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Editors:
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European Integration Perspectives in Times of Global Crises

13th Network Europe Conference
Athens, 19 – 22 June 2022

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Preface

The history of European integration is characterized by a multitude of achievements, but also by challenges and crises. The construction of the European Union as a supranational organization has often raised complex legal questions, especially about the scope of the Union's competences and the remaining competences of the member states. There have also often been controversial discussions about the core of national constitutions, most recently, for example, in connection with the judicial reforms in Poland.

With the White Paper on the Future of Europe, the European Commission had launched a debate on fundamental reforms of the Union structures in 2017. A total of five reform scenarios ranged from a reduction and focusing of the Union's competences to increased integration in the sense of a United States of Europe. However, the White Paper did not have any consequences; none of the reform scenarios presented was implemented. However, current global challenges in the areas of health, climate change and energy resources as well as the shift in the global balance of power and related security issues demonstrate the increasing importance of a strong and united Europe. The idea of an "ever closer union", as laid down in the preamble of the 1992 EU Treaty, could experience a renaissance.

Against this background, the 13th Network Europe Conference addressed the importance of the integration project in times of global crises and the challenges in various policy areas, as well as the EU's relations with its eastern and southern neighbors and its role vis-à-vis global actors such as China and Russia. This publication contains the conference contributions.

Zurich, 20 February 2023

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"Ever closer Union" or flexible Union? Integration Scenarios after Constitutional Court Decisions in Germany and Poland

Peter Christian Müller-Graff

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"'Ever Closer Union' or Flexible Union? Integration Scenarios after Constitutional Court Decisions in Germany and Poland?"[1] This wording of the question assigned to me by the organizers of the 13th Network Europe Conference on the general topic "European integration perspectives in times of global crises" sounds like an alternative between "an ever closer union among the peoples of Europe" as attributed to the Treaty on European Union by its Article 1 para. 2 as "a new stage in the process of creating" it and an undefined "flexible union" (without the objective of an "ever closer union", as David Cameron renegotiated it away in 2016 for Britain[2] in the futile hope to win the referendum). This alternative "closer" or "flexible" is not a new issue, but the subject of a

[1] Text of the author's lecture at the 13th Network Europe Conference in Athens on 20 June 2022.

[2] European Council, Draft Decision of the Heads of State or Government, meeting within the European Council, concerning a New Settlement for the United Kingdom within the European Union, 2 February 2016.

permanent debate.[3] Whether, however, the recent decisions of the constitutional courts in Germany[4] and Poland[5] give new practical impetus for pondering on prospective integration scenarios, is the subject of the following observations. They are structured along four questions: first, the Treaty's formulation of "the process of creating an ever closer union between the peoples of Europe" deserves closer attention – what is meant with it? (in German: "eine immer engere Union der Völker Europas"; in French: "une union sans cesse plus étroite entre les peuples de l'Europe" (I); second, does the PSPP-judgement of the German Federal Constitutional Court's 2nd Senate (FCC) of 5 May 2020 constitutionally jeopardize this process? (II); third, does the Polish Con-

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3 See, e.g., *Thym*, Einheit in Vielfalt: Binnendifferenzierung der EU-Integration, in: Hatje/Müller-Graff (eds.), Europäisches Organisations- und Verfassungsrecht (Enzyklopädie Europarecht Band 1), 2022, § 22 (p. 1173 et seq.); Deutscher Bundestag Fachbereich Europa, Differenzierte Integration in Europa, PE 6 - 3000 - 090/20; *Schimmelfennig/Winzen*, Grand Theories, Differentiated Integration, Journal of European Public Policy (JEPP) 2019, p. 1172 et seq.; *Eppler*, Flexible Integration zwischen integrativem Fort- und Rückschritt, integration 2017, p. 207 et seq.; *Riedeberger*, Die EU zwischen einheitlicher und differenzierter Integration, 2016; *Schimmelfennig/Leuffen/Rittberger*, The European Union as a System of Differentiated Integration: Interdependence, Politicization and Differentiation, Institute for Advanced Studies: Political Science Series Working Paper 137/2014, p. 8 et seq.; *Busch*, Differenzierte Integration als Modell für die Zukunft der Europäischen Union? IW Policy Paper 14/2014; *Leuffen et al.*, Differentiated Integration. Explaining Variation in the European Union, 2013; *von Ondarza*, Auf dem Weg zur Union in der Union. Institutionelle Auswirkungen der differenzierten Integration in der Eurozone auf die EU, integration 2013, p. 17 et seq.; *Müller-Graff*, Modelle differenzierter Integration im Gemeinschaftsprivatrecht, in: Jung/Baldus (eds.), Differenzierte Integration im Gemeinschaftsprivatrecht, 2007, p. 109 et seq.; *John*, Differenzierte Integration im Spannungsfeld von Erwartung und politischer Realität: Eine Bewertung ihrer Auswirkungen auf den europäischen Integrationsprozess, integration 2006, p. 172 et seq.; *Thym*, Supranationale Ungleichzeitigkeit im Recht der europäischen Integration, Europarecht 2006, p. 637 et seq.; *Grieser*, Flexible Integration in der Europäischen Union: Neue Dynamik oder Gefährdung der Rechtseinheit? 2003; *Thun-Hohenstein*, Die Möglichkeit einer „verstärkten Zusammenarbeit" zwischen EU-Mitgliedstaaten. Chancen und Gefahren der „Flexibilität", in: Hummer (eds.), Die Europäische Union nach dem Vertrag von Amsterdam, 1998, p. 125 et seq.; *Wessels/Jantz*, Flexibilisierung, 1997; *Stubb*, A Categorization of Differentiated Integration, Journal of Common Market Studies 1996, p. 283 et seq.

4 Bundesverfassungsgericht (Federal Constitutional Court), Judgment of the Second Senate of 5 May 2020, 2 BvR 859/15, paras 1-237, BVerfGE 154, pp. 17-152.

5 Trybunał Konstyrucyjny, decision K 3/21, 7 October 2021, available at: <https://trybunal.gov.pl/en/news/press-releases/after-the-hearing/art/11664-ocena-zgodnosci-z-konstytucja-rp-wybranych-przepisow-traktatu-o-unii-europejskiej>.

stitutional Tribunal's (PCT) decision of 7 October2021 constitutionally block this perspective? (III); and fourth, do these decisions require a new debate on integration scenarios? (IV).

I. The Content of the Treaty's Formulation of "the process of creating an ever closer union among the peoples of Europe"

What is the content of the Treaty's formulation of "the process of creating an ever closer union among the peoples of Europe", in which the Lisbon Treaty on European Union (quote) "marks a new stage"?

1. First of all, it has to be emphasized that this wording does not talk about a specific organisational structure such as, e.g. a federal European state, or, in particular, about the European Union, but about a "union between the peoples of Europe" (the "union" in French and English not written with an initial capital letter as it is the case in German). Hence, one has to distinguish between the "European Union" as an organisational structure and "a … union between the peoples of Europe" as the substantive destination of the "process of creating" (in German: "bei der Verwirklichung"; in French: "processus créant").
2. Second, obviously, in this formulation the term "Europe" is not identical with the Union, but a territorially related[6] yet open political definitional concept.
3. Third, the wording of "the peoples of Europe" is not addressing the "states" in Europe but sounds – at first sight – ethnically oriented.
4. But fourth, the phrasing "union of the peoples" has to be understood as uttering the political will to establish an "inner connectedness" between the peoples ("innere Verbundenheit"[7]) as the very basis for a common European well-being. This aim of "inner connectedness" in a sense of commonality addresses the millions of individuals in Europe and their respective social networks. If they (realistically their majority in the respective peoples) do not develop such a transnational "inner connectedness", all organisational devices such as the European Union will remain without a stable foundation.[8] Hence, the individuals and societies should converge in their mutual understanding, respect and appreciation.

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6 The EU Member State Cyprus is geographically part of Asia.

7 *Pechstein*, in: Streinz (eds.), EUV/AEUV, 2018, Art. 1 EUV, para. 19.

8 Id.

To these ends the primary law of the Union offers individuals subjective rights to transnationally connect at their own private initiative and in their own interest, be it physically or (if possible) telecommunicationally: those rights are, in particular, the transnational access freedoms of the internal market for workers and business people, self-employed persons and artists, service providers and service recipients, sellers and buyers, lenders and borrowers, investors and companies (Articles 28 et seq. TFEU);[9] and also the rights of the citizens of the Union (Article 20 TFEU),[10] among them the right to move and reside freely within the territory of the Member States and the political rights in other Member States such as the right to vote and to stand as candidates in municipal elections (e.g.: successfully the Dane Claus Ruhe Madsen as Lord Mayor in Rostock). In addition, the secondary law of the Union unfolds and furthers these rights in a great variety of ways, and it also adds the absence of internal border controls for persons (Schengen Borders Code) as a directly applicable provision.[11] But whether an individual makes use of these rights to connect is up to her or him. It can be assumed that in fact this happens hundreds of thousands of times every day within the Union.

A further question is whether an "inner connectedness" of the individuals and societies that realize the standards of living in their daily life should develop in a certain substantive direction. This is up to them, since the Union is founded on (among others) the value of freedom (Article 2 s. 1 TEU). However, the primary law of the Union offers some points of orientation for a thriving togetherness. Article 2 s. 2 TEU contains a vision. It envisages "a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail". And this is politically overarched by six values common to the Member States and the Union itself: "respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights,

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9 *Müller-Graff*, Die europäische Privatrechtsgesellschaft in der Verfassung der Europäischen Union, in: Müller-Graff/Roth, Recht und Rechtswissenschaft. Signaturen und Herausforderungen zum Jahrtausendbeginn, 2000, p. 271, 281 et seq.; *Müller-Graff*, Basic Freedoms – Extending Party Autonomy Across Borders, in: Grundmann/Kerber/Weatherill (eds.), Party Autonomy and the Role of Information in the Internal Market, 2001, p. 133, 137 et seq.

