural economics lab experiment, we show how nature governance laws have evolved over time, how they have been used in practice, how this has impacted landowners compliance decisions, and how it has impacted traditional public enforcement.<sup>7</sup> Our results point to practical ways in which nature governance laws might be made more effective. Beyond EU environmental law, they also demonstrate new empirical ways of measuring law's impacts, which can be applied and adapted to other fields of regulation.

### 1. The role of the Aarhus Convention in bridging EU nature law's implementation gap

The EU's nature laws, notably the Habitats Directive

1. This work was funded by the European Research Council (ERC) under the European Union's Horizon 2020 research and innovation programme (grant agreement No 639084). Further details on the project and its scientific publications can be found at <https://effectivenaturelaws.ucd.ie/>. Special thanks go to Dr. Zizhen Wang, Edwin Alblas, Dr. Mícheál Callaghan, Julie Foulon, Clodagh Daly, Deirdre Norris, Dr. Valesca Lima, and Dr. Geraldine Murphy, members of the Effective Nature Laws research team.
2. “Implementation” here is used in the general sense to extend not only to formal implementation by means of legal norms transposing, for instance, a Directive, but also practical implementation and enforcement, as employed in the key recent policy documents in the field, including the European Commission's Communication on the Environmental Implementation Review, Delivering the benefits of EU environmental policies through a regular Environmental Implementation Review COM(2016)316 final, and the European Commission's Communication on the EU Biodiversity Strategy for 2030, Bringing Nature Back Into Our Lives, COM(2020) 380. The Environmental Implementation Review, for instance, discusses the ‘implementation gap’ within EU environmental law as denoting the regulatory and enforcement gaps leading to situations in which EU environmental legislation fails to achieve its goals in practice, and is ineffective in achieving these goals.
3. Hofmann A (2018), Is the Commission levelling the playing field? Rights enforcement in the European Union, *Journal of European Integration* 40, 737-751.

4. European Commission (2020) Communication on the EU Biodiversity Strategy for 2030, Bringing Nature Back Into Our Lives, COM(2020) 380; European Commission (2020) Communication on Improving access to justice in environmental matters in the EU and its Member States, COM(2020) 643.
5. European Commission (2020) *Communication on the EU Biodiversity Strategy for 2030, Bringing Nature Back Into Our Lives*, COM(2020) 380.
6. For important work in the field, see, e.g., Eliantonio, M. (2018) The role of NGOs in environmental implementation conflicts: ‘stuck in the middle’ between infringement proceedings and preliminary rulings? *Journal of European Integration*, 40:6, 753-767, and Darpö, J. (2013). Synthesis report of the study on the Implementation of Articles 9.3 and 9.4 of the Aarhus Convention in the Member States of the European Union. Available at <https://ec.europa.eu/environment/aarhus/> (accessed 12 November 2021).
7. The principal findings of the project, outlined in this paper, are further detailed in Kingston, S., Alblas, E., Callaghan, M. and Foulon, J. (2021), *Magnetic law: Designing environmental enforcement laws to encourage us to go further. Regulation & Governance*. <https://doi.org/10.1111/rego.12416>; Kingston, S., Wang, Z., Alblas, E. et al., *The democratisation of European nature governance 1992–2015: introducing the comparative nature governance index*. *Int Environ Agreements* (2021). <https://doi.org/10.1007/s10784-021-09552-5>; Kingston, S., Wang, Z., Alblas, E., Callaghan, M., Foulon, J., Daly, C., and Norris, D., *Europe's Private Nature Governance Revolution: Harnessing the Shadow of Heterarchy* (forthcoming); and Kingston, S., Wang, Z., *How do Nature Governance Rules affect Compliance Decisions? An Experimental Analysis* (forthcoming).

(92/43/EC) and Birds Directive (2009/147/EC), provide for extensive protections including, in the Natura 2000 network, the largest coordinated network of protected sites in the world, covering over 18% of the EU's terrestrial area and more than 8% of its sea area.<sup>8</sup> Buttressed by robust judgments from the CJEU, which interpret the requirements of the Habitats and Birds Directives strictly in light of the precautionary principle, protected habitats and species are subject to an impressively stringent legal regime on paper.<sup>9</sup> The practice, however, is often very different. The statistics are grim: in 2019, only 16% of protected habitats and 23% of protected species were in favourable conservation status.<sup>10</sup>

The EU has embraced the private enforcement rights provided by the Aarhus Convention mechanisms as a means of combatting the serious problem of under-implementation of environmental law within Europe, including its nature laws. The aim of the Aarhus Convention is to increase citizens' involvement in environmental matters, by creating the three so-called "pillars" of environmental governance rights: access to information, public participation and access to justice. In the case of access to information, these rights are to be granted to the public in general; in the case of public participation and access to justice, they are to be granted to the public "concerned" by the matter at issue (Articles 6(2) and 9(2)). Qualifying NGOs are granted privileged status to enforce environmental law, being afforded legal standing to bring legal proceedings as of right (UNECE, 1998: Article 9(2)).

The State Parties are also obliged to ensure that legal proceedings falling within the scope of the Convention are not "prohibitively expensive" (Article 9(4)). Strengthening the Aarhus mechanisms forms an important aspect of the governance reforms proposed by the European Green Deal, as highlighted by the strengthening of the Aarhus Regulation in 2021, and the issuing of a (non-binding) 2020 communication on improving access to justice within Member States.<sup>11</sup> With this increasing reliance on the Aarhus mechanisms to bridge EU environmental law's implementation gap, it is important to understand their effectiveness in practice.

## 2. Measuring the impacts of private nature governance: An interdisciplinary toolbox

In investigating this question, we employed an interdisciplinary toolbox, with three principal methodologies.

8. European Commission (2020) *Communication on the EU Biodiversity Strategy for 2030, Bringing Nature Back Into Our Lives*, COM(2020) 380.
9. See generally, Kingston, S., Heyvaert, V. and Čavoški, A. (2017). *European Environmental Law*, Cambridge, Cambridge University Press, ch. 12, and, e.g., Case C-127/02 Waddenzee and Case C-243/15 LZ (No. 2) ('Brown Bears II').
10. European Environment Agency (2019), *The European Environment - state and outlook 2020*. Luxembourg: Publications Office of the European Union.
11. European Commission Communication on the EU Biodiversity Strategy for 2030, Bringing Nature Back Into Our Lives, COM(2020) 380; European Commission Communication on Improving access to justice in environmental matters in the EU and its Member States, COM(2020) 643; European Commission 'Political agreement on the Aarhus Regulation: Commission welcomes increased public scrutiny of EU acts related to the environment', Press Release of 13 July 2021, IP/21/3610.

First, we engaged in qualitative research to explore how nature governance laws might best be designed to encourage voluntary pro-environmental behaviour. We conducted 2000 surveys and 165 in-depth semi-structured interviews across Ireland, France, and the Netherlands in 2018-2019, and spanning three important stakeholder groups in EU nature law governance: farmers and landowners within protected areas; NGOs; and members of the public. These three States were selected to present a variety of geographic size of Member State, environmental conditions, and record of compliance with EU environmental law, legal "family" of the State at issue (common law or civil law), and length of time taken to ratify the Aarhus Convention.

Second, we engaged in quantitative statistical research, using leximetric coding of laws to map the evolution of nature governance laws at national, EU, and international levels, and their use in practice. We developed the Nature Governance Index ("NGI"), by coding over 6,000 nature governance laws, at international, EU, and national levels, from the birth of the EU's flagship nature conservation law, the 1992 Habitats Directive (Directive 92/43/EEC) to 2015 inclusive. This provides the first systematic data showing the transformation of European nature governance regimes over time. We also developed the Nature Governance Effectiveness Indicators ("NGEIs"), a novel set of indicators measuring the impact of these new governance rights in practice since 1992. We regressed the NGEIs against the NGI to provide a first quantitative insight into whether these changes in nature governance laws have actually made a difference in practice, and their impacts on levels of traditional State enforcement. Data from the NGEIs were collected from a combination of publicly available information and over 300 formal and informal requests for access to environmental information made over a period of 3 years to the European Commission and to national and sub-national bodies within Ireland, France and the Netherlands.

Third, we designed a novel behavioural economics lab experiment, to test how nature governance rules affect compliance. We recruited 300 participants from students at University College Dublin to play a one-shot game that tested how traditional and private/Aarhus governance mechanisms made a difference to the behaviour of landowners and environmentally-motivated citizens in practice. Players took decisions and interacted with each other, by means of bespoke computer programme in a behavioural economics computer lab. The number of tokens (money) earned by each player at the end of the game depended on the decisions taken.

## 3. Results

### 3.1. Qualitative results

Outlining first the results of our qualitative research, our surveys and interviews revealed a rich tapestry of factors that either encourage (or magnetise), or discourage (or repel), pro-environmental action by landowners and poten-

tial private environmental enforcers. Table 1 summarises the factors that we found encourage, and discourage, voluntary private nature enforcement by citizens and NGOs.

	Magnetising/encouraging factors	Repelling/discouraging factors
<b>Factors affecting NGO enforcement</b>	<p>Belief that State is not doing enough (IE, NL)</p> <p>Need to counteract strong agricultural lobby (IE)</p> <p>Need to counteract underfunding of State nature conservation agency (IE)</p> <p>Belief in the transformative potential of EU nature conservation law (IE)</p> <p>Belief in the effectiveness of complaints from the NGO sector (NL)</p> <p>Light-touch role of the European Commission (NL)</p>	<p>Lack of NGO resources and expertise (IE, FR, NL)</p> <p>Unwillingness to act against farmers (IE, NL)</p> <p>Belief in State's primary role as enforcer (FR)</p> <p>Exclusionary effect of requirement to have agrément (FR)</p> <p>NGO resources used to support State enforcement (FR)</p>
<b>Factors affecting citizen enforcement</b>	<p>Would get involved if personally affected (IE, NL)</p> <p>NGO support of citizen action (NL)</p>	<p>Lack of awareness of the mechanisms (IE, FR, NL)</p> <p>Belief in farmers' autonomy over own land (IE, FR, NL)</p> <p>Cost and time (IE, NL)</p> <p>Social ostracisation (IE, NL)</p> <p>Complexity (FR, NL)</p> <p>The State should enforce; citizens' role is to comply not to enforce (FR)</p> <p>Environmental activism is for NGOs (IE, NL)</p> <p>Unwilling to restrict economic progress (NL)</p>

Table 1: Law's effects on potential private environmental enforcers

Table 2 summarises the factors that we found encourage, and discourage, farmers landowners' voluntary pro-conservation activities.

<b>Factors magnetising/encouraging farmers' voluntary pro-conservation activity</b>	<p>Belief in importance of nature in protected areas and farmers' role as guardian of the land (IE, FR, NL)</p> <p>Involvement of local farmers in creating the specific rules to be applied and enforced (IE, FR, NL)</p> <p>Direct engagement with farmers in publicising the rules and the reasoning behind them (IE, FR, NL)</p> <p>Engagement with those ENGOS who have conservation expertise (IE, NL); communication and consensus-building (NL)</p>
<b>Factors repelling/discouraging farmers' voluntary pro-conservation activity</b>	<p>Perceived procedural unfairness in Natura 2000 designations (IE)</p> <p>Perceived lack of publicisation of substantive Natura 2000 rules (IE, FR, NL)</p> <p>Perception that rules are imposed/policed by outsider State/NGO city-dwellers who do not understand farming (IE, FR, NL)</p> <p>Perception that the rules do not make environmental sense (IE, FR)</p> <p>Inconsistencies between laws implementing Natura 2000 and agri-environmental subsidy schemes, and belief that agricultural schemes favour intensive farmers (IE)</p> <p>Disconnect between State's environmental and agricultural bodies (IE)</p> <p>Involvement of ENGOS/citizens who have no connection with the local area (IE, FR, NL)</p> <p>Perception of certain ENGOS as serial objectors (IE) who vilify farmers (FR) and/or exaggerate (NL)</p> <p>Perception that NGO/citizen may be using enforcement for their own selfish/NIMBY end (IE, FR)</p>

Table 2: Law's effects encouraging/discouraging farmers' voluntary pro-conservation activity

While there is a general consensus within ENGOS that the Aarhus mechanisms are helpful, relatively few ENGOS in Ireland and France actually made use of those mechanisms. Our in-depth interviews revealed varied reasons for this low take-up, in particular their limited resources and small number of staff members, the practical administrative and financial burdens entailed by using the Aarhus mechanisms, and (especially in the case of access to justice) the perception that use of this mechanism required special legal expertise.

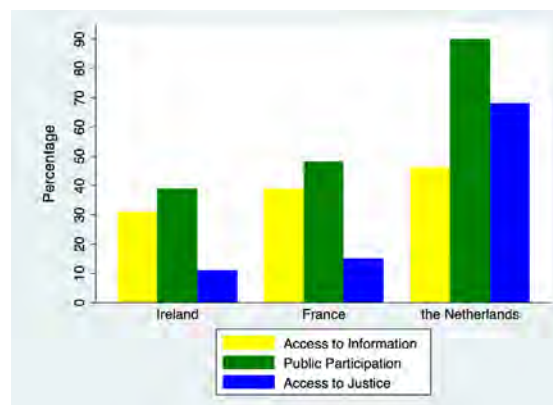


Figure 1: NGOs' use of the Aarhus Mechanisms

In the case of members of the public, few had made use of their rights of access information or access to justice. However, the picture was different for public participation, as one quarter of citizens surveyed had previously exercised their right to make submissions.

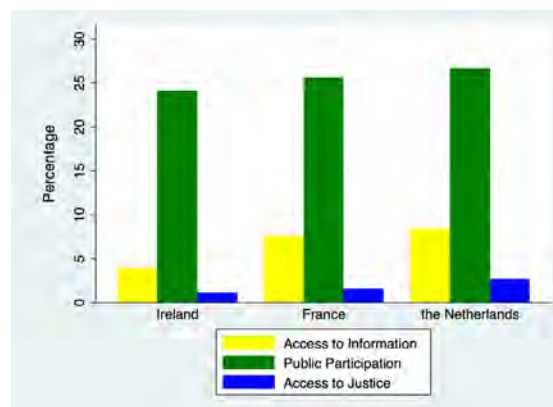


Figure 2: Citizens' Use of the Aarhus Mechanisms

### 3.2. Quantitative results

Turning to our quantitative research, in mapping the evolution of European nature governance laws 1992-2015, our results strongly confirm the democratic turn<sup>12</sup> in the evolution of European nature governance rules over the past generation.

12. In the sense, as noted in the Introduction, of the democratization of environmental enforcement by conferring citizens and ENGOS with legal rights of access to environmental information, public participation, and access to justice in environmental matters.



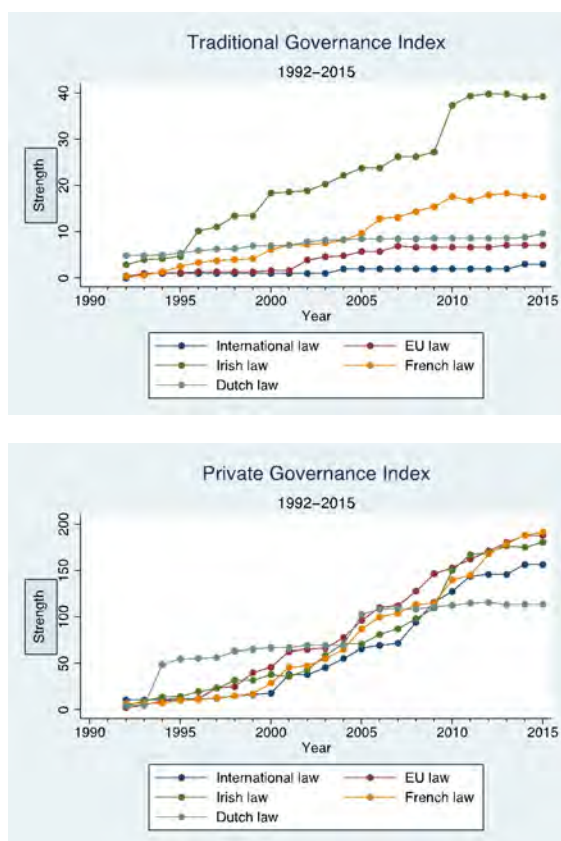


Figure 3: Trends in Traditional vs. Private Governance Compared

As the extract from the Nature Governance Index in Figure 3 shows, the strength of traditional governance mechanisms (such as criminal penalties and civil fines) has remained relatively stable over the 23-year period.