10 *Müller-Graff*, „Nous ne coalisons pas des États, nous unissons des hommes" –Variationen zu Jean Monnet, in: Hanschel et al. (eds.), Mensch und Recht. Festschrift für Eibe Riedel, 2013, p. 429, 436; *Schönberger*, Stiftet die Unionsbürgerschaft europäische Identität? in: Müller-Graff (eds.), Der Zusammenhalt Europas – In Vielfalt geeint, 2009, p. 55 et seq.; *Maas*, Creating European Citizens, 2007; *Schönberger*, Unionsbürger, 2006; *O'Leary*,The Evolving Concept of Community Citizenship, 1996.

11 Article 22 of Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (codification), OJ L 77, 23.3.2016, p. 1–52.

including the rights of persons belonging to minorities". Seen all together, this is the vision of an enlightened way of life in the developed sense of *Immanuel Kant*.[12] At the same time it may be understood as an indication of the European way of life already achieved to a considerable degree in the course of European integration for a considerable part of national societies since the end of the Second World War. This vision can be considered as the "ever closer union of the peoples of Europe" – at least within the European Union that gives the stabilizing legal and institutional frame[13] and direction for this development.

II. Endangerment of the Process of "an ever closer union among the peoples of Europe" by the FCC's PSPP-Ruling?

The question of whether the FCC's PSPP-judgment jeopardizes or even puts an end to the process described by Article 1 s. 2 TEU as "an ever closer union among the peoples of Europe" on the track of the European Union, may find a first answer in the text of the ruling. The formula of Art. 1 par. 2 TEU is not explicitly dealt with by that judgment on the ECB's competence to adopt the financially huge Public Sector Purchase Programme. However, this does not yet give a final answer to the question of whether its shocking violation of procedural Union law[14], its disobedience to the CJEU (and, by that, to the primacy of Union law), and its sharp language towards the CJEU's preliminary ruling on the interpretation of Union law ("simply not comprehensible and thus objectively arbitrary"[15]) signal a break-up and rejection of the Union's community of law, and hence a destruction of the mentioned legal and institutional backbone of an ever closer union between the peoples. To answer this question, a close look must be taken at the two legal dimensions of the judgment (Union law and constitutional law).

1. As far as the FCC's ruling interprets substantive primary Union law provisions on the competence of the ECB (Article 127 par. 1 TFEU – monetary policy – and Article 5 par. 4 TEU – the principle of proportionality) and on the competence of the ECJ (Article 19 TEU – ensuring that in the inter-

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12 As an application to international relations *Kant*, Zum ewigen Frieden, 1795.

13 *Pechstein* (*supra* note 7), Art. 1 EUV, para. 19.

14 See, e.g., *Tilmann*, Verfassungsgericht verletzt das Unionsrecht, IWRZ 2020, p. 166; *Müller-Graff*, Schockwellen im Unionsrechtsraum: Das PSPP-Urteil des Bundesverfassungsgerichts, EuZ 2020, p. 154 (155); *Pernice*, Machtspruch aus Karlsruhe „Nicht verhältnismäßig? – Nicht verbindlich? Nicht zu fassen…". Zum PSPP-Urteil des BVerfG vom 5. Mai 2020, EuZW 2020, p. 508 (511, 518); *Meier-Beck*, De iudicando ultra vires, EuZW 2020, p. 519 (522).

15 Bundesverfassungsgericht (*supra* note 4), para. 118.

pretation and application of the Treaties the law is observed), the FCC's critical review of the ECB's reasoning and of the CJEU's review and reasoning are legitimate and in terms of content not without "a grain of salt". The CJEU's preliminary judgment in this matter,[16] regardless of the justifiable result, did not rise to the expected standards of scrutiny and substantive reasoning on this grave issue.[17] Moreover, there is a widely held understanding, that the PSPP does not aim at raising inflation to around 2%, as articulated by the ECB,[18] but at helping certain Euro-States by mitigating their budget induced problems of access to the capital market.[19] Hence, the review of the persuasiveness of the CJEU's ruling by the FCC falls within the basic responsibility of national courts for the interpretation and authority of Union law.

However, the FCC violated procedural Union law (as part of the primacy of Union law). While the 2nd Senate was legitimized for an in-depth reflection on the completeness and persuasiveness of the CJEU's interpretation of the relevant Union law, it is also evident that the effectiveness and the uniform applicability of Union law across the Union would be jeopardized, if the ultimately binding answer to such questions would be left with national courts or tribunals against whose decisions there is no remedy under national law. In order to avoid this danger, the Member States have wisely agreed on an elementary procedural rule and ratified it in accordance with their respective constitutional requirements: namely the obligation of such national courts and tribunals "to bring the matter before the Court", in other words to refer the question to the CJEU (Article 267 par. 3 TFEU).

While the 2nd Senate hat initially respected this obligation in the PSPP-procedure,[20] it ignored the further procedural obligations after the CJEU's preliminary ruling in this matter. First, it disregarded its obligation to fol-

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16 CJEU, Judgement of 11 December 2018, Weiss et al., C-493/17, ECLI:EU:C:2018:1000.

17 See, e.g., the general concerns in the annotation *Müller-Graff*, EuZW 2019, p. 172.

18 Decision (EU) 2015/774 of the European Central Bank of 4 March 2015 on a secondary markets public sector asset purchase programme (ECB/2015/10), OJ L 121, 14. May 2015, p. 20–24, para. 2-4 and 7.

19 E.g.: Ökonom Sinn schilt die EZB, available at: <https://www.faz.net/aktuell/wirtschaft/konjunktur/hans-werner-sinn-kritisiert-das-ezb-programm-13472298.html>; *Haltern*, Ultra-vires-Kontrolle im Dienst europäischer Demokratie, NVwZ 2020, p. 817 (822); see also Bundesverfassungsgericht (*supra* 4), para. 134, 137.

20 Bundesverfassungsgericht, Order of the Second Senate of 18 July 2017, BvR 859/17, paras. 1-137, BVerfGE 146, 216-293.

low the CJEU's interpretation[21] and, second, in view of the new extensive reasoning of its own interpretation of Union law (in particular on the CJEU's competence) it also violated its new obligation to refer the matter again to the CJEU.[22]

2. But why did the FCC violate this clear obligation under Union law? This leads to the most problematic constitutional self-empowerment of the FCC articulated for the first time in the Maastricht-judgment of 1993[23] and practiced for the first time in the PSPP-judgment,[24] namely the self-empowerment of the FCC to declare measures of Union institutions as non-binding or inapplicable in Germany.[25] One has to ask for the substantive root of this position. That is already alluded to in the reasoning of granting German citizens standing for activating the FCC to review the question of whether a concrete measure of the Union was beyond its power. The PSPP-ruling of the FCC was prompted by constitutional complaints of German citizens that their constitutional right to vote for the Bundestag (Article 38 of the Basic Law) had been violated by the Federal Government's and the Bundestag's failure to take appropriate measures to repeal or not to implement the PSPP-decisions of the ECB, which were alleged to exceed its competences under Union law. This connection between the right to vote and an "ultra vires"-measure of institutions of the Union is not found in the text of the Basic Law. It had been established by the 2nd Senate's Maastricht-judgment on the grounds that this right of the individual's democratic influence was to be safeguarded against the erosion of its substance ("Substanzverlust")[26] either by transferring too many competences from the Bundestag to the Union[27], or by Union measures that are not covered by a transferred competence.[28] Hence, at the basis of the FCC's self-empowerment lays the idea of judicially guarding the democratic principle of the German constitution[29] against "over-

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21 E.g.: *Kelemen et al.*, National Courts Cannot Override CJEU Judgments. A Joint Statement in Defense of the EU Legal Order, in: Verfassungsblog, 26 May 2020.

22 E.g.: *Tilmann* (*supra* note 14); *Müller-Graff*, Höchstgerichte ultra vires?, GPR 2020, p. 167; *Pernice* (*supra*) 518.

23 Bundesverfassungsgericht, Judgment of the Second Senate of 12 October 1993, 2 BvR 2134, 2159/62, BVerfGE 89, 155.

24 Bundesverfassungsgericht (*supra* note 4), para 235.

25 Bundesverfassungsgericht (*supra* note 23), C I 3; Bundesverfassungsgericht, Judgment of the Second Senate of 30 June 2009, 2 BvE 2/08, para. 241 (Lissabon).