In the Netherlands certain legislation (in particular the Flora & Fauna Act 1999, and the Nature Protection Act 1998) further strengthened the applicable traditional governance rules.

In the case of France, a gradual increase can be observed reflecting legislative strengthening, in particular through the establishment of sanctions for damage to preserved environmental areas (Law n° 95-101 relating to the strengthening of environmental protection) and to national and regional natural parks and marine natural parks (Law n° 2013-619 implementing certain EU law requirements in the field of sustainable development), along with the related case-law.

Conversely, Ireland stands out as a jurisdiction where the strength of traditional governance has increased markedly over this period. For Ireland, the next 23 years saw the passage of many important pieces of environmental legislation, including the Wildlife (Amendment) Act 2000 establishing national protected areas (National Heritage Areas), the Planning and Development Act 2000 which fundamentally reformed Irish planning and land use law, and the passage of a number of Ministerial Regulations transposing elements of the Birds and Habitats Directives.

This relative stability of the studied traditional nature governance regimes from 1992-2015 stands in contrast to

the marked increase in the strength of private / Aarhus governance mechanisms across Ireland, France and the Netherlands during this period.

The steady increase in the strength of private governance mechanisms under EU law reflects the EU's decision to incorporate the Aarhus principles into EU law by means of the Access to Information Directive (Directive 2003/4/EC), the Public Participation Directive (2003/35/EC), the Decision concluding the Aarhus Convention on the part of the EU (Decision 2005/370/EC), and the Aarhus Regulation applying the Aarhus principles to the EU's own institutions (Regulation 1367/2006).

French and Irish law followed broadly parallel trajectories to EU law, reflecting the fact that these States were not generally first-movers in incorporating private nature governance norms (i.e., the Aarhus mechanisms) within their governance laws, but rather did so after signature of the Convention.

The outlier trajectory is that of the Netherlands, where the strength of private nature governance rules increased and remained high even before signature of the Convention. This reflects the fact that the essence of the Aarhus mechanisms, i.e., access to environmental information, public participation and access to justice, were already to an extent present in Dutch law. For instance, the entry into force of the Environmental Protection Act in 1993, and the General Administrative Law Act 1994, inter alia codified ENGOs' right of access to the courts. Indeed, our data reveal that private governance was, as a matter of law, already well-established in the Netherlands prior to Aarhus.

Our results also demonstrate the effects of lack of harmonisation<sup>13</sup> in the field of access to justice. Despite the efforts of the European Commission over some 20 years, Member States have resisted enshrining rights of access to environmental justice expressly in EU legislation,<sup>14</sup> leaving the Commission confined to publishing non-binding guidance on the matter<sup>15</sup> save in certain limited fields such as environmental impact assessment and industrial emissions.

13. i.e., the passage of express EU legislation concerning access to justice in environmental matters.

14. Kingston, S., Heyvaert, V. and Čavoški, A. (2017), *European Environmental Law*. Cambridge University Press, ch. 7, pp. 237-246. The Commission proposed a general Directive on access to justice in environmental matters in 2003 (COM(2003)624), but this met with opposition in the Council. The most recent Commission Communication on improving access to justice in environmental matters (COM(2020)643) continues to emphasise the need for greater legislative harmonisation in this field, as discussed below.

15. European Commission, Communication by the Commission: Commission Notice on Access to Justice in Environmental Matters, C(2017) 2616; European Commission, Communication on Improving access to justice in environmental matters in the EU and its Member States, COM(2020) 643.



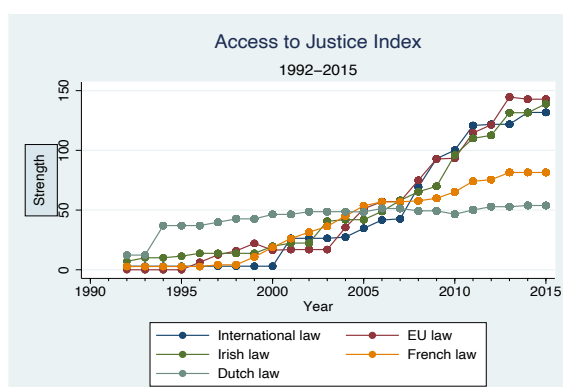
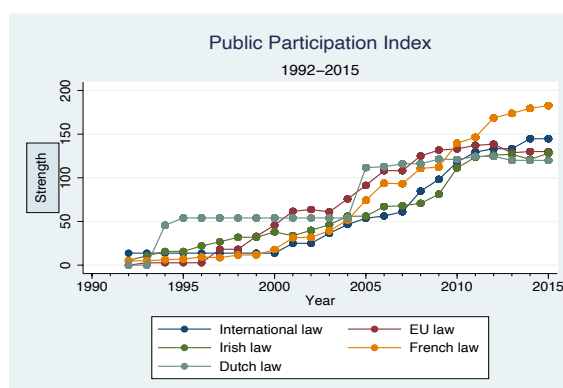
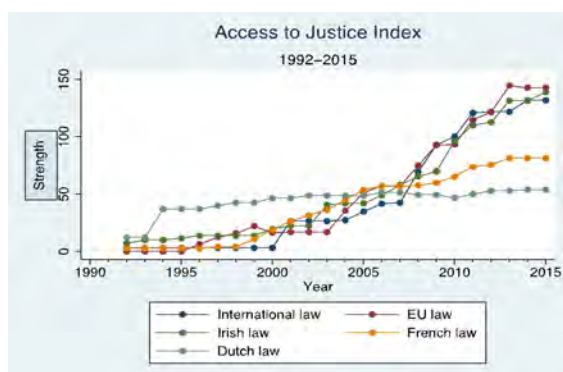


Figure 4: Trends in Access to Information, Public Participation and Access to Justice Compared

Our results confirm that, in the European Commission's continued quest to strengthen access to environmental justice within Member States, express legislation remains the "holy grail". This is, indeed, consistent with the European Commission's recent express plea to the EU co-legislators (i.e., the Council and the European Parliament) to include express access to justice provisions in binding new or revised EU environmental laws.<sup>16</sup>

Turning then to our results from the Nature Governance Effectiveness Indicators, our results tell a cautionary tale of Europe's private nature governance revolution. While our results confirm the widespread embrace of private nature governance laws on the books across our studied jurisdictions from 1992-2015, they also provide, to our knowledge, the first systematic empirical evidence that these enhanced rights for citizens are not being consistently used in practice. To take

16. Ibid.

access to justice as an example, while we certainly found an increase in cases brought by private parties to enforce EU nature law before national courts, this increase was bumpy and, in the case of Ireland and France, figures still remained at relatively low levels (Figures 5A and 5B). Overall, the use of private nature governance mechanisms in practice has not kept pace with their development in law. Further, data on levels of use of the Aarhus mechanisms were often difficult to access, leading to a basic lack of transparency on the success of these new governance mechanisms, a situation itself incongruous with the aims of the Aarhus Convention.

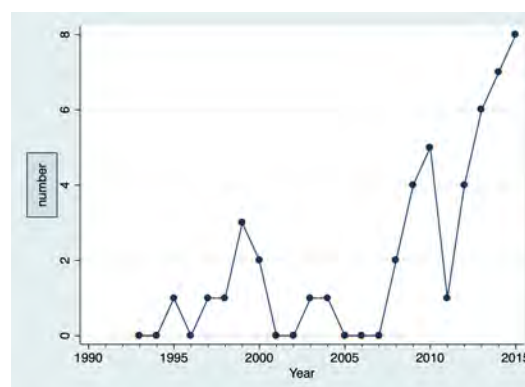


Figure 5A. Ireland

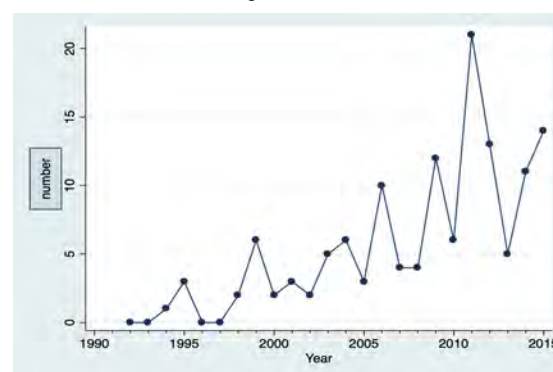


Figure 5B. France

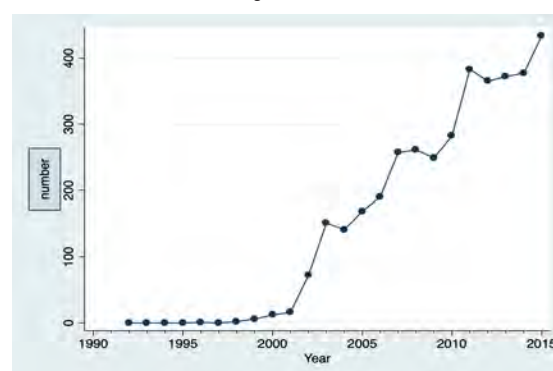


Figure 5C. The Netherlands

Figure 5: Number of proceedings brought by private parties (including ENGOs) before national courts where the Plaintiff sought to enforce EU nature law, 1992-2015

With respect to enforcement proceedings by the European Commission, our data show a clear peak in the commencement of Article 258 TFEU proceedings against all three Member States between the years 1997 and 2003. Such proceedings start from a low level prior to 1997 and

revert back to a low level from 2003 onwards (Figure 6). These data support the view that the Commission has moved towards a “management” approach to environmental compliance, even within the field of nature law, reducing its use of formal legal proceedings.

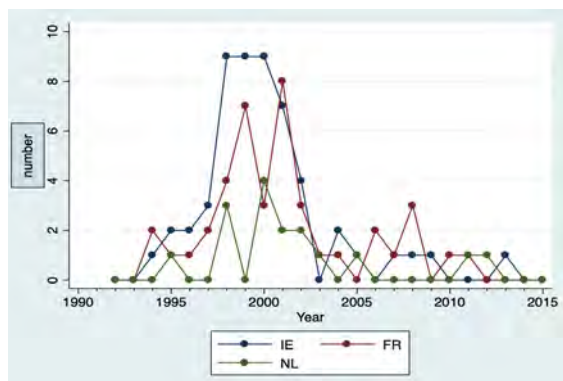


Figure 6. Number of Article 258 TFEU nature infringement actions commenced by the European Commission against Ireland, France and the Netherlands, 1992-2015.<sup>17</sup>

Our statistical regression results also reveal for the first time that, despite these inconsistencies in usage of the Aarhus mechanisms in practice, passing private governance laws can in fact improve levels of State enforcement of EU nature law in practice. Fascinatingly, we found that, while strengthening private governance laws significantly improved levels of State nature enforcement, strengthening traditional governance laws did not.

This suggests that, by strengthening Aarhus/private governance rules, States can harness a shadow of heterarchy to increase the strength of State enforcement of EU nature law on the ground.<sup>18</sup>

### 3.3. Experimental behavioural economics results

Our lab experiment confirmed that traditional and private environmental governance rules together achieve more effective nature conservation outcomes than traditional governance rules alone. This provides empirical support for the common assumption that strengthening mechanisms of “environmental democracy”, and the Aarhus mechanisms in particular, leads to improved environmental outcomes.

Our experimental results also show that there is far less need for environmental governance rules of any sort - whether traditional or private/Aarhus governance rules - if landowners hold strong intrinsic pro-environmental values. This suggests that enforcement resources might best be directed to those with weaker intrinsic environmental values, and complements qualitative research showing that reliance on traditional or private governance rules in cases of strong intrinsic pro-environmental motivations

on the part of landowners can be counterproductive.

Further, our experimental results show that perceptions of the effectiveness of traditional environmental enforcement does not deter citizen enforcers (i.e., the “public”/the “public concerned” within the meaning of the Aarhus Convention). These results therefore question the typical narrative on the part of public enforcers, such as the European Commission, that the Aarhus mechanisms are destined to fill the implementation gap left by public enforcement. However, we note that our experiment did not capture the case of ENGO enforcers, who may be in a position to act more strategically than individual citizen enforcers in choosing to be active where public enforcement is lacking.

### Conclusion

Improving enforcement of the EU’s nature laws is at the heart of the EU’s 2030 Biodiversity Strategy, and is acknowledged by the European Commission as essential in dealing with Europe’s biodiversity crisis (European Commission, 2020a). The Aarhus Convention, and its empowering of private governance by enabling civil society enforcement through law, has been a cornerstone of Europe’s environmental enforcement strategy for the past generation.

Our results reveal that, contrary to what might be assumed, Europe’s private governance revolution has not been at the expense of traditional governance techniques, such as strengthening of criminal sanctions and civil/administrative fines. Rather, private governance has evolved alongside traditional mechanisms, especially at the national level.

Our findings further show striking differences between States’ approaches to nature governance and the impact of EU law in this field, ranging from first-mover (the Netherlands), reactive (Ireland), or something in between (France). Ultimately, they strongly confirm that, even when Member States are independently bound by the Convention as a matter of international law, important divergences between national governance laws will remain, absent express harmonisation in EU law.

In addition, even where legal rights of private enforcement are provided for in law, an unsupportive regulatory culture can subvert private enforcement initiatives. The formal hierarchy of law is not enough. For private environmental enforcement to flourish in practice, this requires a supportive regulatory culture, fostered by the State. The use of the Aarhus mechanisms must be straightforward, uncomplicated, and cheap. From the EU perspective, if the Commission wishes to increase private enforcement activity, it must therefore go beyond monitoring formal implementation of the Aarhus requirements to ensure that the State fosters a regulatory culture that is supportive of and open to private enforcement. Ultimately, despite all the EU’s emphasis on the Convention, there remains a strong belief (across all three jurisdictions, and all three stakehol-

17. Source: Data obtained from European Commission, DG Environment.

18. By contrast to the shadow of hierarchy that has been shown to exist as a result of hierarchical legal architectures in certain cases: see, e.g., Borzel, T., 2010. ‘European Governance: Negotiation and Competition in the Shadow of Hierarchy’ 48(2) Journal of Common Market Studies pp.191 - 219.

der groups) in the central role of public enforcement by the State and/or the European Commission.

Moreover, our findings show that, contrary to the typical narrative that private enforcement enables “environmental democracy”, in fact the Aarhus mechanisms are largely being used by a sub-group of specialised NGOs, not citizens in general. Breaking that mould will, our evidence suggests, require more than the passage of new laws, or even State resources and clear publicisation of the rights at issue, but will require a deeper shift in regulatory tradition and culture, which we doubt can be achieved by the State alone. Furthermore, if the policy aim is truly that of enhancing environmental democracy, there are perhaps more directly effective tools than the Convention. One such tool might be, for instance, a consultative and deliberative citizens’ forum encompassing environmental governance, including nature governance, and which could embrace other stakeholders, including the State, NGOs and farmers. This could draw from citizen deliberative models such as the Constitutional Convention and Citizens Assembly on Climate Change in Ireland.

In sum, our results point to four principal policy lessons. First, in making nature laws more effective, knowledge, communication, and clarity matter. Not just of the content of the law but also its environmental purpose. Across each jurisdiction, our data suggest a need for a clear and independent source of information for landowners, citizens and NGOs on the purpose and content of the EU nature rules and the Aarhus mechanisms.

Second, procedures, consultation and inclusivity also matter. We found evidence in each State that, in protected

areas, locally-led conservation farming schemes that have regard to the specific nature of the protected habitats or species at issue, and involve farmers, can strongly encourage pro-environmental motivations of participating farmers.

Third, efforts to increase levels of private nature governance have not entirely succeeded to date. Member States, and the European Commission, should be cautious in relying on private nature enforcers as (part of) the solution to the EU’s nature law implementation gap. Our quantitative results underscore the danger in overreliance on the Aarhus mechanisms to fill the gaps left by under-enforcement by State and/or EU authorities. Specifically, they highlight the fact that passing private nature governance laws is far from the end of the story for policymakers wishing to engage a potential citizen “watchdog” environmental enforcement army to complement public enforcement. There are still major gaps in their effectiveness in practice, and significant divergences between Member States in the extent to which private citizens and NGOs engage.

Finally, strengthening private nature governance may have the added benefit of improving levels of State enforcement in practice. We found that, while strengthening private governance laws significantly improved levels of State nature enforcement, strengthening traditional governance laws did not. For policymakers seeking to increase enforcement of EU nature law on the ground, strengthening private governance rights may therefore be a more effective means of doing so than simply ratcheting up existing traditional governance mechanisms such as levels of maximum criminal penalties or civil fines.



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## The Emergence of Illiberal Constitutionalism and Illiberal Legality in Europe: What Is Happening and What Can the EU Do about It?

The ongoing political events in Poland and Hungary attest to a serious deterioration of the rule of law, which is unsettling for all the supporters of substantive constitutional democracy with all its components: the rule of law, democracy and protection of human rights.<sup>1</sup> As the legal and political debates between the Polish and the Hungarian governments and different actors at the level of the European Union and the Council of Europe have showed, the rule of law is rejected as a fundamental value, which entails the non-compliance with its legal ramifications<sup>2</sup> and the introduction of illiberal legality,<sup>3</sup> which is a mere formalistic and instrumental approach to the law.<sup>4</sup>

It is intriguing to understand why and how this rule of law deterioration could have happened in two member states of the European Union in the last decade. There is indeed an assumption when discussing these issues that illiberal constitutionalism has emerged only recently, and that it could spread to other member states, as well. Therefore, it is even more important to pinpoint the reasons explaining the success of the governments led by Orbán and Kaczynski in pushing an autocratic and illiberal reform agenda. These reasons could be found, partly, in the historical and emotional trajectory of Poles and Hungarians. Because of the possibly contagious nature of illiberal constitutionalism especially in the Central and Eastern European region, due to its shared history and potentially similar emotional trajectories,<sup>5</sup> it is of utmost

importance to understand what the European Union can and cannot do with its member states that have already consolidated their illiberal constitutional systems (Hungary and Poland) and those that have just undertaken the path leading to such consolidation.

The remainder of this piece is structured as follows: Section I will briefly explain what illiberal constitutionalism is and how it has emerged in Hungary and Poland. The following Section will answer the main question of this paper, namely, how and why the people supported the illiberal and populist governments even after having experienced the detrimental effects of their policies. Section 3 will analyse the options open to the European Union considering the attitude of local voters. The last Section will attempt to summarize some of the lessons learned from this experience – instead of drawing conclusions.

### 1. Illiberal constitutionalism

In a recently published book<sup>6</sup>, I and my co-author develop the concept of ‘illiberal constitutionalism’, taking a holistic view of the regional context, gradualness, methods and content of the changes observed in Hungary and Poland, as well as the tangible differences between the latter and “real authoritarian States”. In our view, illiberal constitutionalism is a stage in the process of ‘authoritarianization’ of EU Member States (‘illiberalization’ of their constitutionalism), mainly in the post-socialist region that has been “hit” by autocrat populist leaders in the second decade of the 21<sup>st</sup> century. They have brought about the deterioration of constitutional democracy and the hollowing out of its components. The gradualness of the deterioration and the embeddedness of EU law (acquis) and human rights commitments (regardless of their weakness and flaws) in the daily adjudication of law have kept these States from turning into (modern) authoritarianisms. This is one part of the concept of illiberal constitutionalism. On the other hand, we propose that the normative appeal of the regime for the population could find its roots more in an unbalanced constitutional identity that longs for a charismatic leader than in a particular political philosophy. Consequently, it is also suggested that this appeal could be satisfied by the application of a patchwork of ideologies in so far as they can be invoked by a charismatic leader for satisfying the current emotional needs of the polity.

Briefly, we argue that i) constitutionalism does not necessarily have to be liberal, ii) illiberal constitutionalism is a deterioration of liberal constitutionalism and a step towards authoritarianism, without reaching this lat-

1. This research is supported by the National Science Centre, Poland (2018/29/B/HS5/00232, ‘Illiberal constitutionalism in Poland and Hungary’.

2. Such as independent judiciary and compliance with the decisions of the CJEU.

3. Kim Lane Scheppele calls the phenomenon autocratic legalism. See, Kim Scheppele, ‘Autocratic Legalism’ (2018) 85 University of Chicago Law Review.

4. Tímea Drinóczi and Agnieszka Bień-Kacata, ‘Illiberal Legality’ in Tímea Drinóczi and Agnieszka Bień-Kacata (eds), *Rule of Law, Common Values, and Illiberal Constitutionalism: Poland and Hungary within the European Union* (Routledge).

5. Tímea Drinóczi and Agnieszka Bień-Kacata, ‘Extra-Legal Particularities and Illiberal Constitutionalism – The Case of Hungary and Poland’ (2018) 59 *Hungarian Journal of Legal Studies* 338.

6. Tímea Drinóczi and Agnieszka Bień-Kacata, *Illiberal Constitutionalism in Poland and Hungary: The Deterioration of Democracy, Misuse of Human Rights and Abuse of the Rule of Law* [Electronic Resource] (Routledge 2021). This paper is based mainly on the findings of this book, and the co-edited one we have published earlier (Tímea Drinóczi and Agnieszka Bień-Kacata (eds), *Rule of Law, Common Values, and Illiberal Constitutionalism: Poland and Hungary within the European Union* (Routledge 2021).) and a piece published on Verfassungsblog (Tímea Drinóczi, ‘The EU Cannot Save Us: Why Poland and Hungary need resilience, not future-oriented reforms of EU enforcement mechanisms’, VerBlog, 2021/7/07, available at <https://verfassungsblog.de/the-eu-cannot-save-us/>).



ter stage yet, iii) it is a coherent theory in its illiberal and weakly constrained manner, iv) it presupposes an illiberal constitutional identity, in which the liberal and non-liberal or illiberal value orientation of the population can intermittently prevail, as it happens in the Hungarian and Polish cases.

The constitutional changes in Hungary and Poland since 2010 and 2015 respectively, leads us to give more weight to the disentanglement of liberalism and constitutionalism. "Constitutionalism" could be seen as less of an ideology and more of a constitutional design that could accommodate a variety of political moralities, philosophies or practices, especially in those States in which liberal constitutionalism is already established as a political ideology and a constitutional design.

Hungary and Poland stand out among the States in democratic decay and are noticeably different from existing (modern) authoritarian regimes. Their deterioration has not, either quantitatively or qualitatively, reached the state of "authoritarianism". This, however, does not mean that no increasingly authoritarian tendencies can be observed in both countries. Hungary and Poland are still members of the EU, which, notwithstanding its failures, imposes a particular, albeit rather weak, internal constraint on the political leaderships of both countries. The existence of this internal constraint means that they are still constitutionalist systems. At the same time, the deterioration of democracy, misuse of human rights, and abuse of the Rule of Law imply that the Hungarian and Polish constitutionalism can be qualified as "illiberal", the sign that the development vector of both ideology and constitutional design took a new turn (different from the original idea of liberal constitutionalism that was introduced at the beginning of the 1990s).

This illiberal constitutionalism relies heavily on the Hungarian and Polish identities that have been molded in such a way that they are prone to accept and support illiberal (non-liberal) visions and ideas, which renders the survival of liberal constitutionalism more difficult – though not impossible. They also enable the illiberal regime to defend and maintain its constitutive elements, as these are not contrary to the unbalanced constitutional identities of Hungarians and Poles.

There are several indices showing us the dismantling of fair election, independent media, lowering of human rights protection, the vanishing of the independence of the judiciary, etc. Most of these indices categorize Hungary and Poland as hybrid regimes, while the V-Dem labels Hungary an authoritarian system. The dismantling and weakening of the institutional guarantees necessary for a substantive constitutional democracy are apparent. However, what is less obvious is whether the popular support for these governments, especially the Hungarian one, is genuine results from manipulations of the electoral system and biased media. Elsewhere, together with

Agnieszka Bień-Kacała and Gábor Mészáros,<sup>7</sup> I argued that regardless of the institutional reforms of this last decade, the policies of both Orbán and Kaczynski enjoyed genuine popular support. Now, the question is why. In one of her public lectures,<sup>8</sup> Kim Lane Scheppelle argued<sup>9</sup> that it is the party system and party politics that are to be blamed for the latest autocratization processes, and not necessarily the people that have been captured or badly influenced by populist politicians. Nevertheless, while there are certainly numerous reasons for this kind of democratic decay, it is still the voters that reelected their representatives (in Hungary, 2014 and later in 2018, and in Poland, 2019) – knowing well what they have been doing with the constitutional and political system.

## 2. The people

Hungarians and Poles have unstable constitutional identities, which may become more visible at certain historical moments, and which are prone to lead them to opt for a charismatic leader, without any need for coherent ideology or moral philosophy. Collective victimhood, collective narcissism, and the illiberal values of a given society, especially when heavily relied on and triggered by a right-wing populist autocratic leader, contribute to the formation of illiberal constitutionalism and prevent reversion of the system. These factors are not favorable to sustaining liberal constitutionalism, although they do not necessarily reject it, and could be viewed as one of the main reasons for the success of populist politics and the illiberal constitutional remodeling.

Both Hungarians and Poles seem to share a specific understanding of values, including the Rule of law – despite similarities and differences in their constitutional history, historical particularities, and emotional trajectories.

Studies from various fields of social sciences<sup>10</sup>, support the assertion that the Hungarian historical trajectory – collective victimhood caused primarily by the Trianon peace treaty in 1920, citizens having been abandoned in their disappointment by all regimes throughout Hungarian history – is not a favorable ground to build an emotionally stable identity upon.<sup>11</sup> Poles are often characterized as a traumatized nation because of their loss of statehood and independence. These particularities were further stren-

7. Drinóczi and Bień-Kacała, 'Illiberal Legality' (n 4); Tímea Drinóczi and Gábor Mészáros, 'Hungary: An Abusive Neo-Militant Democracy' in Joanna Rak and Roman Băcker (eds), *Neo-militant Democracies in the Post-communist Member States of the European Union* (Routledge 2022).

8. UFMG Seminar Series in Constitutionalism and Democracy, 22 September, 2021, <https://www.youtube.com/watch?v=jz4EODT42JY>

9. Kim Lane Scheppelle, 'The Party's Over' in Mark A Graber, Sanford Levinson and Mark Tushnet (eds), *Constitutional Democracy in Crisis?* (Oxford University Press 2018).

10. See e.g., Éva Fülöp and others, 'Emotional Elaboration of Collective Traumas in Historical Narratives' in Joseph P Forgas, Orsolya Vincze and János László (eds), *Social Cognition and Communication* (Psychology Press 2013); Anna Tarnowska, 'The Sovereignty Issue in the Public Discussion in the Era of the Polish 3rd May Constitution (1788–1792)' in Ulrike Müßig (ed), *Reconsidering Constitutional Formation I National Sovereignty: A Comparative Analysis of the Juridification by Constitution* (Springer International Publishing 2016).

11. Fülöp and others (n 10).

ngthened during the Soviet era in both States. Schwartz and Bardi's findings from 1997 on the value priorities in the region after the end of the communist rule, which seem to be supported by the Value research results published in 2019, show that the value profile common in Eastern European countries, which lacks the commitment to egalitarianism and autonomy values, is ill-suited for the development of democracy.<sup>12</sup>

There are two main observations that are important for us here. The first is that people can gradually acclimate their values to changed circumstances, upgrade the importance of values that become attainable and downgrade the importance of those whose pursuit is no longer sustainable.<sup>13</sup> The second is that there do seem to be distinctive Western European values, not commonly shared in Eastern Europe.<sup>14</sup> Apparently, Western Europeans lend low importance to mastery values, most importance to affective autonomy values and least importance to conservative values. They appreciate more initiative and achievement, and they are keen on tolerance and post-material values, such as freedom and social responsibility. In Eastern Europe, mastery values are even less important, conservatism and hierarchy are paramount.<sup>15</sup> One important question follows: how long does this acclimation take and can it happen at all in a particular society?

These different values, and the results of scientific narrative psychology and other social psychological empirical studies, support our hypothesis that the emotional attitudes of the people and the community underpin the illiberal transformation and the degree of tolerance of the disrespect of the Rule of Law. Regardless of the 20 or 25 years of liberal constitutionalism in Hungary and Poland, what we seem to have today (but possibly to differing degrees) is as follows: lack of respect for others; compromised self-confidence; the feeling of being a victim, and all the attached feelings of inferiority; the need for a strong leader; prioritizing values of conservatism and hierarchy; and reluctance regarding, or controversial attitudes towards the values of liberal constitutional democracy or open society, such as intellectual autonomy, individual liberty, and responsibility. All of these identity-related phenomena, which have apparently already been internalized, eventually combine to form a national and constitutional identity. This type of group identity, at

certain historical moments, seemed and still seems to be fertile soil for populist leaders who have an illiberal vision of society and State. Nevertheless, it does not offer the best conditions for developing the civic virtues necessary for upholding a substantive constitutional democracy.

Recent research on collective narcissism has shown that a connection can be identified between this kind of value orientation (nationalism, authoritarianism, hierarchy, social dominance orientation, homogeneity) and populism. These values and attitudes overlap with collective narcissism.<sup>16</sup> Collective narcissism is defined as 'a belief that one's own group (the ingroup) is exceptional and entitled to privileged treatment, but others do not sufficiently recognize it. Thus, central to collective narcissism is resentment that the ingroup's exceptionality is not sufficiently externally appreciated'.<sup>17</sup> As such, collective narcissism is a core source of political choices that undermine liberal democracy. In particular, it is linked to intergroup hostility and aggression, voting behaviour, political conservatism, and conspiratorial thinking. It is related to the biased perception of intergroup reality, in which events are selectively seen and remembered in the service of the ingroup's image and linked to a divisive social identity.<sup>18</sup> It is also linked to collective victimhood. As a result, the victimized collective memory, with perceived historic wrongs remaining unresolved, and the intense feeling of exceptionality shared by Poles and Hungarians create an environment that is prone to illiberal transformation and the emergence of a particular understanding of the Rule of Law - i.e., illiberal legality.

It seems that Hungarians and Poles share these emotional background, which underpins their political demands. In both countries, there is always the feeling that someone else is ultimately responsible for collective failure, or that someone does not recognize or admire the Hungarians and Poles enough. These specific emotional and historical trajectories, value orientations, and attitudes of Hungarians and Poles are not only seriously aggravated by populism, but also overlap with collective narcissism, including conspiratorial thinking. Collective narcissism is associated with the (fictional) idea of an aggression from outgroups, which leads in turn to actual physical aggression against members of the outgroup (e.g., attacks on people of color, including physical attacks or spitting on them) because they speak differently and look different, or are associated with opposing political positions. In Hungary, it is clearly present in the hate campaign against György Soros, the NGOs, LGBTQI people, and those supporting and promoting human rights and diversity. In Poland, it was clear in relation to the Smoleńsk plane crash in 2010, when many

12. Shalom H Schwartz and Anat Bardi, 'Influences of Adaptation to Communist Rule on Value Priorities in Eastern Europe' (1997) 18 *Political psychology* 385. Similarly, G Skąpska, 'Law and society in a natural laboratory: the case of Poland in the broader context of East-Central Europe' in Max Kaase and others, *Three Social Science Disciplines in Central and Eastern Europe: Handbook on Economics, Political Science and Sociology* (1989-2001) (GESIS/Social Science Information Centre IZ ; Collegium Budapest Institute for Advanced Study 2002).

13. Schwartz and Bardi (n 12) 394.

14. From a different perspective, see Max Weber, *The Protestant Ethic and the Spirit of Capitalism* (Allen & Unwin 1930). See also, Wojciech Wrzesiński, *Charakter narodowy Polaków. Z rozważań historyka* [National character of Poles. From the historian's reflections] (Uniwersytet Wrocławski 2004).

15. Schwartz and Bardi (n 12) 406. Similarly see e.g., Martin Krygier, 'The Challenge of Institutionalisation: Post-Communist "Transitions", Populism, and the Rule of Law' (2019) 15 *European constitutional law review* 544.