26 Bundesverfassungsgericht (*supra* note 25 - Lissabon), para. 174 et seq.

27 Bundesverfassungsgericht (*supra* note 25 - Lissabon), para. 264.

28 Bundesverfassungsgericht (*supra* note 4), para. 234.

29 Bundesverfassungsgericht (*supra* note 25 - Lissabon), paras. 213, 216, 218, 250.

empowerments" or self-empowerments of the Union. The FCC's understanding of democracy centres in the understanding of the Member States as the "constituted political primary area of their respective polities".[30] In the (very wordy) Lisbon-judgment this is linked to understanding "European unification on the basis of a treaty union of sovereign states" that "may … not be achieved in such a way that not sufficient space is left to the Member States for the political formation of the economic, cultural and social living conditions".[31]

3. This leads back to the initial question of whether this approach jeopardises the process of "an ever closer union between the peoples of Europe"? This could perhaps be the case if one speculatively assumes that this judgment reinforces a sceptical mood towards the ECB's monetary policy in the German public and can, by that, promote a sceptical perception of the single currency by a considerable part of the population. However, first, the basic approach of the FCC addresses competence issues in the applicable law (including an interjurisdictional power question), but not the socio-empirical process referred to in Article 1 par. 2 TEU. Second, the latter may prove to be more decisive for the political European togetherness. Third, the PSPP-judgment required only a more thorough judicial review ("höhere Prüfungsdichte") of the ECB's programme by the CJEU, as well as a comprehensible reasoning of the CJEU. Fourth, the *relevant* political reaction in Germany to the PSPP-judgment as the first realization of this FCC's self-empowerment was distant and critical, as was particularly evident in the subsequent infringement proceedings initiated by the European Commission against Germany. There, the Federal Government (which – together with the Bundestag – was held by the FCC to have violated the Basic Law for failing to take suitable steps challenging that the Governing Council of the ECB neither assessed nor substantiated that the PSPP satisfies the principle of subsidiarity) declared that it will use all its capabilities to ensure that such a disrespect of the CJEU will not happen again.[32]

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30 Bundesverfassungsgericht (*supra* note 25 - Lissabon), para. 301.

31 Bundesverfassungsgericht (*supra* note 25 - Lissabon), para. 249.

32 Mitteilung der Regierung der Bundesrepublik Deutschland an die Europäische Union vom 3. August 2021 zum Vertragsverletzungsverfahren gegen die Bundesrepublik Deutschland gemäss Artikel 258 AEUV – Urteil des Bundesverfassungsgerichts vom 5. Mai 2020 – Verfahren Nr. 2021/2114, Ziff. 3.

III. Endangerment of the Process of "an ever closer union between the peoples of Europe" by the PCT's judgment of October 7th, 2021?

The same question arises for the PCT's judgment of October 7th, 2021: Does it jeopardize or even put an end to the process envisaged by Article 1 par. 2 TEU as "an ever closer union among the peoples of Europe?" on the track of the European Union? What is the ruling's content and impact?

1. Concerning the content, the PCT's judgment differs from the FCC's PSPP-judgment in view of the "ever closer union"-provision of Article 1 par 2 TEU already insofar as it explicitly addresses this formula. According to the PTC's English press release it adjudicated under point 1: "Article 1, first and second paragraphs, in conjunction with Article 4 (3) … is inconsistent with Article 2, Article 8 and Article 90 (1) of the Constitution of the Republic of Poland" – "insofar as the European Union … creates 'an ever closer union among the peoples of Europe', the integration of whom – happening on the basis of EU law and through the interpretation of EU law by the Court of Justice of the European Union – enters 'a new stage' in which: a) European authorities act outside the scope of the competences conferred upon them by the Republic of Poland in the Treaties; b) the Constitution is not the supreme law of the Republic of Poland, which takes precedence as regards its binding force and application; c) the Republic of Poland may not function as a sovereign and democratic state."[33] A further explanation details this statement by saying: "that Article 1, first and second paragraphs of the TEU remains consistent with the Constitution of the Republic of Poland. However, if the new stage of ever closer cooperation entails that the norms of EU law, especially those derived by the CJEU, happen to be situated outside the scope of the competences conferred by the Republic of Poland as well as above the Constitution …, thus causing the loss of sovereignty, then the stage of 'an ever closer union' infringes the Constitution…"[34]

   These statements were triggered in reaction to the CJEU's finding that certain measures of the Polish judiciary reform were contrary to the Union law obligation to ensure effective legal protection in the areas covered by EU law (Art. 19 TEU).[35] The PCT denied competences of the Union

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33 Trybunał Konstytucyjny (*supra* note 5), 1.

34 Trybunał Konstytucyjny (*supra* note 5), II 9 (3).

35 See, in particular CJEU, Judgement of 15 July 2021, Commission v. Poland, C-791/19, ECLI:EU:C:2021:596, para. 235.

for the functioning of the national judicial system and the organisational structure thereof and hence constitutionally fenced off the national judiciary from certain applications of Article 19 TEU by holding that its interpretation is unconstitutional insofar as it grants domestic courts the competences to "bypass the Constitution … [or] adjudicate on the basis of provisions which are not binding [because of having been revoked by the Sejm and/or found to be unconstitutional by the PCT] … [or] review the legality of the procedure for appointing a judge … [or] review the legality of the National Council of the Judiciary's resolution to refer a request to the President of the Republic to appoint a judge … [or] determine the defectiveness of the process of appointing a judge."[36]

2. Concerning the impact of this ruling on the objective "an ever closer union between the peoples" the broad abstract relativisation of the Union's community of law seems to put a massive roadblock to Poland's participation in the development of the EU. However, it is unclear how serious the abstract wording must be taken. First: The constitutional legitimacy of the PCT's composition and its character as an independent and impartial judicial institution is not beyond any doubt. The European Court of Human Rights (ECHR) in its judgment of 7 May 2021 found the PCT as not being a "tribunal established by law" in the sense of Article 6 § 1 of the European Convention on Human Rights.[37] Besides that, second, these positions, if taken seriously, would diminish or even devastate Poland's political posture in and its financial benefits from the Union. This is due to three serious deviations of the PCT's position from the very basics of Union law: (a.) The question of "ultra vires" implies the interpretation of Union law and is already a topic of Articles 263, 267 and 277 TFEU. If the PCT sees itself and not the ECJ as the ultimate arbiter, it clearly violates Union law. (b.) The assumption of the supremacy of the constitution after ratification of the Union Treaties is a clear violation of the principle of "pacta sunt servanda", as contained in Articles 26 and 27 of the Vienna Treaty Convention and a clear contradiction to basic requirements of the EU as expressed in several judgments of the ECJ (Case 11/70 – Internationale Handelsgesellschaft;[38] Case C-409/06 – Winner Wetten[39]). (c.) The wording "sovereign state" uses a sweeping abstract term which does not take into account that all Member States have limited their sovereignty (Case

36 Trybunał Konstytucyjny (*supra* note 5), 2.

37 ECHR, Judgement of 7 August 2021, Xero Flor, Application no. 4907/18.

38 CJEU, Judgement of 17 December 1970, Internationale Handelsgesellschaft, Case 11/70, ECLI:EU:C:1970:114, para. 3.

39 CJEU, Judgement of 8 September 2010, Winner Wetten, C-409/06, ECLI:EU:C:2010:503, para. 61.

26/62 – van Gend & Loos;[40] Case 6/64 – Costa/ENEL[41]). The reason for limiting their own sovereignty in favour of a limited common sovereignty of the Union lays in the very substantive decision to survive together in peace and well-being on the globe. If constitutional provisions would be excepted from the primacy of Union law, it would, by simply amending the constitution, open a gate for circumventing basic obligations of internal market law such as e.g. the prohibition of measures having equivalent effect (this is perhaps the case of Article 4 of the Slovak Constitution which prohibits the export of unbottled mineral water) or the incompatibility of state aids which distort competition. Eventually a third aspect of doubts about the PCT's ruling's importance is the decision of the Polish Parliament of May 2022 (presumably motivated by a mixture of concerns about EU funding and the Russian threat) to abolish the Disciplinary Chamber for judges[42] – and with it the possibility to punish judges for referring questions to the CJEU. This Chamber was found by the CJEU to violate Article 19 TEU.[43] Poland's non-compliance with the interim suspension ordered by the CJEU in April 2020[44] had caused the imposition of penalties (1 mio. € per day since October 2021)[45] and also the blocking of the disbursement of 24 bs. € plus 12 bs. in loans from the NGEU-Fund.[46]

IV. Requirement of a New Debate on a "Flexible European Union" due to the Two Judgments?

The concluding question inquires whether these judgments require a new debate on a "flexible European Union" and on integration scenarios. This question provokes the counter-question: Why should they? On the one side,

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40 CJEU, Judgement of 5 February 1963, Van Gend & Loos, Case 26/62, ECLI:EU:C:1963:1, p. 25.

41 CJEU, Judgement of 15 July 1964, Costa/ENEL, Case 6/64, ECLI:EU:C: 1964:66, p. 1269.

42 Polen schafft Disziplinarkammer für Richter ab, LTO, 9 June 2020, available at: <https://www.lto.de/recht/nachrichten/n/richter-disziplinarkammer-polen-parlament-beschliesst-abschaffung/>.

43 CJEU, Case C-791/19 (*supra* note 35).

44 CJEU, Order of the Court (Grand Chamber) of 8 April 2020, Commission v. Poland, C-791/19 R, ECLI:EU:C:2020:277.

45 CJEU, Order of the Vice-President of the Court of 27 October 2021, Commission v. Poland, C-204/21 R, ECLI:EU:C:2021:878, paras. 57 and 64.

46 *Baczynska*, How Poland blew its chance to get billions in EU recovery cash, available at: <https://www.reuters.com/world/europe/how-poland-blew-its-chance-get-billions-eu-recovery-cash-2021-12-12/>.

two national constitutional courts have spoken. But on the other side, their impact on the envisaged "process on even closer union between the peoples in Europe" on the track of the European Union seems doubtful.

1. The FCC only demanded stricter judicial control of the ECB and a comprehensible reasoning of the ECJ. This is reasonable. But the judgment had no consequences for the participation of the Bundesbank in the PSPP.[47] In the aftermath, the FCC found the Federal Government and the Bundestag as having sufficiently evaluated the subsequently delivered considerations of the ECB.[48] And in the infringement procedure of the European Commission against Germany,[49] the Federal Government declared its full respect for the primacy of Union law including the judgments of the ECJ and its firm willingness to avoid a repetition of such an outbreak of the FCC,[50] thereby expressly pointing to the procedural requirement of a second referral to the ECJ for resolving such a conflict.[51] These are already indications enough that the PSPP-judgment may remain a singular event. And there are more (such as the change of generations in the 2nd Senate).
2. The PCT, although referring to Article 1 par.2 TEU, spoke in such abstract terms, that, taken seriously, this position would deny the basic principles of the Union's community of law which are not negotiable. Taken seriously, the PCT's position would diminish Poland's posture in the Union and put into question its further membership in the Union. But already the practical authority of the PCT in this matter is doubtful. This is shown by the recent Polish political move to honour the ECJ's findings on the Disciplinary Chamber.
3. Summarized: There might always be reasons to discuss scenarios of flexibility in European integration. However, these two judgements don't require a new debate on more flexibility of the Union as it is already possible under primary law. Insofar instruments exist: Enhanced cooperation (Article 20 TEU); permanent structured cooperation for military missions (Article 42 par. 6, 46 TEU); and – not to forget – Article 4 par. 2 TEU with

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47 *Müller-Graff*, Das Karlsruher PSPP-Urteil – ein Corona-Jahr danach, integration 2021, 227 (228), available at: <https://www.nomos-elibrary.de/10.5771/0720-5120-2021-3-227.pdf>.

48 Bundesverfassungsgericht, Order of the Second Senate of 29 April 2021, 2 BvR 1651/15, paras. 1-111, BVerfGE 158, 89-130.

49 Europäische Kommission, Vorrang des Unionsrechts: Kommission leitet Vertragsverletzungsverfahren gegen Deutschland ein, Pressemitteilung 9. Juni 2021, available at: <https://germany.representation.ec.europa.eu/news/vorrang-des-eu-rechts-kommission-leitet-vertragsverletzungsverfahren-gegen-deutschland-ein-2021-06-09_de>.

50 *Supra* note 32, Ziff. 3.

51 *Supra* note 32, Ziff. 4.

the principle of respecting the Member States' national identities "inherent in their fundamental structures, political and constitutional". But such "flexibility" must have its limits when the core values of the Union are at stake. Hence the respect expressed by Article 4 par 2 TFEU convincingly comprises only their "fundamental structures" and is limited by the Member States' obligation to comply with the values set out in Article 2 TEU: respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights. States which wish to deviate from this enlightened path, must do so outside the Union with its elementary destination of "an ever closer union among the peoples of Europe."

Reform scenarios for EU migration and asylum policy in light of new refugee movements

Peter R. Rodrigues

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Introduction

In judgments given by the Court of Justice of the European Union in joined migration cases of the European Commission against Poland, Hungarian and the Czech Republic in 2020,[1] the Court found that the burden of receiving migrants must be divided between all the other Member States, in accordance with the principle of solidarity and fair sharing of responsibility between the Member States. This principle is contained in Article 80 of the Treaty on the Functioning of the European Union (TFEU) and it governs the Union's policy on asylum. But does the principle of solidarity still prevail in 2022? Or is political power play occurring when it comes the question of what constitutes the fair sharing of responsibility?

[1] CJEU, Judgment of 2 April 2020, European Commission v. Republic of Poland and Others, C-715/17, C-718/17 and C-719/17, ECLI:EU:C:2020:257.

This contribution first considers the New Pact on Migration and Asylum of the European Commission (section I). The next topic is the proposed revision of the Schengen Borders Code that regulates the crossing of internal borders within the EU (section II). A current issue to be discussed is the so-called instrumentalization of migrants for political goals which involves diverting migratory flows in order to destabilize other countries (section III). One possible win-win situation with respect to the influx of migrants is linked to the increasing shortage of workers in the Member States of the EU. The question whether the European Commission's policy on labour migration will contribute to both migration and labour policy will also be discussed (section IV). As a result of the war in Ukraine, the Temporary Protection Directive is now in force. Does this Directive allow for the preferential treatment of people fleeing from Ukraine (section V)? The contribution closes with conclusions and recommendations (section VI).

I. New Pact on Migration and Asylum

The refugee crisis of 2015-2016 demonstrated major shortcomings in European asylum law, as well as the complexity of managing a situation which affects different Member States in different ways. At that time, around one million people had fled the war in Syria and applied for international protection in the EU.[2] Those countries that fulfilled their legal and moral duties, or were exposed more than others, looked to rely on the solidarity of the EU Member States. However, that proved to be lacking. For that reason, the European Commission published the New Pact on Migration and Asylum (hereafter the Pact) on 23 September 2020.[3]

The most important issues covered in the Pact are:

1. Robust and fair management of external borders

Pre-entry screening which includes identification, health and security checks, fingerprinting and registration in an updated European Asylum Dactyloscopy Database (Eurodac). Special border procedures are required to keep the third-country national (TCN) outside the EU territory. Academics argue that the pre-entry screening and new border procedure in the Pact will lead to exter-

2 UNHCR, Most common nationalities of Mediterranean sea and land arrivals from January 2021, available at: <https://data2.unhcr.org/en/situations/mediterranean>.

3 Communication from the Commission on a New Pact on Migration and Asylum, 23 September 2020, COM(2020) 609 final.

nalization of the asylum procedure.[4] One example is the UK's plan to outsource asylum by deporting migrants to Rwanda who had crossed the Channel by boat.[5]

2. Fair and efficient asylum rules

This is intended to signal an important shift: the equal sharing of burden and responsibility and being able to effectively address the mixed arrival of persons who are in need of international protection, and those who are not. In my opinion, if the rule that asylum seekers should start their asylum application procedure in the first country of entry (the Dublin Regulation) remains unchanged, and in view of the lack of concrete measures, this appears to be wishful thinking.

3. Effective return policies

A common EU system for returns is needed which combines stronger structures inside the EU with more effective cooperation with third countries concerning return and readmission. This should be developed building on the recast of the Return Directive and effective operational support, including via Frontex (the European border and coast guard agency). However, one of the most important problems is undocumented TCNs who cannot return to their country of origin.

4. Better implementation of migration and asylum policies

The idea is that total harmonization will lead to fair sharing of responsibility. Therefore, the directives should be changed into regulations. But do regulations, such as the Dublin Regulation, really avoid differences in practice? My answer is no. Besides this caveat, transmitting directives into revised regulations takes a lot of time, and because political consensus in the Member States is still pending.

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4 *Cassarino*, J-P. and *Marin*, L., The Pact on Migration and Asylum: Turning the European Territory into a Non-territory?, European Journal of Migration and Law, 2022, pp. 1-26.

5 *Kohnert*, D., One-Way Ticket to Rwanda? Boris Johnson's Cruel Refugee Tactic Meets Kagame's Shady Immigration Handling, 18 May 2022, available at: <https://ssrn.com/abstract=4109330>.

5. Crises preparedness and response

A new legislative instrument should provide for temporary and extraordinary measures when needed in the face of a crisis. It should provide flexibility to Member States to respond to a crisis and situations of force majeure. In view of the COVID-19 pandemic and the war in Ukraine, this makes sense. However, flexibility should not be counterproductive to human rights protection. On the other hand, such an instrument already exists – the Temporary Protection Directive of 2001 – which was activated for the first time on 4 March 2022 due to the war in Ukraine.[6]

6. Mutually beneficial partnerships with key third countries of origin and transit

The Commission calls for the development and advancement of tailor-made comprehensive and balanced migration dialogue and partnerships with countries of origin and transit, complemented by engagement at the regional and global level. This is a start in tackling one of the root causes of irregular migration – too great inequality of opportunity.

At the time of writing, in the summer of 2022, the progress of the Pact remains limited. Many of the draft regulations are not yet in force because there is still debate about the content. There is strong disagreement about the key draft Regulation on Migration and Asylum Management.[7] The proposal is unlikely to bring any substantial relief to countries of first entry. This is because it gives frontline countries no guarantee that others will offer enough relocation places to offset the additional burdens that other proposals in the Pact would place on their administrations.[8]

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6 Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, Official Journal L 212, 7 August 2001, pp. 12-23.

7 European Parliament, Draft Report on the proposal for a regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund], 11 October 2021, 2020/0279(COD), available at: <https://www.europarl.europa.eu/doceo/document/LIBE-PR-698950_EN.pdf>.

8 *Movileanu*, D., Regulation on Asylum and Migration Management, The Right Formula to end the EU's Longstanding Controversies?, 89 Initiative, 2021, available at: <https://89initiative.com/wp-content/uploads/2021/06/D.-Movileanu-The-Regulation-on-Asylum-and-Migration-Management.pdf>.

More generally, the principle of the Dublin Regulation that the asylum seeker must process his application in the first Member State of entry, seems to be the biggest bottleneck for equal burden sharing in EU migration policy. This principle remains (though the name disappears) and puts the pressure on border States such as Greece, Italy, Malta, and Spain.

All Member States are required to contribute to the Pact, but they are allowed to choose the form of their contribution. This can be relocation (physical transfer of asylum seekers and refugees), return sponsorship (taking care of the return of a rejected asylum seeker from the territory of another Member State), and capacity building (this option can take many forms, like funds and human resources). The consequences, since the Regulation on Migration and Asylum Management allows Member States not to contribute with relocation, are that frontline States will be left with an increasing number of asylum seekers and returnees on their territory.