16. Agnieszka Golec de Zavala, Karolina Dyduch Hazar and Dorottya Lantos, 'Collective Narcissism: Political Consequences of Investing Self Worth in the Ingroup's Image' (2019) 40 *Political psychology* 37; Aleksandra Cichocka and Aleksandra Cislak, 'Nationalism as Collective Narcissism' (2020) 34 *Current opinion in behavioral sciences* 69.

17. Golec de Zavala, Dyduch Hazar and Lantos (n 16) 37-38. Ibid. 37-38.

18. Ibid 39, 42, 44.

claimed that former Prime Minister Donald Tusk and Russia were to blame.

Voters in both Hungary and Poland care little about the realization, implementation, and especially the value-content of the Rule of Law, which is quite unfortunate. As the Venice Commission noted, '[t]he Rule of Law can only flourish in a country whose inhabitants feel collectively responsible for the implementation of the concept, making it an integral part of their own legal, political and social culture.'<sup>19</sup> Collective responsibility can hardly be nurtured when the Rule of Law is surrounded by nationalistic and political interpretations. It takes the concept out of context, especially when claiming that the Rule of Law is itself a fluid, mainly political concept, ill-fitted or inadequate for use as an objective measure in an official legal procedure (such as on Article 7 TEU or the Rule of Law conditionality). It disregards the co-existence of two considerations, and, thus, misguides the debate: even though legal procedures can be politically assessed, criticized, or even praised, they should still be thought of as belonging to the realm of the law, and as such informed by legal approaches, guarantees, processes, and legal arguments. Nevertheless, this approach enjoys continuous support from the voters.

Polish and Hungarian voters show similar value attitudes: majoritarian understanding of democracy;<sup>20</sup> strong desire for stability, which is the reason why they are willing to trade off liberal and democratic values; tendency towards conservatism and authoritarianism; prioritizing hierarchy as a primordial value, as opposed to egalitarianism, intellectual and affective autonomy, and mastery.<sup>21</sup> Therefore, it is still the people who tolerate, accept, and even support these changes in the constitutional system and populist politics. It seems that people want, or at least do not substantially oppose, the remodeling of the Hungarian and Polish constitutionalism.

This being said, recent election results, in the autumn of 2019, in Poland and Hungary, could bring a healthier vertical division of power and more quality in legislation in the Hungarian and Polish illiberalism which could recalibrate the degree of the Rule of Law compliance. These election results show, first, that the Hungarian opposition could organize itself to support one common candidate against a Fidesz candidate, leading to some satisfying results at the local level.<sup>22</sup> Second, Poles still support the illiberal turn of the ruling Law and Justice (Prawo i Sprawiedliwość) party but, at the same time, they do not fully

accept further reduction of pluralism.<sup>23</sup>

Nevertheless, the foundations of the illiberal regime are still intact. The local levels' autonomy is limited, Hungarian local governments and the Polish Senate, which cannot significantly influence legislative content and avert any informal (and usually unconstitutional) constitutional change, still need to work within the national, and thus illiberal, framework, which can easily be changed if needed.

### 3. What can and cannot be done?

It is now a fact that the EU cannot resolve its legal differences with Hungary and Poland. There are two alternative implications of a situation in which a legal and cultural community is not able to maintain and enforce its legal regime. Either the shared nature of its legal values and political ideals and principles can be justifiably questioned, or the country whose actions raise doubts about the universality of these principles has already ceased to be the part of that community. This is why it is suggested to think of the Rule of Law implementation in Hungary and Poland as an instance of 'illiberal legality'. Legal actions taken by the 'outside group' cannot be effective against illiberal legality, insofar as illiberalism and all of its implications are also symptoms of what is going on with the society as a whole, which not only does not and/or cannot revolt forcefully but supports the regime and applauds its actions.

In the most pessimistic assessment, Hungary and Poland seem to already be outside of the 'community', as attested by the weak constraint power the remnants of the EU law can have on the Hungarian and Polish public authorities. The question is when the European legal community, i.e., EU, and Hungary and Poland themselves, will realize it and what measures they will take. Wielders of the political power of Hungary and Poland cannot be disciplined by the usual 'in-group' measures, because these are dispute resolution methods belonging to another 'reality.' The sooner the European political community and leaders realize this, the better they can promote the universality of the principle of the Rule of Law within the European Union, and productively advance the European project further.

An optimistic version would propose or refer to an enforcement mechanism through which the EU could successfully enforce its values. Regrettably, prevention seems to be more important than dealing with the renegade States - which is understandable, for the actors do not speak the same 'language'. This approach does not help to resolve the differences at all, but, instead, either brings us back to the most pessimistic scenario or demands a more realistic one. A more realistically appealing assessment would project a formation of a longer-term game between the EU and Hungary and Poland, until the point when the

19. Rule of Law Checklist (Adopted by the Venice Commission at its 106th Plenary Session (Venice, 11–12 March 2016).

20. Jan Eichhorn and others, 'How European publics and Policy actors value an open society. Key insight across countries' (Open Society European Policy Institute 2019), available at [http://voicesonvalues.dpart.org/images/finalreports/OSI-019-18-Key-Insights\\_v5.pdf](http://voicesonvalues.dpart.org/images/finalreports/OSI-019-18-Key-Insights_v5.pdf).

21. Schwartz and Bardi (n 12) 398.

22. *Editor's note:* most notably, in the 2019 Hungarian local elections, Gergely Karácsony was elected mayor of Budapest, defeating the incumbent Fidesz candidate István Tarlós who had been in office since 2010.

23. *Editor's note:* during the 2019 Polish parliamentary elections, the ruling Law and Justice party retained its majority in the Sejm, but lost its majority in the Senate to the opposition. With 43.6% of the popular vote, Law and Justice received the highest vote share by any party since Poland returned to democracy in 1989.



illiberal constitutionalism is overturned, or when the EU membership of Hungary and Poland will politically, economically and emotionally be undesirable for other Member States and the EU herself. The synergy of these three factors is, however, improbable to occur at the same time. Neither does the overturning of the regime seem feasible.

To be absolutely clear: there are two alternative implications of a situation in which a legal and cultural community is not able to maintain and enforce its legal regime: either the universality of its legal values and principles can justifiably be questioned, even if there is no common understanding concerning the definition of the Rule of Law; or the country whose actions challenge the universality of a principle and value has already ceased to be the part of that community. It is an “either/or” issue; there should be no in-between.

The EU leaders and the leaders of Hungary and Poland live in different realities. It just follows that what the EU can do is not to reverse the changes, not even to improve the already lost judicial independence or increase compliance with the rule of law and human rights commitments. Rather, revising procedures, strengthening the protection of the values of the EU, and trying to increase their enforceability are forward-looking, aimed at preventing the rise of future-to-be autocratic leaders. This being said, as I have argued elsewhere,<sup>24</sup> I do not see how even these new political and legal mechanisms could help if these future-to-be autocratic leaders do follow the Polish (and Hungarian) example: gradually transforming their systems through (formal and) informal constitutional changes, based on democratic legitimacy won in (the first) fair and competitive and free election(s); abusively invoking national sovereignty arguments (or their constitutional identity) at both political and legal levels; maintaining their support with right-wing populist rhetoric; always being one step ahead of the reactions to their wrongdoings.

Moreover, political measures coming from the EU would be counterproductive. These would be decried as attacks from Brussels and would trigger more severe defenses relying on national sovereignty or constitutional identity narratives (as it happened in the EU-Polish “dialogue” on the judicial reform). Legal measures would be ineffective, too: the “value-oriented” EU law infringements will not be rectified by these governments but could result in the same political response: non-compliance and pushing the limits even further.

Economic measures could help but we lack meaningful precedents in this area – maybe the daily penalty Poland must pay for non-compliance will inform us about the efficiency of this kind of measure. As for the Rule of Law conditionality mechanism,<sup>25</sup> the original plan has been

softened, and especially the Hungarian government has other resources, e.g., Chinese financing and governmental bonds – insofar as the government only cares about its short term goals and the enrichment of oligarchs rather than long-term well-being.

A more effective way constitutionalists could contribute to the fight against even more illiberalization and autocratization of Hungary and Poland would be to help the resilient factors within these countries so that Hungarians and Poles could help themselves. For that, a more Western-oriented identity and value-orientation of the voters should prevail in the next election, even if society, to a certain extent, has gotten used to or even welcomes governments’ illiberal visions. There seems to be a powerful discontent about the Polish abortion decision<sup>26</sup> and the Hungarian anti-LGBTQ law,<sup>27</sup> which brought people to the streets. Tusk returns to Polish politics, and Hungarian opposition is more than less united and, according to the latest polls, half of the voters supports them,<sup>28</sup> regardless of how Fidesz tries to divide them, for instance over the anti-LGBTQ law. Nevertheless, Hungarians, as of the end of September 2021, have not yet seen a coherent program of how exactly the opposition wishes to govern and exactly what they have to offer to the people (besides that they want Orbán out) if they won the election next Spring – in a way, that is acceptable in a constitutional democracy.

However, as already explained, we should also be realistic: reformed mechanisms at the EU level could only be helpful against those who feel like following the example of Hungary and Poland if they are caught “red-handed” during their very first actions against EU values and principles – the determination of which is not only challenging but tricky, too.

#### 4. Instead of conclusion: lessons learned

What the Hungarian and Polish examples and, mostly, the lack of success of the strategies against them teach us, is that constitutional democracies that still retain their

mechanism in the long-term budget 2021–2027 to protect the EU budget against breaches in the implementation of jointly agreed rules and regulations, and allowing the EU to suspend, reduce or restrict access to EU funding in a manner proportionate to the nature, gravity and scope of the breaches.

26. *Editor's note:* on 22 October 2020, the Polish Constitutional Tribunal found that abortion in the case of severe fetal defects is inconsistent with Article 38 of the Polish Constitution. The chief justice, Julia Przyłębska, said in a ruling that existing legislation – one of Europe's most restrictive – that allows for the abortion of malformed fetuses was incompatible with the constitution. Following the ruling, abortion is only permissible in Poland in the case of rape, incest or a threat to the mother's health and life, which make up only about 2% of legal terminations conducted in recent years.

27. *Editor's note:* on 15 June 2021, the Hungarian Parliament approved with a 157 – 1 vote certain amendments to the Child Protection Act, the Family Protection Act, the Act on Business Advertising Activity, the Media Act and the Public Education Act, with the aim, in particular, to ban sharing information with minors that are considered to be promoting homosexuality or gender reassignment and to restrict LGBT representation in the media by banning content depicting LGBT topics from daytime television and prohibiting companies from running campaigns in solidarity with the LGBT community. In addition, it also declared that only individuals and organizations listed in an official register can provide sexual education classes in schools.

28. Závecz Research, 13–20 Sept 2021, <http://www.zavecresearch.hu/>

24. Drinóczi and Bieñ-Kacała, ‘Illiberal Legality’ (n 4).

25. *Editor's note:* for instance, Regulation (EU, Euratom) 2020/2092 on a general regime of conditionality for the protection of the Union budget, setting up a new



substantive status, States taking the first steps towards their democratic decay, or EU Member States on their first steps towards illiberal constitutionalism, still have multiple choices and possibilities. But they must heed the warning signs and strengthen their own defense mechanisms, be that through a reinforcement of their constitutional design or by raising public awareness, especially among children and the youth, about the values of respect, autonomy, liberty, freedom, responsibility, dignity and diversity; and they must meaningfully involve all who are affected in the decision-making processes. Finally, they have to take good care of the institutions and values they already have, in light of what the future might bring. This is especially true for the EU, whose actions are yet to show whether the whole is indeed greater than its parts or, on the contrary, the chain is no stronger than its weakest link.

Leaving Poland and Hungary behind would be the best for the EU, its values, and integrity but it would be the worst for Poles and Hungarians as for now, they are pro-European and do not want to be abandoned by the European nations yet again (as they believe to have been abandoned throughout history). The European Union is not only about values and harmonized or unified legal measures but also about economic interests and investments accompanied by political considerations. The EU should decide which is more important for it, which direction it wants to evolve towards. Once this is figured out, it can start looking for the best political and legal tools to achieve its objectives.



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## Solidarity Deficit, Refugee Protection Backsliding, and EU's Shifting Borders: The Future of Asylum in the EU?

There is a refugee-related crisis in the EU;<sup>1</sup> however, it is not a 'refugee crisis', it is a crisis of EU values and governance. Crisis vocabulary has constantly dominated public discourse on asylum in the EU since 2015. The 'crisis' is often associated with increased arrivals of asylum seekers to the EU, which peaked during the summer and autumn of 2015. According to the dominant narrative, the sheer number of arrivals overwhelmed the EU and its Member States, suggesting that EU's asylum system was otherwise adequately designed and performant.

But this (policy) vision ignores the problems and limitations in EU's common asylum system design, and most notably a structural solidarity deficit due to its responsibility allocation arrangements and its implementation design. Moreover, it ignores the gradual erosion of EU's foundational values, such as fundamental rights and the rule of law. Finally, it ignores the EU's constantly ambivalent approach towards refugee protection and global responsibility-sharing. The EU's commitment to protection emerged in tandem with attempts to ensure that few asylum seekers would be able to reach the territory of EU Member States to claim asylum.

In this contribution, I scratch beneath the 'refugee crisis' discourse, and critically analyse responsibility-sharing efforts and the solidarity deficit in the EU's asylum policy design, refugee protection backsliding, and EU's externalisation projects. I outline causes and the resulting effects and offer some thoughts on a productive way forward to ensure that there is a future for asylum in the EU.

### Solidarity in the EU asylum policy: a palliative and emergency-driven approach

The EU treaties contain an arguably legally binding

principle of solidarity and fair sharing of responsibility.<sup>2</sup> This principle profoundly impacts the goal of the EU asylum policy: it dictates a certain 'quality' in the cooperation between the various actors, and arguably calls for structural changes in the policy's implementation modes, for example the method of allocating responsibility.<sup>3</sup> Nevertheless, EU asylum policy lacks a system for allocating responsibility among the Member States based on objective indicators.<sup>4</sup> Instead, EU's responsibility allocation system, the so-called Dublin system,<sup>5</sup> allocates more responsibility to States at the Union's external maritime borders. Once the responsibility is assigned, it is for the individual Member State to take care of the refugee. Therefore, refugee immobility permeates the system, hindering further redistributive efforts, while EU support measures, such as funding, are limited. If the EU policy were based on an objective assessment of the protection capacity of each Member State, the 'inability to comply' with a State's obligations could be clearly distinguished from an 'unwillingness to comply', reducing tensions between Member States; instead, the current system pits Member States against one other and disincentivises compliance.

While some manifestations of intra-EU solidarity in the asylum policy do exist, these are underpinned by a palliative and emergency-driven vision of solidarity. The palliative vision of solidarity takes the unequal distributive effect of EU's current responsibility allocation system as a given. Rather than seeking to address the source of the problem, a series of quick and ad hoc 'fixes' are employed, meant to – somewhat – counterbalance the lack of fair-sharing of responsibilities. For example, agency operational deployments are targeted at addressing 'particular pressures' on the national asylum and reception systems. They were supposed to be limited in time. Emergency funding, as its name suggests, was and continues to target situations of heavy migratory pressure. Intra-EU humanitarian aid is also a time-limited measure.

Every effort has been made to suggest that it was not necessary to depart from the initial implementation design, and that the source of the 'ill' of the system were the passing emergencies, a form of *force majeure* created by

1. This work was supported by a VENI programme grant (project Nr. VI.Veni.191R.040) which is financed by the Dutch Research Council (NWO).

2. See, TFEU, Article 80.

3. See, E. Tsourdi, 'Solidarity at Work? The Prevalence of Emergency-Driven Solidarity in the Administrative Governance of the Common European Asylum System' (2017) 24 Maastricht Journal of European and Comparative Law, 667, 673-675. See also analysis in E. Küçük, 'The principle of solidarity and fairness in responsibility sharing: more than window dressing?' (2016) 22 European Law Journal 448; E. Karageorgiou, 'Solidarity and sharing in the Common European Asylum System: the case of Syrian refugees' (2016) 17 European Politics and Society 196.

4. See, P. De Bruycker and E. Tsourdi, 'In search of fairness in responsibility sharing' (2016) 51 Forced Migration Review 64, 65. See also E. Guild, C. Costello, and V. Moreno-Lax, 'Implementation of the 2015 Council Decisions Establishing Provisional Measures in the Area of International Protection for the Benefit of Italy and of Greece', Study for the LIBE Committee (2017), 68-70.

5. Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), OJ L 180/31 (Dublin III Regulation).

‘external’ pressure. And yet some Member States, such as Greece and Italy, have drawn almost constantly from ‘emergency funding’ since its inception, while the EU agency European Asylum Support Office steadily continues to renew ‘emergency plans’ with ‘special support plans’ on the ground. Therefore, rather than being purely external, the pressures are also internal, created by the misconceptions of the implementation design itself, as well as the adoption of a palliative vision of solidarity.

Even so, no lasting change has been made to EU’s responsibility allocation system.<sup>6</sup> The New Pact on Migration and Asylum,<sup>7</sup> the latest policy framework on EU asylum, migration, and integrated border management policies, and the series of legislative proposals that accompany it,<sup>8</sup> embed a variant of flexible solidarity. Heterogeneous contributions, a Byzantine operationalisation mechanism, and a strong externalisation impetus riddle these proposals, which are unlikely to achieve fair sharing in EU’s asylum policy.<sup>9</sup>

### Refugee Protection Backsliding: erosion of adherence to fundamental rights and the rule of law

The asylum policy’s ills are exacerbated by another major challenge facing the EU which is the ‘rule of law crisis’.<sup>10</sup>

One facet is linked with what has been conceptualised as the ‘rule of law backsliding’. Building on Jan-Werner Müller’s analysis of constitutional capture,<sup>11</sup> Laurent Pech and Kim-Lane Scheppele have defined rule of law backsliding as ‘the process through which elected public authorities deliberately implement governmental blueprints which aim to systematically weaken, annihilate or capture internal checks on power with the view of dismantling the liberal democratic state and entrenching the long-term rule of the dominant party’.<sup>12</sup> Presumably, systemic fundamental rights violations refer to violations of a certain type, intensity, or duration. But rule of law failings are broader than these forms of grave constitutional capture.

Indeed, policy documents, such as the Commission’s annual rule of law report, refer to breaches relating to judicial independence, harassment of civil society organisations and educational institutions, and violations of the freedom of expression.<sup>13</sup>

These developments are connected with refugee protection backsliding. The choice not to implement asylum-related obligations in defiance due to ideological opposition to refugee protection is exemplified through the emergency relocation schemes. Two Council decisions established emergency relocation, meaning intra-EU transfer of asylum seekers between Member States, to benefit Italy and Greece during 2015-17.<sup>14</sup> This initiative was undercut by several factors, including its own legislative and administrative characteristics.<sup>15</sup>

Both decisions numerically capped their potential beneficiaries,<sup>16</sup> restrictively defined eligible applicants,<sup>17</sup> and had an expiration date of two years.<sup>18</sup> Like the Dublin system, they failed to take into account the preferences of the asylum seekers themselves. The scheme’s implementation was also undercut by the outright refusal of certain Member States to relocate asylum applicants. A mixture of ‘moral’ and legal arguments undergirded the resistance to the implementation of the decisions, and to asylum obligations more broadly, by the Visegrad group (i.e., Czech Republic, Hungary, Poland and Slovakia). These included pleas to Europe’s (and Hungary’s) Christian identity,<sup>19</sup> or constitutional

6. See, E. Tsourdi and C. Costello, ‘The Evolution of EU Law on Refugees and Asylum’, in P. Craig and G. de Búrca (eds.), *The Evolution of EU Law* (OUP 2021), 793, 805-809.

7. Communication COM(2020) 609 final from the Commission of 23 September 2020 on a New Pact on Migration and Asylum.

8. The most relevant to our analysis are: Commission Proposal for a Regulation introducing a screening of third country nationals at the external borders, COM(2020) 612 final; Amended Commission Proposal for a Regulation establishing a common procedure for international protection in the Union, COM(2020) 611 final; Commission Proposal for a Regulation on asylum and migration management, COM(2020) 610 final; and, finally, Commission Proposal for a Regulation addressing situations of crisis and force majeure in the field of migration and asylum, COM(2020) 613 final.

9. See, E. Mavropoulou and E. Tsourdi, ‘Solidarity as normative rationale for differential treatment: common but differentiated responsibilities from international environmental to EU asylum law?’, forthcoming in the *51 Netherlands Yearbook of International Law* 2020 (2022).

10. See, E. Tsourdi, ‘Asylum in the EU: One of the Many Faces of Rule of Law Backsliding?’, 17(3) *EU Constitutional Law Review* (2021), 471-497.

11. See, J-W. Müller, ‘Should the EU Protect Democracy and the Rule of Law Inside Member States?’ (2015) 21 *European Law Journal*, 141-60.

12. See, L. Pech and K. L. Scheppele, ‘Illiberalism Within: Rule of Law Backsliding in the EU’ (2017) 19 *Cambridge Yearbook of European Legal Studies* 3, 10.

13. See, e.g., European Commission, ‘2020 Rule of Law Report: The rule of law situation in the European Union’, COM(2020)580.

14. Council Decision (EU) 2015/1523 of 14 September 2015 Establishing Provisional Measures in the Area of International Protection for the Benefit of Italy and of Greece [2015] OJ L239/146 (1st Emergency Relocation Decision); 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 (2nd Emergency Relocation Decision).

15. See, B. De Witte and E. Tsourdi, ‘Confrontation on Relocation – The Court of Justice Endorses the Emergency Scheme for Compulsory Relocation of Asylum Seekers within the European Union: Slovak Republic and Hungary v Council’ (2018) 55 *Common Market Law Review*, 1457, 1459-67; E. Guild, C. Costello, and V. Moreno-Lax, ‘Implementation of the 2015 Council Decisions Establishing Provisional Measures in the Area of International Protection for the Benefit of Italy and of Greece’, *Study for the LIBE Committee* (2017), pp. 42-4: [https://www.europarl.europa.eu/RegData/etudes/STUD/2017/583132/IPOL\\_STU\(2017\)583132\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2017/583132/IPOL_STU(2017)583132_EN.pdf).

16. 1<sup>st</sup> Emergency Relocation Decision, Art 4; 2nd Emergency Relocation Decision, Art 4(1).

17. 1<sup>st</sup> Emergency Relocation Decision, Art 3(2); 2nd Emergency Relocation Decision, Art 3(2) establishing the notion of applicants ‘in clear need of international protection’.

18. The first relocation decision applied until 17 September 2017 and the second until 26 September 2017. See respectively 1st Emergency Relocation Decision, Art. 13(2) and 2nd Emergency Relocation Decision, Art. 4.

19. See e.g., M. Karnitschnig, ‘Orban says migrants threaten “Christian” Europe’ (Politico Europe, 3 September 2015), referring to the Hungarian PM’s op-ed for the German newspaper *Frankfurter Allgemeine Zeitung*: <https://www.politico.eu/article/orban-migrants-threaten-christian-europe-identity-refugees-asylum-crisis/>.

identity,<sup>20</sup> or (Poland's) ethnic homogeneity.<sup>21</sup> The CJEU was not persuaded and found that these Member States' refusal to comply with the EU policy violated EU law.<sup>22</sup>

Asylum-related systemic fundamental rights violations have been observed in different Member States. For example, since 2015, the Hungarian government has dismantled refugee protection through a series of legislative amendments. The measures affected every aspect of the national asylum system.<sup>23</sup> Among other things, they curtailed procedural rights under 'normal procedures'; abolished integration measures for recognised beneficiaries; introduced a fully informal removal mechanism first within an eight-kilometre distance of the fence with Serbia and later throughout the whole territory; criminalised the crossing of the 175 kilometre fence; and established that a 'crisis situation' permits the deprivation of liberty of asylum seekers in transit zones during the entire refugee status determination procedure.<sup>24</sup> These amendments led to systemic violations of asylum seekers' fundamental rights, including procedural rights, which fall within the scope of the rule of law principles.

In Greece, systemic fundamental rights violations have been linked with the operationalisation of the 'hotspot approach to migration management'<sup>25</sup> and pushbacks at the external borders. The hotspot approach essentially concerns interagency collaboration, where national experts deployed by specific agencies—the European Asylum Support Office (EASO), Frontex, Europol, and Eurojust—and agency staff operationally assist national administrations in 'hotspots' for migrant arrivals. Critical migration studies scholars conceptualise these hotspots as an incubator of 'liminal EU territory', understood as 'a sorting space that filters through the 'deserving few' and

detains or removes the 'undeserving' and the 'rightless'.<sup>26</sup> From a doctrinal legal perspective, the current implementation of the EU hotspot approach has led to fundamental rights violations, including the risk of refoulement due to return to a non-safe country,<sup>27</sup> disproportionate restrictions to the freedom of movement of asylum seekers,<sup>28</sup> and violations of the principle of human dignity and of the prohibition of inhuman or degrading treatment.<sup>29</sup>

These dynamics are certainly not limited to Greece or the operations of hotspots, as the recent situation at the external border of Poland and Lithuania with Belarus illustrates.<sup>30</sup>

A final example of such unilateral deflection actions in violation of human rights takes place at the EU's external sea borders. Namely, the absence of an EU-coordinated response to disembarkation of asylum seekers and migrants arriving by sea has seen Member States such as Italy and Malta unilaterally declaring a 'closed port' policy combined with non-disembarkation practices. This has led to intense human suffering with boats remaining adrift at sea for lengthy periods.<sup>31</sup> When disembarkation and relocation takes place, it is organised in an ad hoc manner, 'ship-by-ship'.<sup>32</sup>

### EU's shifting borders: embedding externalization in EU's external relations

Alongside physical border barriers, such as walls and barbed wire fences, new technologies and instruments driven by 'sophisticated legal innovations', have led to the emergence of the 'shifting border' paradigm, turning the border into an individual moving barrier.<sup>33</sup> The location of this border is not fixed in time or place – it shifts inwards and outwards of the territory – while simultaneously exhibiting features of a static border transformed into 'the

20. For analysis of this case law see G. Halmi, 'Abuse of Constitutional Identity: The Hungarian Constitutional Court on Interpretation of Article E(2) of the Fundamental Law' (2018) 43 *Review of Central and East European Law* 23. On the dangers for the rule of law emanating from constitutional pluralism, see also D. R. Kelemen and L. Pech, 'The Uses and Abuses of Constitutional Pluralism: Undermining the Rule of Law in the Name of Constitutional Identity in Hungary and Poland' (2019) 21 *Cambridge Yearbook of European Legal Studies* 59. For views in support of constitutional pluralism see various contributions in G. Davies and M. Avbelj (eds.), *Research Handbook on Pluralism and EU Law* (Edward Elgar 2018).

21. See, ECJ 6 September 2017, Joined Cases C-643/15 and C-647/15, *Slovak Republic and Hungary v Council of the European Union*.

22. See, ECJ 2 April 2020, Joined Cases C-715/17, C-718/17 and C-719/17, *European Commission v Poland, Czech Republic and Hungary*, paras. 24-31 and commentary in E. Tsourdi, 'Relocation Blues – Refugee Protection Backsliding, Division of Competences, and the Purpose of Infringement Proceedings: Commission v. Poland, Hungary and the Czech Republic' (2021) 58(6) *Common Market Law Review*, 1819 – 1844.

23. See, B. Nagy, 'From Reluctance to Total Denial: Asylum Policy in Hungary 2015-2018', in V. Stoyanova and E. Karageorgiou (eds.), *The New Asylum and Transit Countries in Europe During and in the Aftermath of the 2015/2016 Crisis* (Brill 2019), p. 17; K. Juhász, 'Assessing Hungary's Stance on Migration and Asylum in Light of the European and Hungarian Migration Strategies' (2017) 13 *Politics in Central Europe* 35; Hungarian Helsinki Committee, *Two Years After: What's Left of Refugee Protection in Hungary?* <[http://www.helsinki.hu/wp-content/uploads/Two-years-after\\_2017.pdf](http://www.helsinki.hu/wp-content/uploads/Two-years-after_2017.pdf)>.

24. Nagy, *op.cit.*

25. For its first conceptualization see Commission Communication of 25 September 2015 on managing the refugee crisis: immediate operational, budgetary and legal measures under the European agenda on migration, COM (2015)490 final, Annex II.

26. See, A. Papoutsis et al. 'The EC hotspot approach in Greece: creating liminal EU territory' (2019) *Journal of Ethnic and Migration Studies*, 2200, 2201.

27. See, M. Gkliati, 'The EU-Turkey Deal and the Safe Third Country Concept Before Greek Asylum Appeals Committees' (2017) *J. Crit. Migration & Border Regime Stud.* 213 and E. Tsourdi, 'Regional Refugee Regimes – Europe', in C Costello, M Foster, and J McAdam (eds) *Oxford Handbook of International Refugee Law* (Oxford University Press, 2021) 352, 365-367.

28. See, M. Mouzourakis, 'All but last resort: The last reform of detention of asylum seekers in Greece' (18 November 2019) *EU Immigration and Asylum Law and Policy/Odysseus Academic Network* <<https://eumigrationlawblog.eu/all-but-last-resort-the-last-reform-of-detention-of-asylum-seekers-in-greece/>>.

29. See, E Tsourdi, 'COVID-19, asylum in the EU, and the great expectations of solidarity' (2020) *International Journal of Refugee Law* (2020) 32 *International Journal of Refugee Law*, 374.

30. See, G. Baranowska, *The Deadly Woods: Legalizing pushbacks at the Polish-Belarusian border*, *VerfBlog*, 2021/10/29, <https://verfassungsblog.de/the-deadly-woods/>.

31. One such highly mediatised case was that of the Aquarius ship. See, SOS Méditerranée (2018), On instructions from Rome, the Aquarius is stopped at sea between Malta and Italy, waiting for a safe port to disembark 629 survivors, Press Release 11 June 2018 <<https://sosmediterranee.com/on-instructions-from-rome-the-aquarius-is-stopped-at-sea-between-malta-and-italy-waiting-for-a-safe-port-to-disembark-629-survivors/>>.

32. See, S. Carrera and R. Cortinovis, *Search and rescue, disembarkation and relocation arrangements in the Mediterranean: Sailing Away from Responsibility?*, CEPS Paper in Liberty and Security No. 2019-10, 2019.

33. See, A. Shachar, *The shifting border: Legal cartographies of migration and mobility*. Ayelet Shachar in dialogue (Manchester University Press 2020) 6-7.



last point of encounter, rather than the first.<sup>34</sup>

Deterrence is not limited to EU's territorial borders. When it comes to protection issues, the 'shifting border' manifests itself in practices such as placing the countries of origin of those likely to seek international protection on the EU visa 'blacklist', and privatising migration control through the sanctioning of carriers (such as airlines) that allow those without visas to travel by means of regular flights. Together, these measures illegalize certain would-be entrants, creating a market for illicit travel.

This account of the EU and refugee containment has long been recognised. As early as 2001, Noll identified the 'common market of deflection',<sup>35</sup> while both Moreno-Lax<sup>36</sup> and Gammeltoft-Hansen<sup>37</sup> have provided insightful accounts on how the EU's external border control, visa, and migration policies impede access to protection and deflect protection obligations to non-EU States.

A newer development is that of 'contactless control' which signifies a shift in the 'deterrence paradigm' from the mere prevention of spontaneous arrivals and deflection of flows to other destinations, to hindering the exit of 'risky' migrants.<sup>38</sup> These policies are implemented by securing the strategic partnership of key transit and origin countries which are persuaded to contain, as well as readmit, potential asylum seekers in exchange of political and financial gains, such as funding, visa facilitation or accession negotiations.<sup>39</sup>

Emblematic of this approach is the EU-Turkey Statement of March 2016.<sup>40</sup> This Statement, or 'deal' as it is commonly called, sought to curb irregular arrivals of (in particular Syrian) refugees from Turkey, by envisaging that Turkey would swiftly readmit anyone making an irregular journey to the Greek islands. In exchange, Turkey was offered greater financial support, and promises of visa free travel to the EU for Turkish nationals, amongst other incentives.

The EU-Turkey deal has been hailed as a success. Nonetheless, both its actual effectiveness and its compati-

lity with human rights norms are contested.<sup>41</sup> Still, the EU continues seeking to co-opt other active partners in migration management in key transit countries in Sub-Saharan Africa, such as Niger.