The Visegrád countries (Czech Republic, Hungary, Poland, and Slovakia), who have traditionally taken a hard line on migration in the EU, rejected the Commission's proposal immediately after its presentation.[9] The proposal does not satisfy the border States either. In a joint statement in March 2021, the interior ministers of the so-called MED5 (Cyprus, Greece, Italy, Malta, and Spain) insisted that solidarity should be mandatory and called for compulsory relocation.[10]

In Augustus 2021, the European Parliamentary Research Service (EPRS) published an Impact Assessment on the New Pact on Migration and Asylum.[11] The Assessment concludes that all of the assessed dimensions will be influenced by the proposed new pact. Although interviewed stakeholders indicate that, in certain cases, the Pact stands to have a positive impact on various aspects of migration and asylum in the EU, the overall consensus is that the Pact, as currently presented by the Commission, will have significant negative consequences for Member States, local communities, and migrants. Such potential negative effects have been found in all four dimensions covered by the Assessment: territorial, economic, social, and fundamental rights.

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9 *Zalan*, E., Visegrad countries immediately push back on new migration pact, 2020, available at: <https://euobserver.com/justice/149537>.

10 *Tagaris*, K., Europe's south calls for more solidarity in new EU migration pact, 2021, available at: <https://www.reuters.com/article/us-europe-migrants-idUSKBN2BC0JY>.

11 European Parliamentary Research Service, The European Commission's New Pact on Migration and Asylum, Horizontal substitute impact assessment, August 2021, available at: <https://www.europeanmigrationlaw.eu/documents/EPRS_The European Commission's New Pact on Migration and Asylum.pdf>.

II. Schengen Borders Code

The reintroduction of intra-Schengen State border controls has been a recurring phenomenon since the abolition of these controls in 1995. The past decade saw three different regimes of temporarily reintroduced border controls: to prevent secondary movements of people seeking international protection (Syria crisis), to counter terrorism (e.g. the state of emergency in France) and to counter the spread of COVID-19.[12]

The Schengen area consists of 26 European States, most of which are EU Member States, though some are not.[13] In the State of Schengen Report of 24 May 2022, the European Commission recommends admitting Croatia, Romania, and Bulgaria to the Schengen area, and after completing the evaluation process, also Cyprus.[14]

In December 2021, the European Commission launched its proposal to amend the Schengen Borders Code.[15] The proposal flows from the Roadmap for a New Pact on Migration and Asylum, more specifically the Commission's "Schengen Strategy", published in June 2021. The proposal expands the possibilities for Member States to reintroduce internal border controls and travel restrictions when faced with health emergencies. That is the lesson learned from COVID-19.

It also establishes a new procedure for transferring persons apprehended in the vicinity of an internal border in the EU to the Member State from which the person entered. This procedure enables Member States to immediately transfer a person, thus circumventing the Dublin procedure. The decision to refuse entry can be appealed, but the appeal has no suspensive effect and can therefore not stop the transfer. In this light, the proposal also contains an amendment to the Return Directive, requiring the receiving Member State to issue a return decision to the transferred person.

This border procedure seems to me to indicate a lack of mutual trust and it should be made clear that this may never result in a situation of refoulement that would be in breach of its prohibition in Article 19(2) of the EU Charter of

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12 *Guild, E.*, Schengen Borders and Multiple National States of Emergency: From Refugees to Terrorism to COVID-19, European Journal of Migration and Law, 2021, pp. 385-404.

13 Iceland, Lichtenstein, Norway and Switzerland.

14 Communication from the Commission, State of Schengen Report 2022, 24 May 2022, COM(2022) 301 final/2.

15 Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders, 14 December 2021, COM(2021) 891 final.

Fundamental Rights. In addition, one precondition is good and fair cooperation between Member States (solidarity) and a significant improvement in the diplomatic relations with the third countries of return.[16]

The proposal introduces a list of grounds that may give rise to a "serious threat to public policy or internal security" and would justify temporary border controls. This list introduces new grounds, including "large scale health emergencies", as well as "large scale unauthorized movements". "Large scale health emergencies" is related to COVID-19 and other pandemics.

The proposed definition of "large scale unauthorized movements" seems to be too vague and leaves Member States with too much discretion to maintain controls at their internal borders based on so-called secondary movements.[17] In this way, the right to asylum, as included in Article 18 of the EU Charter, can easily be frustrated. Article 4 of the Schengen Borders Code obliges Member States to apply the Code in full compliance with Union Law, including the EU Charter of Fundamental Rights.

III. Instrumentalization of migrants

In 2021, Latvia, Lithuania, and Poland were confronted with an emergency situation characterized by a sudden inflow of nationals of third countries which was instrumentalized by Belarus for political purposes. The government of President Lukashenko facilitated asylum seekers from third countries, like Iraq, Syria, and Afghanistan, being able to cross the borders of the EU. The response was to refuse reception to the migrants in the Member States and to send them back. Human rights concerns grew because of pushbacks by the Polish military. Pushbacks are unlawful under EU law, since a migrant's application for asylum should always take place before forced return is allowed. The European Court of Human Rights ruled that the collective expulsion of Chechen families at the Poland-Belarus border was in violation of the European Convention on Human Rights.[18] In 2022, pushbacks were also used by

16 *Heijer*, *Den M.*, The Pitfalls of Border Procedures, Common Market Law Review 2022, pp. 641-672.

17 Meijers Commission, Commentary on the Commission Proposal Amending the Schengen BordersCode (COM(2021) 891), CM2205.

18 Articles 3 and 13 of the Convention and Article 4 of Protocol No. 4 to the Convention; see, ECHR, Judgment of 30 June 2022, A.B. and Others v. Poland, Application no. 42907/17, and A.I. and Others v. Poland, Application no. 39028/17.

Croatia (back to Bosnia), Greece (back to Turkey) and France (back to the UK). In 2021, the European Commission published a proposal to prevent the abuse of migration law for geopolitical purposes.[19]

The proposal enables Member States, when faced with the "instrumentalization of migrants", to limit the number of border crossing points and intensify border surveillance. This proposal must be read together with the draft recast of the Schengen Borders Code, which provides a definition of instrumentalization of migrants.[20] Instrumentalization of migrants refers to a situation where a third country instigates irregular migratory flows into the Union by actively encouraging or facilitating the movement to the external borders to destabilize the Union or a Member State.

To counterbalance, the European Commission proposed an emergency procedure with the possibility to make use of the so-called border procedure, where the asylum seeker is treated as if he is not on EU territory, and to extend the time period for processing the asylum application. This is processed at the external EU borders. The proposal follows from the triggering of Article 78(3) TFEU in response to the instrumentalization of migrants at the external border. It is presented as a response to a "hybrid attack on the EU as a whole".

The European Council for Refugees and Exiles states in their comments that the measures would have an adverse effect on the right to asylum by creating a parallel system of managing borders and asylum for situations of "instrumentalization", based on derogations from the standards in the asylum acquis.[21]

Although the proposed regulation does mention the principles of non-refoulement, best interests of the child, and the right to family life, it does not include the necessary guarantees to ensure that the rights are accessible in practice. There is also concern about the broad and unclear definition of "instrumentalization" which covers too many situations at the EU's external borders and can be applied too easily. In the summer of 2022, Poland built a fence that is five-metres high and more than 185 kilometres long, along the border with Belarus.

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19 Proposal for a Council Decision on provisional emergency measures for the benefit of Latvia, Lithuania and Poland, 1 December 2021, COM(2021) 752 final.

20 Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders, 14 December 2021, COM(2021) 891 final , see Article 2 point 27.

21 ECRE, Comments on the Commission proposal for a Regulation of the European Parliament and of the Council addressing situations of instrumentalization in the field of migration and asylum, COM(2021) 890 final, January 2022, available at: <https://ecre.org/wp-content/uploads/2022/01/ECRE-Comments-Instrumentalisation-January-2022.pdf>.

In the case *N.D and N.T* versus *Spain*, the European Court of Human Rights made it clear that the border States must keep a door in their fences to offer asylum seekers an opportunity to apply for international protection.[22] In this case, migrants climbed over the fences at the border of Melilla, a Spanish enclave in Morocco, and were directly deported by Spain. States should offer "appropriate arrangements", but the Court did not formulate concrete criteria. Fencing and pushbacks make the need for clarity more urgent.[23]

IV. Labour migration

On 27 April 2022, the European Commission proposed a so-called ambitious and sustainable legal migration policy. It is intended to solve current labour shortages and needs, for example in the long-term care sector. It should also provide a legal entry for third-country workers to the EU.

This idea had already been mentioned in the Pact.[24] The proposal consists of legal, operational and policy initiatives that should benefit the EU's economy, strengthen cooperation with third countries and improve overall migration management in the long run. Attention has also been given to the influx of those fleeing Russia's invasion of Ukraine and how they should be integrated in the EU's labour market.

With this initiative the European Commission recognizes that legal migration has a positive impact all round: It gives those who want to migrate an opportunity to improve their circumstances, while providing more skilled workers for host countries, who in turn boost the economy for all. For that reason, the Commission proposed revising the Single Permit Directive and streamlining the procedure for a combined work and residence permit. It will ensure equal treatment of workers from non-EU countries and those of Member States and will prevent labour exploitation. This is important because during the COVID-19 pandemic, the poor labour conditions of migrant workers in the EU were more visible than ever, attracting attention from the Fundamental Rights Agency of the EU.[25]

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22 ECHR, Judgment of 13 February 2020, N.D. and N.T. v. Spain, Application nos. 8675/15 and 8697/15.

23 *Strik*, T., Fundamental Rights as the Cornerstone of Schengen, European Journal of Migration and Law 2021, pp. 508-534, p. 513.

24 Communication from the Commission on a New Pact on Migration and Asylum, 23 September 2020, COM(2020) 609 final, chapter 7.

25 FRA, Stop labour exploitation and protect workers from COVID-19, 13 July 2020, available at: <https://fra.europa.eu/en/news/2020/stop-labour-exploitation-and-protect-workers-covid-19>.

The Long-term Residence Directive should also be revised and the admission conditions for the EU long-term residence status should be simplified. Family reunification and intra EU-mobility will be enhanced. The Commission sees the potential for focusing on forward-looking policies around three areas of action: care, youth and innovation.

Following a pilot, the Commission is now committed to partnerships with Morocco, Tunisia and Egypt. Labour exploitation and brain drain are to be mitigated. The Commission also wants to create a "talent pool" for the millions of Ukrainian refugees who are expected to stay in the EU for a longer period of time; employers can then see who they can use from that pool. Labour participation of people from Ukraine is higher in most Member States than that of asylum seekers, because the Temporary Protection Directive facilitates their access to the labour market.[26]

Although labour shortages are a serious issue in the Netherlands and in other Member States, the Dutch Government was not pleased with the proposal. There is currently a shortage of housing in the Netherlands and the country is hardly capable of providing accommodation to asylum seekers and people fleeing from Ukraine. One other problem is that migration is strongly politicized and most political parties will be keeping an eye on their voters when migration policy is under discussion. More migration is not always what the voters want.

V. Preferential treatment for people fleeing from Ukraine?

Since Russia's attack on Ukraine, 6.3 million people have fled the country due to the disruption and destruction of their surroundings and the danger to their lives.[27] Most people fled to neighbouring Poland – more than 1.3 million people are still there – but also to other EU Member States.[28] According to certain Member States, the negative consequences of the war in Ukraine are asymmetrical and several, especially humanitarian consequences, are dispro-

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26 OECD, The potential contribution of Ukrainian refugees to the labour force in European host countries, 27 July 2022, available at: <https://www.oecd.org/ukraine-hub/policy-responses/the-potential-contribution-of-ukrainian-refugees-to-the-labour-force-in-european-host-countries-e88a6a55/>.

27 This section is adapted from my contribution with *Christa Tobler*, Reception of people from Ukraine: Discrimination in international protection? Leiden Law Blog, 17 May 2022, available at: <https://www.leidenlawblog.nl/articles/reception-of-people-from-ukraine-discrimination-in-international-protection>.

28 UNHCR, Ukraine Refugee Situation, available at: <https://data.unhcr.org/en/situations/ukraine>.

portionately serious. As such, ten Member States (Bulgaria, Croatia, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, and Slovakia) have signed a joint statement asking the European Commission for more resources to manage the refugee flow of Ukrainian citizens.[29] This is a humanitarian emergency, and the Member States are generously trying to provide reception. Their hospitality is highly praised, but it is in stark contrast to the reception of asylum seekers from Syria, Afghanistan and Eritrea for example.[30]

As mentioned before, on 4 March 2022, the EU's Temporary Protection Directive of 2001 was activated in order to provide a special form of protection to people fleeing from Ukraine.[31] This Directive has never been used before, even the so-called Migration Crisis in 2015, when 1 million asylum seekers from Syria came to the EU, appears not to have been perceived as a reason to activate the Directive. The Directive was activated because it should allow people fleeing from Ukraine to enjoy harmonized rights across the Union that offer an adequate level of protection. It is also expected to benefit the Member States, as the rights accompanying temporary protection limit the need for displaced persons to immediately seek international protection and thus help avoid the risk of overwhelming their asylum systems. The Directive reduces formalities to a minimum because of the urgency of the situation.

This warm welcome raises the question of whether the reception of people from Ukraine does not constitute unequal treatment of those from the Middle East or Africa. Is there an objective justification for the differentiation in legal approach?

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29 See: <https://www.politico.eu/wp-content/uploads/2022/05/02/Joint-statement-on-the-needs-and-challenges-regarding-the-unprecedented-humanitarian-migration-to-the-European-Union.pdf?utm_source=POLITICO.EU&utm_campaign=d351aa7783-MAIL_CAMPAIGN_2022_05_03_04_33&utm_medium=email&utm_term=0_10959edeb5-d351aa7783-190899872>.

30 *Peers*, S., Temporary Protection for Ukrainians in the EU? Q and A, EU Analysis, 27 February 2022, available at: <https://free-group.eu/2022/03/02/eu-law-analysis-temporary-protection-for-ukrainians-in-the-eu-q-and-a/>.

31 Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection, Official Journal L 71/1, 4 March 2022, pp. 1-6.

Ukrainian nationals are visa-free travellers and have the right to move freely within the Union after being admitted to the territory for a 90-day period.[32] The Temporary Protection Directive grants migrants from Ukraine, among other things, the right to a residence permit (Article 8), work (Article 12), housing (Article 13), education for young persons (Article 14), family reunification (Article 15) and access to the asylum procedure; in case no decision about asylum is taken during the temporary protection period, the Member State must do so thereafter (Article 17). Compared to the rights of regular asylum seekers under EU law, the position of persons falling under the Temporary Protection Directive is more beneficial.

On the other hand, the Temporary Protection Directive has always been perceived as an instrument of interstate solidarity. In the concrete emergency situation of Ukraine, Member States should act in accordance with Article 80 of the TFEU, the principle of solidarity and fair sharing of responsibility between the Member States, which governs the Union's asylum policy. In its case law, the Court of Justice of the European Union has emphasized the importance of this principle in migration affairs.[33] Considering the influx in Poland of people from Ukraine, the other Member States must help based on the EU principle of solidarity.

However, in my opinion, this preferential treatment is only justified on a temporary basis and unequal treatment of migrants depending on their home country should be prevented.[34] In the Netherlands, the differentiation in reception facilities of the municipalities has been qualified as unequal treatment by the Dutch Human Rights Commission.[35]

VI. Final remarks

From a human rights perspective, the plans for change as discussed above do mention the guarantee of fundamental rights but seem to miss the operational tools to enforce these rights. It is time to summarize the findings.

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32 Regulation (EU) 2018/1806 of the European Parliament and of the Council of 14 November 2018 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, *Official Journal L 303, 28 November 2018, pp.* 39–58.

33 CJEU, Judgment of 2 April 2020, European Commission v. Republic of Poland and Others, C-715/17, C-718/17 and C-719/17, ECLI:EU:C:2020:257.

34 See Article 1(3) International Convention to Eradicate all forms of Racial Discrimination.

35 <https://www.mensenrechten.nl/actueel/nieuws/2022/07/29/oproep-aan-de-staatssecretaris-van-asiel--migratie-legitimeer-geen-discriminerend-opvangbeleid-van-gemeenten>.

EU migration and asylum policy should adapt to new refugee movements. One of the main issues is how to achieve equal sharing of the burden and respect of solidarity. Solutions should be based on mutual trust and a common approach by all the Member States of the EU. To tackle the problems, the European Commission has proposed the New Pact on Migration and Asylum. Although this attempt is commendable, the solutions are based mainly on the same concepts from the past. It seems to me that measures to actually assist the border States are still lacking and the unfair rule of the Dublin Regulation has not been amended. The preservation of the first country of entry criterion of the Dublin Regulation in the New Pact on Migration and Asylum coupled with the newly introduced border procedure, will increase rather than lower the pressure on border States. The best way to relieve the burden on border States is the introduction of a system of solidarity. The Pact, however, provides too much flexibility to the Member States.

The new border procedure as proposed in the draft of the reviewed Schengen Borders Code seems to be more focused on the interest of the host Member State, instead of on the human rights of the migrants. One worrying aspect is the discretionary power of the Member States to introduce internal border controls. The right to asylum and the prohibition of refoulement are fundamental and should not be in conflict with border management. The proposed Schengen Borders Code provides too many vague exceptions for Member States to reintroduce border controls and therefore undermines the legal protection of migrants.

The extent to which the migration debate has become politicized is illustrated by the theme of instrumentalization of migrants. Just to frustrate certain Member States of the EU, desperate asylum seekers were transported to Belarus and dumped at the border with Poland. As difficult as it is to stop this new phenomenon, it is inhumane and contrary to fundamental rights to push back asylum seekers. Diplomatic or economic sanctions seem to be a more appropriate answer. If a fence is chosen as a solution, there must always be a door in the fence where migrants can apply for international protection.

The plans related to labour migration are a good step towards facilitating a legal route to the EU for third-country nationals. In view of labour shortages in many EU Member States, labour migration can offer a solid solution. The European Commission's plans, however, seem to lack sufficient support for the Member States concerned. Currently, in these politically polarized times in society, it seems to be difficult for governments to embrace labour migration.

Managing asylum is complex because unexpected events, climate change, economic disasters and repressive governments can change the situation. The war in Ukraine has demonstrated the impact of such an event on the Member States of the EU. The assistance provided in the EU to Ukrainians is commendable, but this should not lead to other asylum seekers, who also deserve international protection, being left behind. Temporary support for people fleeing from Ukraine is necessary and justified. Yet, care must be taken to ensure that this preferential treatment does not lead to the unequal treatment of other asylum seekers.