At the same time, the EU has engaged in voluntary and programmatic commitments of responsibility-sharing at the global level through the UN Compact on Refugees,<sup>42</sup> although resettlements to the EU remains numerically modest. At the height of the Syrian displacement, EU Member States resettled a total of 27,800 persons.<sup>43</sup> A voluntary scheme initiated by the Commission and running between September 2017-December 2019 was meant to resettle an additional 50,000.<sup>44</sup> By October 2019 the latter scheme had led to the resettlement of 39,000 persons, while Member States pledged an additional 30,000 places for 2020.<sup>45</sup>

While these numbers are more significant than in the past, they should be compared with the global resettlement needs, which for 2020 were projected to 1.44 million persons by UNHCR.<sup>46</sup> Importantly, the voluntary nature of Member State participation in these schemes has led to divergences within the EU, with 12 Member States not resettling a single individual in 2019.<sup>47</sup>

### Conclusions: is there another way forward?

It follows from the above that the solidarity deficit, refugee protection backsliding, and EU's shifting borders are a reality. But this reality is not inevitable, and a different way forward for EU's asylum policy exists.

Firstly, there are different approaches to achieve a fair-sharing of responsibilities than the ones foreseen in the New Pact. Rather than a single approach constituting a 'silver bullet' to the solidarity deficit, it is more likely that a combination of those alternative approaches would yield results. Instead of the heterogeneous contributions foreseen in the Pact to realise solidarity with frontline

34. Ibid., 5. See also the finalized and forthcoming special issue with contributions exemplifying the nature of the shifting border in the EU and critically analysing its implications, E. Tsourdi, A. Ott and Z. Vankova (eds), *The EU's Shifting Borders Reconsidered: Externalisation, Constitutionalisation, and Administrative Integration*, European Papers (2022).

35. See, G. Noll, *Negotiating Asylum: The EU Acquis, Extraterritorial Protection and the Common Market of Deflection* (Brill 2001).

36. See, V. Moreno-Lax, *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law* (OUP 2017).

37. See, T. Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (CUP 2011).

38. See, M. Giuffré and V. Moreno-Lax, 'The rise of consensual containment: from contactless control to contactless responsibility for migratory flows', in S. Juss (ed.) *Research Handbook on International Refugee Law* (Edward Elgar Publishing 2019) 84. On contactless control see further V. Moreno-Lax, 'The Architecture of Functional Jurisdiction: Unpacking Contactless Control—On Public Powers, S.S. and Others v. Italy, and the "Operational Model"' (2020) *German Law Journal* 385.

39. See, Giuffré and Moreno-Lax, 'The rise of consensual containment', *op.cit.*, 84.

40. See, EU-Turkey statement, SN 38/16, 18 March 2016, and analysis below in subsection C(4).

41. See, T. Spijkerboer, 'Fact Check: Did the EU-Turkey Deal Bring Down the Number of Migrants and of Border Deaths?' (*Border Criminologies*, 28 September 2016) <<https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centre-border-criminologies/blog/2016/09/fact-check-did-eu>> and S. Carrera, L. den Hertog and M. Stefan, 'The EU-Turkey deal: reversing "Lisbonisation" in EU migration and asylum policies', in S. Carrera, J. Santos Vara and T. Strik, *Constitutionalising the external dimensions of EU migration policies in times of crisis: Legality, Rule of Law and Fundamental Rights Reconsidered* (Edward Elgar 2019) 155.

42. The Global Compact on Refugees is contained in the Report of the United Nations High Commissioner for Refugees: Part II, A/73/12, 2018 and affirmed by UN General Assembly, Resolution adopted by the General Assembly, 17 December 2018, A/RES/73/151. For commentary see the various contributions in the special issue of the *International Journal of Refugee Law* (2018) 30(4) titled *The 2018 Global Compacts on Refugees and Migration*.

43. See, European Commission, 'Managing Migration in all its Aspects: Progress under the European Agenda on Migration', COM(2018)798, 4.

44. Commission Recommendation of 3.10.2017 on enhancing legal pathways for persons in need of international protection, C(2017) 6504.

45. European Commission, 'Progress report on the Implementation of the European Agenda on Migration', COM(2019)481, 18.

46. UNCHR, 'UNHCR Projected Global Resettlement Needs: 2020', 2019.

47. According to Eurostat statistics: <<https://ec.europa.eu/eurostat/databrowser/view/tps00195/default/table?lang=en>>. The Member States in question were Austria, the Czech Republic, Cyprus, Denmark, Greece, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia.

Member States, such as ‘return sponsorships’, or capacity building in third countries, secondary EU law could establish concrete positive contributions to the asylum systems of other Member States even without relocation (e.g. improving reception conditions).<sup>48</sup>

Next, a more radical shift in the implementation modes of EU’s asylum policy could be foreseen through further enhancing administrative integration and joint implementation patterns, for example in asylum processing, with the involvement of the EU level, including through the European Union Agency on Asylum.<sup>49</sup> Moreover, a significant boost in fair sharing could be the result of providing more structural forms of EU funding to Member States for implementing asylum-related obligations rather than expecting that human and financial resources for the realisation of EU’s asylum policy will be drawn mainly from national budgets. Finally, the EU co-legislators could foresee the mutual recognition of positive asylum decisions, coupled with variants of free movement rights for recognised beneficiaries, mirroring those pertaining to EU citizens.<sup>50</sup>

Some of those envisaged solutions, such as establishing free movement rights for recognised beneficiaries or establishing concrete positive contributions to the asylum systems of other Member States, could be achieved in the short term as they merely require amendments in secondary law. Other solutions, such as foreseeing structural forms of EU funding to implement EU’s asylum policy, would require a drastic overhaul of the distribution of financial envelopes in the multi-annual financial framework and thus can only be achieved in the longer term.

Secondly, it should be noted that defiance for ideological or political reasons could be a symptom of constitutional capture, or rule of law failings. The response here cannot remain policy specific. Even if the solidarity deficit were to be addressed, this type of asylum-related problems would persist. In fact, where constitutional capture is grave, relevant governments are likely to resist productive solutions on enhancing fair sharing and ensuring the viability of EU’s asylum policy, as exclusionary nationalist discourses, racism, and xenophobia, suit their political agenda.

As part of a broader pattern of dismantling the rule of law at the national level, the examination of these failings should be incorporated into processes seeking to probe risks to EU values, such as Article 7 TEU procedures, or related procedures like those under Commission’s rule of

law framework.<sup>51</sup> These examinations could also be part of what Scheppele conceptualises as ‘systemic infringement actions’,<sup>52</sup> particularly the type of action arguing that systemic violations of basic principles of EU law violate the principle of sincere cooperation (Article 4, para. 3 TEU).<sup>53</sup>

Another variant of the infringement procedure could allege systemic violations of fundamental rights,<sup>54</sup> and they can be useful even where violations do not relate to constitutional capture. Finally, Kochenov has described how infringement actions initiated by Member State and focusing on rule of law failings could forcefully complement pressure by EU institutions.<sup>55</sup> There are some modest signs that Member States could be willing to engage in such actions.<sup>56</sup> However, there has not been an actual initiation of an infringement action by another Member State relating to respect of the rule of law to date.

Finally, on the fundamental issue of legal access to asylum, only legislative change in either the EU asylum, or the EU visa policy, could alter the current status quo. I am referring to the establishment of so-called humanitarian visas that would allow asylum seekers to travel legally to the EU to seek protection. Despite some encouraging signs from the European Parliament, this option is not currently explored by the other EU institutions.

In EU’s external relations, the focus should shift from a predominantly containment and deterrence approach to measures genuinely supporting the development of disadvantaged populations in third countries, meaning measures targeting refugee and local communities alike. This should be coupled with the provision of a meaningful amount of resettlement places to the EU, including targeting especially vulnerable refugee groups, e.g., those in need of special medical assistance, rather than ‘cherry picking’ refugees for resettlement based on integration criteria.

48. See, P. De Bruycker, ‘The New Pact on Migration and Asylum: What it is not and what it could have been’, *EU Immigration and Asylum Law and Policy/Odyssey Network*, 15 December 2020 (<https://eumigrationlawblog.eu/the-new-pact-on-migration-and-asylum-what-it-is-not-and-what-it-could-have-been/>).

49. See, E. Tsourdi, ‘Holding the European Asylum Support Office Accountable for its Role in Asylum Decision-Making: Mission Impossible’ (2020) 21 *German Law Journal* 506.

50. See, V. Mitsilegas, ‘Humanizing solidarity in European refugee law: The promise of mutual recognition’ (2017) 24 *Maastricht Journal of European and Comparative Law* 721.

51. For commentary regarding their functioning and limits, see M. Bonelli, ‘From Sanctions to Prevention, and Now Back to Sanctions?: Article 7 TEU and the Protection of the EU Founding Values’, in S. Montaldo, F. Costamagna and A. Miglio, *European Union Law Enforcement: The Evolution of Sanctioning Powers* (Routledge 2021), 47; D. Kochenov and L. Pech, ‘Better Late than Never?: On the European Commission’s Rule of Law Framework and its First Activation’ (2016) 54 *Journal of Common Market Studies* 1062.

52. See, K. L. Scheppele, ‘Enforcing the Basic Principles of EU Law through Systemic Infringement Actions’, in C. Closa and D. Kochenov (eds.), in C. Closa and D. Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016), 105.

53. See, K. L. Scheppele and R. D. Kelemen, ‘Defending Democracy in EU Member States: Beyond Article 7 TEU’, in F. Bignami (ed.), *EU Law in Populist Times: Crises and Prospects* (CUP 2020) 413, 437-438.

54. See, K. L. Scheppele, D. Kochenov and B. Grabowska-Moroz, ‘EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union’ (2020) 39 *Yearbook of European Law* 3, 80-85.

55. See, D. Kochenov, ‘Biting Intergovernmentalism: The Case for the Reinvention of Article 259 TFEU to Make It a Viable Rule of Law Enforcement Tool’ (2015) 7 *The Hague Journal of the Rule of Law* 153.

56. I am referring to the December 2020 resolution of the Dutch House of Representatives to request the government to initiate an infringement action against Poland for undermining the rule of law. See G. Iñiguez, *The Enemy Within?* Article 259 and the Union’s Intergovernmentalism (New Federalist, 12 December 2020).



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## Europe is Sleepwalking in an Unsustainable and Fragile World

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**Jean-Yves Heurtebise:** In its blind march towards the abyss, there is nothing more than a thin layer of ice standing between mankind and nothingness in a world that struggles to support our weight. The new epistemological, epidemiological, and energetic state of crisis makes reflection an urgent need. It is an ever-growing emergency in the face of mounting crises, which compound each other and irreversibly weaken the metastability of our human dwelling. However, faced with the violence of the immediate, the brutality of the here and now, time is running out. This is an extremely paradoxical situation: we have a sense of urgency which, by pushing us to respond to the most urgent needs, makes us incapable of confronting the more existential, more global emergency which is threatening us.

**Jacques Toubon:** Multiple, converging, and varied emergencies hide The Emergency, in the singular, from us. If the political system is no longer able to restore its ability to govern, it is because it has been reduced to managing a series of increasingly unpredictable daily crises. What we are missing is the panoramic vision that allows us to anticipate future events. We are living in an era where the “public debate” is in a permanent state of hysteria, though it is no longer really a “debate” because confrontation is favored over dialogue, nor is it really “public” as it is continually spilling over into the private sphere, relying on personal opinions that no longer even seek to be based on truth. The result is a loss of universality due to this so-called realistic discourse which is divisive and prevents

the development of a much-needed common solution to this singular and manifold emergency.

**J.Y.H.:** This is especially true if this emergency misleads us into believing that the catastrophe is what will happen soon. Thinking about the catastrophe as what will happen is tantamount to giving ourselves a deadline and falling prey to the collective evil of generalized procrastination: 2025 or 2034 for the Chinese invasion of Taiwan and the beginning of the “third world war” whose rumblings we can already feel; 2030 or 2050 for unbearable global warming with entire countries under water; 2080 or 2100 for the peak in global population of 11 billion inhabitants that will be impossible to feed. By giving a future date for the worst to come we have the illusion that there is still time, that the solution will appear between now and then. But the catastrophe has already begun. What we are seeing are not the warning signs of a future apocalypse but the symptoms of an end that has already begun. This emergency does not stem from the fact that there is little time left to face these crises but from the fact that time itself is endangered and is a vanishing resource.

**J.T.:** The fundamental issue is knowing how to think of a universal concept that would allow everyone to come together in the face of a critical situation. Not only how to define it, but how to disseminate and communicate it. The goal would be to define transnational imperatives that would allow for the development of an open and progressive global governance. The world, and Europe itself, are in a crisis situation with increasingly inadequate governance solutions that lead to the opposite of the solidarity-based governance that we desire, and instead propose “identity-based” and irredentist political projects that base their appeal on the fracturing of the collective. In the majority of democracies and in Europe, we find ourselves in a situation where it seems that what attracts voters the most is this discourse which advocates doing what others do not do, simply because they are not doing it, in order to emphasize one’s own autonomy, by overplaying the opposition and incompatibility between national sovereignty and European objectives.

**J.Y.H.:** It is as if Europe in particular, and humanity in general, had lost the transcendental capacity for tasting what allows one to appreciate the very distinctive flavor of the universal, with our only remaining ability being proprioception. The soul’s satisfaction when in contact with the universal has been replaced by the pleasure of one’s own singular nature: the pleasure of feeling that one is oneself, and especially “not like others”. This is true on all levels: the individual, the group, gender, ethnicity, and the national. There is a total externalization of difference and a total internalization of identity – a radical heterogenization of the other and a radical homogenization of the self. We are no longer in a mindset of equality where we must give an equal place to what is different, but in a mindset of identity where each individual thinks he embodies a self which is so radically different from others that they can

1. The Collegium International is a network created in 2002 at the initiative of Michel Rocard, Milan Kučan, Stéphane Hessel and Sacha Goldman. Bringing together men and women from the fields of philosophy, sciences and the arts, as well as high-level leaders and politicians, its actions are oriented towards fostering a new theory of global governance. At the instigation of the United Nations Office at Geneva, the Collegium proposes to create, in collaboration with the IHEID, a Charter to connect the different components of a fragmented and disintegrated multilateral system, in order to address the current impasse of a world thrown into a maelstrom of growing crises.



only obstruct his freedom and threaten his survival. This identity-based mindset can take on diametrically opposed political forms, but they all move in the same direction of separation. From the point of view of the “alt-left”, it is no longer enough for the majority subject (the white heterosexual man) to give equal status to the minority “other”; with the understanding that his existence stands in the way of solving the world’s ecological, economic, and social problems, the white heterosexual male must therefore step aside. From the point of view of the “alt-right”, there exists the fable of a majority that has become a minority and which must defend itself against the weak link (instrumentalized from the outside) of globalization: the migrant. From this comes the withdrawal into the group, the nation, ethnicity, and “civilization” that leads to this fragmentation of identity and this global crisis of governance that causes us to move seamlessly and naturally from the Brexit of islanders to the Terrexit of billionaires.

**J.T.:** After the Second World War, the general impression was that the world could no longer continue as it had before. In this spirit of rebuilding, made necessary by the scene of devastation that the world had (already) become, a response such as the United Nations was instituted. This multilateral structure no longer functions efficiently enough to fulfill its original purpose: it is not meant to allow each nation to express its unyielding, sovereign demands, but to facilitate the collective construction of a consensus that transcends national self-interests and strives for the common good. There is no need to argue about who is most responsible for this. China bears a large part of the responsibility, even though, paradoxically, it was the main beneficiary of this multilateral system for several decades. In making China a sort of *deus ex machina* of the United Nations in the context of the Cold War, the West was blinded by a kind of naivety: we were convinced that the fundamental values that had emerged from the Enlightenment through to the Nuremberg Trials would naturally prevail. But this is not at all the case. We must therefore undertake a reconstruction process in order to develop a global governance that will respond to the demands of the current eco-political crisis and define a new common destiny.

**J.Y.H.:** There is the impression that, following the Second World War and with the dissolution of the Soviet Union at the end of the (first) Cold War, Europe allowed itself to be caught up in the fiction of post-history, of post-hegemony. It is a fiction that goes back to the Hegelian philosophy of history, with this idea of a linear history that has certain necessary stages that would end with the German Europe of the 19<sup>th</sup> century. The entire globe was supposed to repeat this process in a “natural” way (especially if it was “helped” to go in this direction, first by colonization, then by the IMF’s structural adjustment programs), in order to finally reach the same political and social form as ours.

This narrative of the “end of history”, according to

Francis Fukuyama’s famous expression, crystallized in 1989 with the fall of the Berlin Wall which was supposed to symbolize the total victory of Western liberalism. The ironic thing is that before November 9, 1989, on June 4, 1989 – 200 years after the French Revolution – an event occurred outside Europe that cancelled out all this “post-historical” discourse even before it emerged: the suppression of the student uprising in Tiananmen. Rather than the end of history, 1989 was the beginning of a divergent history that marked the death of universal history under the impact of the fragmentation bomb of ethno-cultural sovereignty, which was taken as the final criteria of political development. Between July 4, 1776 in Philadelphia and June 4, 1989 in Beijing, we witnessed a rise of fundamental human rights whose power of universality would transform the whole world and find its culmination in decolonization – before coming to an abrupt halt before the tanks in Tiananmen Square – which ushered in this new narrative of the indomitable specificity of “civilizational blocs”.

From that point on, what Europe interpreted as the end of history would be seen outside the West as simply marking the end of Europe’s history: the end of its contribution to the history of the world, which would from that point onwards “pivot” towards Asia and China. With the emergence of “Asian values”, the idea spread that freedom would only be an abstract, Western concept whose political overdetermination would deny the primacy of the right to development and the right to satisfying the basic needs of less advanced countries. For the West, what was the end of history has been transformed into a “hunger for history” in emerging countries. But the tragedy is that, on a planetary scale, the emergence of such a counter-narrative comes at the same time as the clear awareness that “our common future”, in the absence of a paradigm shift in our mode of development, is fundamentally threatened by the environmental crisis; this has been the case since 1987 with the publication of the Brundtland Report, and since 1988 with the creation of the IPCC. The necessary overhaul of the global production model was made almost impossible by the fact that such ecological demands were perceived by non-Western powers – first and foremost China, but also India – as a “neo-colonial” strategy aimed at impeding their “legitimate growth”. The West, or more precisely – which is not at all the same – the multinational companies based there, were quite happy with the double-digit GDP growth in this part of the world.

**J.T.:** This is therefore not the end but the beginning of history, a history that leads to an uncertain future. In Europe and in France, we believed that, after 1989, China had entered a new era of reform and openness that would lead it to align itself with “European” values (on the social, political and cultural levels) in the near future. We were under the illusion that economic growth would inevitably lead to liberalization. On the contrary, what we failed to see was that this economic development served to create a system of values that was not only different but



also in competition with ours: the self-proclaimed “Asian values”. What I find most fascinating is this return, whether in Russia or China, to the notion of “civilization”. Aside from the Eurasianism in Russia and the rebuilding of Chinese identity with the return to Confucianism in China, two other examples are worth mentioning: on one hand, in Hungary, there is the desire to return to the dominance of the Magyars; on the other hand – and this will be discussed during the upcoming elections in Spain – there is the Vox party which wants to return Spain to the times of Isabella the Catholic and the Reconquista, and the expulsion of Muslims. There is much work to be done to show that fundamental human rights are not Western but universal and that they can be implemented and effective outside what the rest of the world calls “the West”.

**J.Y.H.:** This return to the theme of civilization in Russia and China is taking place in the context of Marxism’s decline as an ideology as well as in the context of an opening up to capitalism whose State control does not change its productivist and inegalitarian nature. This “civilizationism” lends a traditionalist and localist veneer to the country’s inclusion in the transnational value chains on which it depends for its survival. Furthermore, this civilizational culturalism marks the return to Empire as a central feature of the political imagination. This makes sense, since in order to circumvent the democratic model there is a need to return to the imperial process of dynastic consolidation.

This is also worrisome since an empire, unlike a nation, is defined by the absence of clear borders: its survival depends on its continuous expansion. What is interesting and paradoxical is the fact that while, at the beginning of the twentieth century, modern Chinese leaders had made the Qing Empire of the Manchurians a symbol of corruption, decline, and defeat, contemporary China seems to think that the colonial conquests led by the Qing in Xinjiang (at the expense of the Dzungar genocide, with 80% of the population killed between 1755 and 1757), Tibet, and Taiwan, constitute the country’s natural borders. The annexation of Taiwan, by force, if necessary, is therefore seen as the sign of a successful “rejuvenation”. What this return to Empire and “civilization” also symbolizes is the desire to avoid any form of “decolonization” of the territories annexed by the Empire (Qing or Tsarist), drawing on the narrative that colonialism was uniquely Western.

**J.T.:** The return of Empires is among the Collegium International’s main concerns, specifically that the world’s advancement towards global governance depends on the development of solidarity between democracies and not on solitary, hostile, and supremacist sovereignties, in both the political and ethnic sense of the term. The issue is knowing whether this return to Empire is a fatal obstacle or a necessary step in the social, economic, and global progress that will enable a global political convergence. From this point of view, the curbing of oligarchy in China by the leader of the People’s Republic, Xi Jinping, may also signify the reaffirmation of the paramount value of

politics as the only legitimate vector of governance. This is assuming that it does not lead to irresponsible war-mongering in the Taiwan Strait, on the Ladakh Plateau, or around the Senkaku Islands, which would be a suicide mission due to nuclear deterrence.

By placing politics back at the center of things, the imperial desires of authoritarian leaders could, in a new historical irony, lead to the development of a global governance based on solidarity and democracy. Our guiding principles are twofold: on the one hand, multilateralism no longer works; on the other hand, the idea of global governance is not as utopian as we might think. Of course, the resurgence of neo-imperialistic structures, driven by a supremacist “civilizational” narrative which claims “values” that are not compatible with those of others, seems to run counter to such a convergence. At the same time, the desire for a “community of destiny” is also expressed in those countries (such as China) that seem, judging by their actions, to be the most resistant. As Mireille Delmas-Marty says, “the global community will only be united by becoming aware of its common destiny”. How is such awareness possible in the fragmented, splintered, and divided world we live in, where the universal itself has lost its meaning? When all is said and done, wouldn’t these powers that, in general, purport to relegate Europe and the West to a state of “historical detritus” become sources of universalization themselves?

**J.Y.H.:** The question is indeed that of the rebuilding of the universal in the face of separatist, segregationist, identity-based thinking. According to this thinking, the self exists only in opposition to what it is not. Now, what the philosophy of relationalism says is that relation is the primary term, in the sense that the “self” is defined only in its relation to the other, and that, in its attempt to be everything that the “other” is not, what the identifying subject rejects is not so much the “other” as the part of the self that was formed through contact with the latter. Martin Buber stressed this point: “Man is anthropologically existent, not in the isolation of the self, but in the entirety of the relationship of the one to the other.” The “self” and the “other” do not precede the we that places them in relation in the social and linguistic space, etc. Francis Jacques noted in *Difference and Subjectivity*: “It is without a doubt me who speaks; I am the speaker. But strictly speaking, I am not the one speaking: it is we who say.” Speaking or writing for a subject, is not only speaking the self, revealing the foundations of one’s subjectivity; it is first addressing someone, anticipating the answers and modifying one’s words in advance. Furthermore, this co-construction of meaning only makes sense because it refers to a third party, because the “self” and the “other” not only speak of themselves, but of something else that exists independently of them. This is why the identity mindset does not simply lead to denying the other but to denying the real: the narcissistic confinement of the “self” therefore goes hand in hand with the proliferation of the false.

**J.T.:** Europe is the perfect arena for the immediate application of these ideas. On the one hand, countries such as Hungary or Poland affirm that their values are those that they define themselves – without the authority of Brussels – in a gesture of axiological entrenchment that erodes the common European base from within. Germany and France, on the other hand, after having fought each other in 1870, 1914, and 1939, have brought themselves together by drawing on what was left in common and tempering what was still different. It is in this spirit of dual overcoming that the great civilizational spheres can now come together within a new universal which will not be “Western” but, because it is fundamentally human, truly global.

**J.Y.H.:** Transposing to the cultural and civilizational levels this relational and co-constructive approach of the meaning of the self can allow us to understand what happened in Europe between the 16<sup>th</sup> and 18<sup>th</sup> centuries: the creation of a transcultural modernity which, by de-Europeanizing Europe, universalized it. When we want to define “Europe”, we often repeat the story of its dual foundation, its cross-fertilization by Athens and Jerusalem: the Greek *logos* and the Hebraic-Christian *gnosis*. But we must remember that at the time of its construction in the Middle Ages, Europe was situated outside of its cultural sources. For a Frankish king – which is to say, a “barbarian” – Plato and Christ were two figures outside of his culture and geography, having existed far away in the South-East.

As Rémi Brague stated: “It is only by passing through the ancient and foreign that the European acquires what is his own”. But it is what is “his own” that is always already “secondary”. For what is specific to European culture is that its origin merges with a detour. This detour takes an even more radical form from the Renaissance onwards and, with the Enlightenment, ends in a profound cultural shift from which the very idea of the universal emerges. Europe’s encounter with the non-European world in the Americas, Japan, China, and India cannot be reduced to a simple tendency to subjugate, exploit, and eradicate the other. It has also and at the same time had the consequence of radically and irreversibly upsetting the value system of the colonizer. When this process came to an end at the close of the 18<sup>th</sup> century, “European modernity [was] now defined, at least in part, as a scientific, educational, and political project that stood in opposition to Europe’s own religious and cultural heritage” (Joan-Pau Rubiès). If the values of the “Enlightenment” are not only “Western”, it is because they were developed in the context of a relationship between Europe and the other which shook up its definition of itself in a relationship of “cultural thirdness” with Asia which led to the formulation of transcultural universals.

**J.T.:** It would be useful to draw on examples from Enlightenment thinkers in Europe (France, Germany, the Netherlands, etc.), to ask the question of how these changes were transferred from one civilization to another,

to learn how modernity appeared in the world through these cultural encounters of which Europe was the hub of these relationships. Today, it is important to remember this history at a time when Europe is closing in on itself, at a time when certain countries are putting themselves in Europe even from outside of Europe, at a time when certain groups are closing themselves off through identity-based thinking within nations that are increasingly divided and polarized.

**J.Y.H.:** Of all the possible examples, let us use the example of the Jesuit missions in China which began in 1582. If we interpret this event in terms of the conventional categories of post-colonial orientalism, we will only see the doomed attempt of a religious group to impose its monotheistic and “Eurocentric” views on a culture that is several thousand years old. One would conclude (a bit hastily) that interculturalism is impossible. However, this event is significant because of the diffusion of Chinese writings in Europe. Before Leibniz, commentaries and translations of Confucian books were most widely read in France among the Libertines: La Mothe Vayer in 1642 and Simon Foucher in 1688 introduced Confucius as part of a strategy, formalized by Bayle and finalized by Voltaire, aimed at demonstrating that a stable social order and virtuous civic attitudes were possible without religious control of politics. Our separation of Church and State and our idea of an inherent universal that was more universal than that of religions certainly found its basis there. A delightful paradox is that by seeking to evangelize China, the Jesuits contributed to the secularization (confucianization) of Europe, and thus to its universalization.

**J.T.:** To make this irony more striking, we should note that we are now witnessing the opposite trend in China with the establishment of a religion of the State – or more precisely a religion of the Party – which makes any opposition not only dissident but also heretical. If it is true that the introduction of Chinese thought led to a shift away from religion in Europe, the Sinicization of an atheistic ideology, such as Marxism-Leninism, ironically produced the opposite effect: from Mao to Xi Jinping, the cult of the leader is imposed on everyone, both socially and economically. As a result, the Chinese oligarch is now a political opponent, an economic dissident, and an ideological heretic. It is a system of reverse power that destabilizes world governance, undermines the functioning of the United Nations, interferes with WTO conventions, weakens democratic standards at the regional level, and is unnerving because of its return to a nuclear-powered cold war. This latent geopolitical crisis has led to a shift towards the Pacific in terms of international relations. It must be considered as a major event whose repercussions will be felt at all levels. Brexit was only the first step on the path that has led to the creation of AUKUS, which means that the West has been split in two with continental Europe on one side and the Commonwealth sphere of countries surrounding the Pacific on the other.

Throughout this process England has not been a fifth wheel, as has been suggested, but a leader. After all, these countries have common denominators in language, history, religion, common law, and culture which have been intertwined for centuries in such a way that the United States could be considered as part of it. Consequently, Europe is the collateral damage of this split in the West caused by China's accelerated march towards an uncertain future.

**J.Y.H.:** Let's continue to explore this irony by asking ourselves whether Europe is currently more "Chinese" than the neo-Maoist China of Xi Jinping in the sense that, by renouncing the values that it presents as Western (and that it has in fact, through its past influence, helped to produce), contemporary China is cutting itself off from its own potential for universalization. This is also true in the sense that, as Anne Cheng said, the Chinese model of world governance under the name of *Tianxia*, which aims to counteract the limitations of the Westphalian model, is better achieved in European institutions than in Beijing's relations with Hong Kong, Taiwan, or the countries bordering the South China Sea. From this point of view, it is a mistake to think that in order to increase European "soft power", Europe would have to produce a global narrative of itself which, in response to Russian and Chinese culturalist narratives, would affirm its own radical singularity. Indeed, if "Europe" has any kind of connection to the "universal", it is not so much because of specific, "unique" cultural content (Greek immanence, Hebrew-Christian transcendence, scientific rationality, romantic individualism) as it is because of an absence of its own essence other than that which results from its continuous remaking through contact with the other.

Let's not follow Heidegger's proposal take a detour through our origins in order to be even more ourselves (to become Greek so as to be German), or to take a detour through somewhere else in order to achieve a pure cultural identity (to stop being "Asian" in order to become truly European). In reality, for Europe, there is no other origin than the detour, no other term than return. Our belief at the Collegium is that the universal is not what one imposes on others; it is the product of the effort made by each person to shed a little of himself, to yield his own sovereignty (personal or collective). As Jürgen Habermas noted: "Instead of imposing on all others a maxim that I want to be a universal law, I must submit my maxim to all others in order to examine its claim to universality through discussion." Europe has nothing to gain by entering the game of civilizational confrontation through the creation of a meta-narrative celebrating its exceptional cultural uniqueness. This does not mean denying the existence of conflict or forgetting the balance of power but thinking of the universal as the common good resulting from the never-ending process of self-transformation. Let us thereby prevent a misunderstanding: if, by letting go of itself, a non-European culture can have the impression of becoming European-

ized, it is not in the sense that it would adopt "foreign" values (which would be contrary to "their" values that they should strive to preserve in order to preserve their "cultural identity") but in the sense that it repeats this gesture of internal differentiation, of difference from itself, which defines the non-European Europeanity of Europe.

**J.T.:** I would like to conclude by revisiting this theme – which was that of my predecessor as president of the Collegium, Michel Rocard – when speaking of this profound crisis. Indeed, we find ourselves today in the situation presented in his last major work, *Suicide de l'Occident, suicide de l'humanité* ? For Michel Rocard, it was necessary "to emphasize the profound seriousness, which is too often underestimated, of the life-threatening trends that threaten us – humanity – in the long term". Our inability to resolve these cumulative crises is glaring. The absence of common values threatens global management. By not being collectively prepared for global challenges, any accident is potentially fatal. In fact, one could say that the pandemic started before the emergence of COVID-19. Furthermore, the inability to regulate climate change is becoming increasingly alarming.

When the president of the United States gives a speech at the world summit on the environment (COP26) in 2021 using the same terms as his predecessor five years earlier (COP21), the lack of progress is astounding. Meanwhile, the Amazon has burned, Australia has burned, California has burned... And when Joe Biden ends with "God bless the planet", it is to say: *ite, missa est*. The oratory redundancy leads to a flight from policy on several levels. During elections, this is manifested by the plethora of candidates who go on wild goose chases, and by the influx of media attention-seekers with their arsenal of tabloid fodder and carnival-like political tactics. Michel Rocard said: "My job no longer exists".