'Laws of Fear' in the EU: Precautionary Principle and Public Health Restrictions to Free Movement of Persons in the Time of COVID-19*

Iris Goldner Lang

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Abstract

COVID-19 has demonstrated the fragility of EU free movement rules when faced with an unknown virus of such magnitude and strength that it threatens our lives, health systems, economies and society. The aim of this text is to show the dynamics between the threat of COVID-19 and the rules imposed as a response to the pandemic, which have impacted the functioning of the EU internal market and the Schengen area. The text will concentrate on the application of precautionary principle and public health restrictions, caused by COVID-19, to free movement of persons in the EU. The analysis will lead to three conclusions. First,

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This title draws inspiration from the book by Cass R. Sunstein, *Laws of Fear: Beyond the Precautionary Principle*, CUP, 2005.

it will be shown that the decisions to apply free movement restrictions and the logic followed in the EU COVID-19-related documents can be viewed as a triumph of precautionary principle. Second, it will be argued that the implementation of precautionary principle has a transformative effect on the application of the principle of proportionality in EU law. Finally, it will be shown that COVID-19 has emphasized and increased the difference between the conditions for the applicability of public health restrictions, when compared to restrictions based on public policy and public security grounds.

I. Introduction

Fear is a terrible thing. For the past several months, the fear of COVID-19 has driven our behaviour and the functioning of our societies. COVID-19 has generated fear for our lives and health, and made us dread the collapse of our health systems, economies, society, and the way of life as we knew it. COVID-19 has also demonstrated the fragility of EU free movement rules when faced with an unknown virus of such magnitude and strength, while raising the issues of power, solidarity and trust in the system. The aim of this text is to show the dynamics between the fear of COVID-19 and the rules imposed as a response to the pandemic, which have impacted the functioning of the EU internal market and the Schengen area. The text will concentrate on the application of precautionary principle and public health restrictions, caused by COVID-19, to free movement of persons in the EU. The analysis will show that the decisions to apply free movement restrictions and the logic followed in the EU COVID-19-related documents were based on precautionary principle, whose recourse enables decision-makers to adopt and legitimise restrictive measures when "scientific information is insufficient, inconclusive or uncertain" and risks for human health are high,[1] and whose implementation transforms the application of the principle of proportionality to public health restrictions of free movement of persons in the EU.

[1] According to Commission Communication, "whether or not to invoke the precautionary principle is a decision exercised where scientific information is insufficient, inconclusive, or uncertain and where there are indications that the possible effects on the environment, or human, animal or plant health may be potentially dangerous and inconsistent with the chosen level of protection." (Communication from the Commission on the precautionary principle, COM(2000) 1 final, para. 1). See also Cases C-333/08 *European Commission v French Republic*, ECLI:EU:C:2010:44, para. 93 and Case C-77/09 *Gowan Comércio Internacional e Serviços Lda v Ministero della Salute*, ECLI:EU:C:2010:803, para. 76.

The discussion will show that the reactions of EU Members States and EU institutions to the pandemic lead to new insights into the functioning of public health restrictions, the principle of proportionality and precautionary principle in EU law. The analysis will enable three conclusions. First, the restrictive mobility rules adopted as a response to the pandemic and the rhetoric used in the related EU documents can be viewed as a triumph of the much-disputed precautionary principle, even though this principle was rarely expressly mentioned as such. The reliance on precautionary approach will be supported by examining the most important EU documents on COVID-19 and by discussing the importance of science in COVID-19 policies and the interface between science and political discretion in the adoption of precautionary measures. Second, the text will problematize the application of the principle of proportionality to restrictions of free movement of persons in the EU. By linking precautionary principle to the principle of proportionality, it will be argued that the application of precautionary principle transforms the test of necessity, entailed within the principle of proportionality. The discussion will show that evaluating whether public health could have been equally successfully protected by less restrictive COVID-19 mobility restrictions is particularly difficult when faced with a high degree of scientific uncertainty associated to coronavirus. Finally, it will be shown that COVID-19 has emphasized and increased the difference between the conditions for the applicability of public health restrictions, when compared to restrictions based on public policy and public security grounds. Even more so, COVID-19 has forced us to reconsider our understanding of public health restrictions, due to the fact that it has certain characteristics which differentiate if from other infectious diseases we have know so far.

The text will be structured into five sections. It will follow the usual methodology for analysing measures impacting the functioning of the internal market by, first, identifying the COVID-19 restrictions impacting free movement of persons in the EU, then moving to the grounds for their justification and finally discussing them from the perspective of the principle of proportionality, while linking it to precautionary principle. Hence, following the introduction, the second section will provide a short overview of the COVID-19 measures which restrict free movement of persons in the EU and the functioning of Schengen rules. The third section will focus on the grounds for justifying mobility restrictions and concentrate on the analysis of public health justifications. The section will contrast public health to public policy and public security justifications and reveal new characteristics of public health justifications, which have emerged in the context of COVID-19. The fourth, central section will focus on the principle of proportionality and precautionary principle and link the two principles together. The section will, first, show that precaution-

ary principle has been relied on in the EU COVID-19 mobility-related documents. It will then explain the functioning of precautionary principle in the context of the pandemic, by discussing the interface between science and politics, and, finally, reveal the impact of the use of precautionary principle on the application of the principle of proportionality to COVID-19 mobility restrictions. The concluding section will summarise the findings.

II. Identification of COVID-19 Mobility Restrictions

Most EU Member States reacted promptly to the risk of exponential spread of coronavirus and adopted rigorous precautionary measures, which resulted in unprecedented restrictions of free movement of persons in the EU, with major consequences for the functioning of the internal market. In March 2020 almost all EU Member States unilaterally imposed a number of mobility-related measures, drastically restricting EU cross-border movement. They also enforced lockdowns, which included restrictions on intra-state non-essential movements, and temporarily closed their external borders towards third countries for most non-residents. Never in the history of the European integration, which is based on the idea of the internal market,[2] has the EU been confronted with such a magnitude of restrictive measures, which have called into question the viability of the internal market.

Interestingly, all mobility restrictions were adopted nationally, without being first agreed and coordinated at the level of EU institutions.[3] The European Commission was initially reserved towards this idea, but soon yielded under pressure and the reality of unilateral national restrictions implemented across the Union, and started adopting a set of soft law measures aimed at coordinating national measures and emphasising the importance of non-discrimination

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2 See Art. 3 TEU, which lists the establishment of the internal market as one of the Union's aims.

3 For the discussion on the importance of a coordinated approach towards COVID-19, and suggestions on how to improve it, see Alessio M. Pacces and Maria Weimer, 'From Diversity to Coordination: A European Approach to COVID-19', European Journal of Risk Regulation, 11(2), 2020, pp. 283-296; Andrea Renda and Rosa Catro, 'Towards Stronger EU Governance of Health Threats after the COVID-19 Pandemic', European Journal of Risk Regulation, 11(2), 2020, pp. 273-282.

and proportionality.[4] The only exception was the closure of external borders towards third countries, which was first agreed by the European Council and then implemented by each Member State separately.[5] Nevertheless, the fact that all EU measures were adopted as soft law instruments does not necessarily imply their ineffectiveness. As an example, the EU's 'traffic light system' for coordinating national travel restrictions related to the pandemic has been

[4] For the initial reactions, see the statements of the EU health Commissioner Stella Kyriakides and the EU crisis management Commissioner, Janez Lenarčič, from February 24, 2020, saying that possible border controls and travel restrictions should be "proportionate, coordinated among EU states and based on scientific advise and risk assessment" and adding that "travel or trade restrictions are not recommended by the World Health Organisation (WHO) or the ECDC at the moment" (Elena Sánchez Nicolás, "No risk yet to Schengen from Italy's coronavirus outbreak", EUobserver, February 25, 2020, available at: <https://euobserver.com/coronavirus/147543> - last accessed on July 15, 2020). Three weeks later, at a press conference held on March 13, 2020, the Commission President Ursula von der Leyen announced the adoption of a set of EU measures to coordinate the response to the pandemic. For the overview of the Commission' measures, see here: <https://ec.europa.eu/info/live-work-travel-eu/health/coronavirus-response/overview-commissions-response_en> (last accessed on July 15, 2020).

[5] On 16 March 2020 the Commission adopted its Communication on temporary restriction on non-essential travel to the EU (Communication from the Commission to the European Parliament, the European Council and the Council: COVID-19: Temporary Restriction on Non-Essential Travel to the EU, COM/2020/115 final, 16.3.2020.). In this document, the Commission recommended the European Council to adopt a coordinated decision on the closure of external borders. The agreement was reached by the European Council the following day (Conclusions by the President of the European Council following the video conference with members of the European Council on COVID-19, 164/20, 17/03/2020). A number of other Commission Communications followed: Communication from the Commission: COVID-19: Guidance on the implementation of the temporary restriction on non-essential travel to the EU, on the facilitation of transit arrangements for the repatriation of EU citizens, and on the effects on visa policy 2020/C 102 I/02, C/2020/2050, OJ C 102I, 30.3.2020, p. 3–11; Communication from the Commission to the European Parliament, the European Council and the Council on the third assessment of the application of the temporary restriction on non-essential travel to the EU, COM/2020/399 final; Council Recommendation (EU) 2020/912 of 30 June 2020 on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction, ST/9208/2020/INIT, OJ L 208I, 1.7.2020, p. 1–7.

agreed by all EU Member States and adopted as a Council Recommendation with the intention to promote transparency, predictability and free movement in safe conditions.[6]

Restrictive measures in most EU Member States limited several aspects of the right to free movement and can be categorized into two groups. First, the wide majority of Schengen states imposed border checks on their intra-Schengen borders. By July 15, 2020 seventeen Schengen states reintroduced internal border controls.[7] Additionally, non-Schengen EU Member States strengthened their border controls towards neighbouring Member States. Consequently, in spring 2020 the whole European territory stopped being a border-control-free area, which was a strong blow to what has always been considered as one of the most notable achievements of European integration.