**J.Y.H.:** When we know that climate change, the loss of biodiversity, air and soil pollution, are all recognized phenomena dating back to the beginning of the industrial revolution and scientifically analyzed over the last 50 years, we can wonder about the darker side of "desire" in the intensification and proliferation of extreme weather events. An emergency that we do nothing, or very little, about is no longer an emergency but an opportunity... On the one hand, we collectively denounce in an informative communiqué the "dramatic melting of ice"; on the other hand, each country is positioning itself to exploit the resources that are now available in the Arctic. Can we be satisfied with the hypothesis of the Accident, of an external event taking us by surprise? A catastrophe that we do nothing, or very little, to avoid is no longer a catastrophe but the expression of an expectation... Jean-Luc Nancy wrote, in *The Truth of Democracy*, "Nothing is more common than the death impulse – and the point is not to know if State technological policies that allowed Auschwitz and Hiroshima unleashed impulses of this magnitude, but rather to

know if humanity, overburdened by its millions of years, has not chosen the path of its own annihilation over the last few centuries”.

Is the Holocaust the sign of the end of the Holocene and the beginning of the Anthropocene, which leads us straight to an “Anthropocaust”? Heiner Müller, on the subject of Nazism, once made this terrible observation: “The Germans are a suicidal people who encountered Jews along the way.” Today, we could say: *Homo sapiens* is a suicidal species that has encountered the Earth along the way. But how can we understand Man’s death impulse, this outwardly suicidal creature who is dragging everything real into his sinking ship? Our inability to act for the better encourages and reinforces our “capacity” to stay on course for the worst. It is, in the words of Nietzsche, more a will to nothingness than a nothingness of will. The Anthropocene is the anthro-obscene: the symptom of a collective symphorophilia whose civilizational crash is the ultimate “nirviagra”. Disgust and fascination mix in our a-porn-ocalyptic society of the spectacle whose only revelation is the staging of its disappearance: from the Romans delighting in the sight of martyrs devoured by lions, to the never-ending stream of news stories showing giant fires and deadly floods, the nature of the thrill remains the same, only the scale of the sacrifice has changed. J. G. Ballard, in the introduction to the French version of his most iconoclastic book *Crash* (1973), offered the following diagnosis: “Voyeurism, self-loathing, the infantile nature of our dreams and aspirations – these diseases of the psyche – have resulted in the most terrifying death of the 20th century: the death of affect.”

Urgency is not just a problem of “speed” and “acceleration”; even more than a constriction of time, we are

witnessing a true constriction of the heart, a crisis of connection. In *Time-Image*, Deleuze asserted that the only solution to the crisis of action, to the paralysis of our reaction, was a belief in this world. However, at a time when the world itself is disappearing, the only answer that remains is faith in others: *I believe you*. But how can we trust the other if “the other” is only defined in opposition to “me”? By forsaking the deadly mindset of solitary ipseity for the life-affirming mindset of solidarity-based otherness. Recreating connection in the co-construction of meaning paves the way towards a transversal whose model is less rational dialogue and more loving contact. This other-than-oneself comes from somewhere far away and is a response to the desire to become other than oneself: one is not born human, one becomes human – when one says to the other: change me!

**Jacques Toubon:** It is as Peter Sloterdijk says in his book, *You Must Change Your Life*. Within the *Collegium*, he has brought the idea of updating categorical imperatives, conditions sine qua non for the preservation of what is going to happen. The overlap and cross-pollination of the political and the philosophical are essential. Indeed, according to Max Weber in *Science as a Vocation* and *Politics as a Vocation* (“*Wissenschaft als Beruf*”, “*Politik als Beruf*”), the subject of philosophical thought and the subject of political action are not supposed to be able to meet. However, the inability for these two activities to converge must be overcome given the extreme crises affecting the world today. Furthermore, as Edgar Morin says, there is really only one crisis: a polycrisis, which produces the polycatastrophe in which we find ourselves. Since its creation, it is in the very DNA of the Collegium International, with its political-philosophical double helix, to bring these two roles together.





**Raphaël Glucksmann** • European Representative

## The Will to Power

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A dictator such as Lukashenko can send his Mig jets to divert an aircraft flying between two European capitals to kidnap a journalist; or he can bring thousands of human beings from Baghdad or Damascus to the Polish border, creating a “migrant crisis” with no other purpose than to destabilize and manipulate us. Why? Because, whether right or wrong, he believes that the European Union is structurally powerless.

We should not assume that this is an isolated case, or a simple stroke of madness carried out by a desperate tyrant. The same calculation is being made in the circles of power in Moscow, Beijing, and Ankara. In a violent and conflict-ridden world, so far from the peaceful ideal of the End of History, weakness is an invitation to aggression. We are condemned to be powerful or to no longer be.

And yet we act as if we were spectators of our inexorable decline, experienced as though it were a preordained fate. Europe has become a continent of consumers: consumers of goods produced in China and consumers of security produced in the United States. The relationship of European elites to the world is reminiscent of Hegel’s Master: enjoying the goods produced by his slave, he becomes sluggish, soft, and the slave to his slave. Until his downfall. Where do we start if we want to break free of the trap of powerlessness?

### A mental revolution

What is the Master’s original sin? It is to eternally fantasize about a victory which was only ephemeral, to think that the struggle was over. It is having read Fukuyama when the Berlin Wall fell, dreaming of perpetual peace and believing that rest was possible. This is the great philosophical and political error of the 1990s and 2000s that we are paying for today.

If there is no more strategic adversary, no great theological-political conflict, no more great peril, then what is the point of pursuing power? And what good are poli-

tics, in fact? The straightforward management of common problems by a class of experts is enough. In Taiwan, I was surprised to see the most talented individuals of a generation enter the public sector and take up a political career. In Europe, they would certainly have chosen to be singers or to launch their start-ups. In Taipei, they want to serve the state. Why? Because the Taiwanese democracy lives under the constant threat of the Chinese Communist Party. This existential threat confers a sacred dimension to the common cause. On the other hand, the absence of threat makes it irrelevant and precipitates the bureaucratization of democracy, the process of de-politicization of which the European Union in its present form is the result.

So, the first challenge, in order to revitalize our polities and overcome the powerlessness that undermines them, is to understand that we are threatened. We are threatened, first and foremost, by climate collapse, which gives our individual and collective existence a tragic outlook, and thus restores meaning to the very idea of the city. We are threatened, as well, by multinationals that are becoming more powerful than our States and that play on common interests as well as on general will. Finally, we are threatened by geopolitical adversaries who impose constant power struggles on us, to which we must respond.

In the European Parliament, the Special Committee on Foreign Interference, which I chair, has for more than a year been examining the hybrid war waged by authoritarian regimes against the European Union. We are clearly not at war, but we are no longer truly at peace either. We are living in an in-between period characterized by a high level of conflict without direct military confrontation. From constant disinformation campaigns or massive hacker attacks against our institutions or hospitals, to hostile investments in our strategic infrastructures or the methodical capture of a part of our political or social elites, Putin’s Russia, Xi Jinping’s China and, sometimes, Erdogan’s Turkey, are trying to weaken European democracies from within. Their actions erase all boundaries between diplomacy and politics.

We have no choice but to rediscover within ourselves a form of will to power in order to face these threats. It remains to be seen whether we can find a realistic path towards the emergence of a European power.

### In the beginning, there was the market

If we do not want to fall into federalist incantations, we must understand what the European Union is today: a market. The largest market in the world. No multinational can afford to forego it, no producing country can do without it. This is Europe’s only true strength today, but it is not nothing. It is a lot, even. Provided that we do something radically different from what we have done with it up until now.

From the beginning of my mandate, I understood the division of labor that was at work within the European institutions: on one side are the debates on principles

and geopolitics, on the other side is the management of commercial affairs. In the Parliament, those who wish to debate geopolitics join the Foreign Affairs Committee and the Human Rights sub-committee, while those who wish to defend the interests of large European companies join the International Trade Committee. I therefore joined both with a clear idea: to make trade a means to serve our long-term interests and principles.

The goal is to use the European market as a strategic tool for exporting standards. To that end, the European legislation on the duty of vigilance is undoubtedly the most important text of our mandate. In the way we have conceived and developed it in the European Parliament, it can be seen as the first step in the European city's attempt to regain control of globalization. It is therefore a moment of rupture since the Brussels doxa on trade has been to promote the removal of restrictions and "obstacles" to the complete liberalization of trade.

This dogma of "loosening up" has led to the breakdown of value chains, offshoring, and an explosion in profit margins, and therefore in dividends. Large multinationals have delegated the manufacture of their products to others and have thereby freed themselves from any legal responsibility. The duty of care puts an end to the impunity that became the norm in the globalization of the 1990s and 2000s and imposes a set of legally binding obligations on European companies as well as on all those active within the European market.

These rules requiring them to identify, prevent, and stop all human, social, and environmental rights violations in their value chain will force them to restructure their business model. This will benefit countries that have a minimum level of respect for the rule of law. The day is coming when executives from Zara or Nike will have to face the courts in Europe because their Chinese suppliers are exploiting Uyghurs slaves. On that day, the European Union will have become a global normative power and will have decided to play a global role.

Not surprisingly, the multinationals have gone to war against this project. But resistance is not coming only from the private actors who benefit most from the current erasure of politics; it is coming in part from the political establishment itself. The Commission and some Member States have been reluctant to move forward, as if they were afraid of asserting their own power. This is why public pressure, through massive civic campaigns, will be crucial: the challenge is to compel power to act.

### **The meaning of strategic autonomy**

The duty of vigilance is only a first step, one which is intended to give the European elites a taste for power. The foundations of global European power will subsequently need to be laid.

Our dependence on China means that any major EU policy has disastrous counter-effects. Take for example

the European Green Deal, the vitally important transition to low-carbon electricity production and, specifically, the question of photovoltaic panels. China currently manufactures a large proportion of these panels using polysilicon produced by the forced labor of the Uyghurs. Our public subsidies will therefore be used to finance the Chinese concentration camp system if we do not combine the Green Deal with a genuine plan for European reindustrialization.

We must not only promptly ban any products produced by slavery from entering European territory – following the example of the United States – but we must also take measures to once again make Europe a continent of manufacturers. This can be done first and foremost by using the weapon of public procurement. The 2.400 billion euros of orders placed each year by the European public sector must be focused on companies manufacturing in Europe. This is the purpose of the Buy European Act that we are promoting in Parliament. By supplementing it with a carbon tax at the EU's borders, a Made in Europe Act to foster the emergence of European leaders in the ecological transition or digital revolution, as well as massive investments in research and development, we will be able to lay the groundwork for a European industrial power.

But a power only exists if it has the means to defend itself. The Union will not be able to control its own destiny as long as it remains militarily dependent on the United States. Trump's presidency was not a digression: the period of American hegemony is ending, and it is now crucial for Europe to develop a defense and security policy worthy of the name. France has an essential role to play as the only country in the Union able to offer the necessary security guarantees – including nuclear guarantees – to the whole of the common zone.

### **An institutional rebuilding**

The question of power is, at the end of the day, the question of sovereignty. We must make the Brexit slogan "Take Back Control" our own. Convoluted treaties, the product of precarious compromises, have diluted the idea of political responsibility in a sea of bureaucracy. It is no longer clear who does what, who is responsible for what in the European architecture, and the art of governing has become one of permanent deflection.

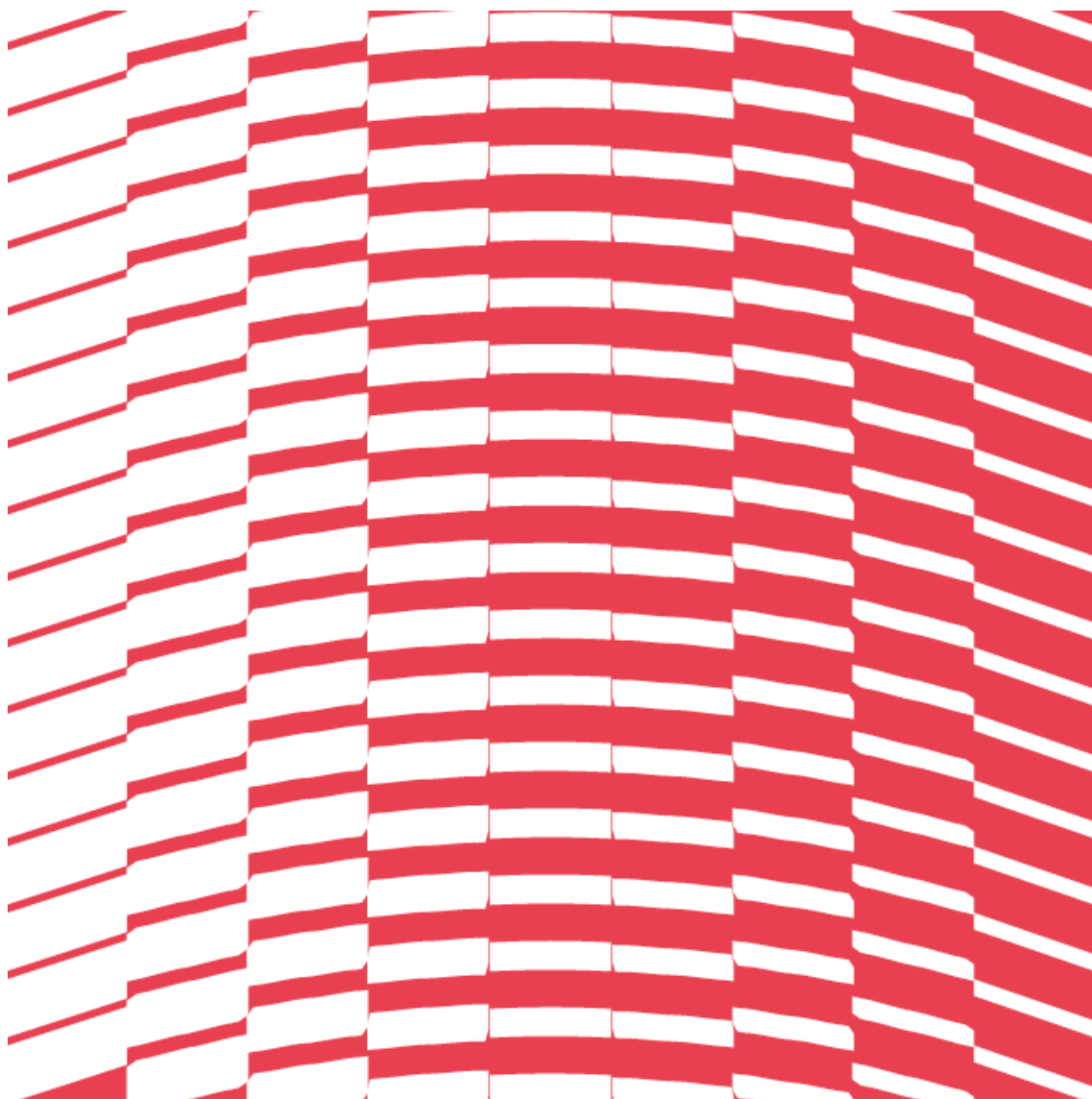
A major reassessment is therefore necessary, a reassessment that would in certain ways be a return to basics. In the wake of the Second World War, European construction was based on concrete cooperative projects between European countries, from the ECSC to the Spaak report, including the aborted EDC project. Our «founding fathers» wanted to work together so that they could no longer wage war against each other. Their successors wanted to live together, losing sight of the objective of action. This triggered the bureaucratization of the European project, gradually delegitimizing it in the eyes of citizens.

Instead of locking ourselves into unproductive debates about federalism, we should define the major projects to be carried out on a European scale. We should then adapt our operations to these projects. In order to carry out these projects, the European institutions will have to take a federal leap in certain specific areas, imposing binding objectives on Member States and being solely accountable to their citizens. In other matters, individual nations will reclaim their preeminence.

Planning Commissioners would receive a clear and defined mandate from the European Parliament, supported

by specific objectives. The Commission would no longer be a secondary government with a ridiculous budget and unclear authority. Whether in industry, energy transition, or defense, the people would know to what end they are sharing their sovereignty and how this sharing is not a loss, but a gain in power and control.

It is in this way that we will be able to address the feelings of decline, dispossession, and powerlessness that are eating away at European politics and leading the European project to disintegration. And it is in this way that we will once again be proud to be Europeans.



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