The second type of COVID-19 measures restricting free movement of persons in the EU were various types of travel restrictions, suspending different forms of passenger transportation – such as flights, trains, buses and maritime transport – and bans on entry and exit[8] of persons to/from national territories.[9] The difference in scope and rigidity of national travel restrictions and bans resulted in a spectrum of diverse and sometimes inconsistent measures across

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6 Council Recommendation on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic, 13 October 2020. Press release available here: <https://www.consilium.europa.eu/en/press/press-releases/2020/10/13/covid-19-council-adopts-a-recommendation-to-coordinate-measures-affecting-free-movement/> (last accessed on 25 November 2020).

7 For the full list of EU Member States' notification of temporary reintroduction of internal border controls, see here: <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control/docs/ms_notifications_-_reintroduction_of_border_control_en.pdf> (last accessed on July 15, 2020). For a detailed account of national measures reintroducing internal border controls, see Sergio Carrera and Ngo Chun Luk, "Love thy neighbour? Coronavirus politics and their impact on EU freedoms and rule of law in the Schengen Area", CEPS Paper, No. 2020-04, April 2020. Also, for one of the first legal appraisals of travel bans, see Daniel Thym, "Travel Bans in Europe: A Legal Appraisal" (Parts I and II), Odysseus blog, March 2020.

8 According to the case law of the Court of Justice of the European Union, the right to free movement also entails the right to leave one's territory (see Case C-415/93 *Union royale belge des sociétés de football association* ASBL *v Jean-Marc Bosman, Royal club liégeois* SA *v Jean-Marc Bosman and others and Union des associations européennes de football* (UEFA) *v Jean-Marc Bosman*, ECLI:EU:C:1995:463, paras. 95-96).

9 For the list of national restrictions impacting mobility and transport, for each Member State separately, see: <https://ec.europa.eu/transport/coronavirus-response_en> (last accessed on July 15, 2020).

the EU. As an example, most entry bans to national territories excluded domestic nationals and residents, some excluded nationals, residents and persons confirmed negative for COVID-19, while others excluded nationals, residents and persons entering the national territory for 'valid reasons'.

III. Grounds for Justifying COVID-19 Mobility Restrictions and the Need to Reconsider Public Health Justifications

Member States justified the reintroduction of border controls and the imposition of travel restrictions – including entry and exit bans to/from national territories – by COVID-19. Even though one might have thought that COVID-19 is a public health justification, this seems not to be the case in relation to the reintroduction of internal border checks. Namely, the Schengen Borders Code tolerates temporary reintroduction of internal border checks in case of a serious threat to public policy or internal security in the respective Member State.[10] Border controls may be introduced for a limited period of time either in the context of a foreseeable event or an event requiring immediate attention.[11] However, the Code does not expressly mention the reintroduction of internal border controls in case of threats to public health.[12] Nevertheless, the European Commission seems to suggest that in an extremely critical situation, a risk posed by a contagious disease can be equated to a public policy or internal security threat.[13]

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10 Articles 25 and 28 of Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ L 77, 23.3.2016, p. 1–52.

11 Articles 25 and 28 of the Schengen Borders Code.

12 However, the importance of border controls as a means to prevent threats to public health is mentioned in the Preamble (point 6). The Code (Art. 6(1)(e)) also states that third-country nationals are granted Schengen stays provided they are not considered a threat to public health.

13 See point V.18 of Commission COVID-19 Guidelines for border management measures to protect health and ensure the availability of goods and essential services, C(2020) 1753 final, 16.3.2020: "Member States may reintroduce temporary border controls at internal borders if justified for reasons of public policy or internal security. In an extremely critical situation, a Member State can identify a need to reintroduce border controls as a reaction to the risk posed by a contagious disease. Member States must notify the reintroduction of border controls in accordance with the Schengen Borders Code."

Unlike the Schengen Borders Code, EU Treaty and secondary law rules on free movement of EU citizens explicitly allow justifying national restrictions by public health reasons.[14] According to the Citizens' Rights Directive, public health grounds can be relied on only for diseases with epidemic potential, as defined by the relevant instruments of the World Health Organization, and for other infectious or contagious parasitic diseases if they are the subject of protection provisions applying to nationals of the host Member State.[15] There is no doubt that COVID-19 satisfies these parameters, meaning that public health grounds can be invoked as a legitimate justification for national travel restrictions and entry/exit bans.

Consequently, the COVID-19 pandemic was used as a public health justification for all types of travel restrictions and bans.[16] Nevertheless, the possibility to rely on public health as a justification for restricting free movement of persons (as well as internal security justifications, in the context of internal border controls) does not give Member States a *carte blanche* to impose any national restrictions in case of threats to public health. Restrictive measures are admissible only provided they satisfy the principles of non-discrimination and proportionality. Additionally, they cannot be used to serve economic ends.[17] Finally, procedural safeguards, including the right to judicial and, where appropriate, administrative redress procedures, should apply to decisions taken on grounds of public health.[18]

Sub-section IV.3 will discuss the principle on proportionality in the context of COVID-19 mobility restrictions and point to a number of problematic issues associated to the satisfaction of proportionality requirements. It will show that scientific uncertainty associated to COVID-19 makes it extremely difficult to establish with certainty whether travel bans were proportional. Sub-section IV.3 will also examine the proportionality of mobility corridors and point to

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14 Article 45(3) TFEU and Article 27(1) of Directive 2004/38 on the right of citizens of the Union and their family membersto move and reside freely within the territory of the Member States.

15 Article 29(1) of Directive 2004/38.

16 Guidelines for border management measures to protect health and ensure the availability of goods and essential services, C(2020) 1753 final, 16.3.2020, points I.4. and III.11: Communication from the Commission: Towards a phased and coordinated approach for restoring freedom of movement and lifting internal border controls — COVID-19, 2020/C 169/03, C/2020/3250, OJ C 169, 15.5.2020, p. 30–37, point I (Introduction).

17 Article 27(1) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ L 158, 30.4.2004, p. 77–123.

18 Article 31(1) of Directive 2004/38.

numerous factors that need to be taken into account when considering proportionality *stricto sensu*. At this point two additional points related to public health restrictions will be made.

First, the use of public health as a justification for limiting free movement of EU citizens, points to the dichotomous role of public health in the context of the pandemic. On the one hand, the application of precautionary principle to COVID-19 policies in a number of EU documents renders public health not just a national, but an EU value – a value which, according to the Commission, has become an overriding EU priority.[19] On the other hand, public health is used as a national justification to limit another important EU value – free movement of persons. This is certainly not the first time that a particular national value is also recognised as an EU value. After all, the fact that public health has been accepted by EU law as one of the grounds for justifying national restrictions of free movement, confirms the fact that it has been recognised as an EU value. However, the COVID-19 pandemic is the first time in the EU history that public health has been simultaneously used by all EU Member States to justify free movement restrictions and this is what makes the reliance on this value so unique in the context of EU law. Such a dual role of public health – as an EU value and a national value used to restrict another important EU value – points to the balancing exercise that is taking place in the context of the pandemic. The EU aims to protect both public health and free movement interests, which are mutually exclusive: the more public health is protected by imposing national travel restrictions and bans, the less free movement there is. On the other hand, the choice of national precautionary measures restricting free movement of persons shows that Member States take the view that the more free movement is allowed, the more public health is jeopardised.

Second, COVID-19 has emphasized and increased the difference between the conditions for the applicability of public health restrictions, when compared to public policy and public security restrictions. Even more so, COVID-19 has forced us to reconsider our understanding of public health restrictions, due to the fact that it has certain characteristics which differentiate if from other infectious diseases we have know so far. Certain differences between pub-

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19 In its Communication, the Commission stated: "The protection of public health has become the overriding priority for both the EU and its Member States." (Communication from the Commission to the European Parliament, the European Council and the Council on the third assessment of the application of the temporary restriction on non-essential travel to the EU, COM/2020/399 final). Similary, in its Conclusions on COVID-19, the European Council stated provided: "The priority is the health of our citizens." (Conclusions by the President of the European Council following the video conference with members of the European Council on COVID-19, 164/20, 17/03/2020).

lic health restrictions, on the one hand, and public policy and public security restrictions, on the other hand, are visible in the Citizens' Rights Directive. First, whereas the Citizens' Rights Directive determines which diseases justify public health restrictions, it does not give similar guidance on public policy and public security justifications. Nevertheless, all the three justifications do not impose on Member States a uniform set of values.[20] Member States are tolerated a certain area of discretion when determining the scope of these concepts, as long as they comply with EU law.[21] As reiterated in the Commission Communication on the special measures concerning the movement and residence of citizens of the Union which are justified on grounds of public policy, public security or public health, "Member States are free to determine the scope of [public policy, public security and public health] on the basis of their national legislation and case law, but within the framework of Community law".[22]

Most importantly, the Citizens' Rights Directive expressly provides that measures taken on grounds of public policy and public security have to be based "exclusively on the personal conduct of the individual concerned".[23] They cannot be based on general preventive grounds[24] or be automatic or systematic.[25] The Court of Justice has, on several occasions, pointed out that measures justified by public policy and public security grounds may be taken only following a case-by-case assessment,[26] but neither the Citizens' Rights Directive, nor

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20 In *P.I.*, in the context of public security restrictions, the Court pointed out that "European Union law does not impose on Member States a uniform scale of values as regards the assessment of conduct which may be considered to be contrary to public security." (Case C-348/09 *P.I. v Oberbürgermeisterin der Stadt Remscheid*, ECLI:EU:C:2012:300).

21 In *Van Duyn*, in the context of public policy, the Court stated: that "the particular circumstances justifying recourse to the concept of public policy may vary from one country to another and from one period to another, and it is therefore necessary in this matter to allow the competent national authorities an area of discretion within the limits imposed by the treaty." (Case 41/74 *Yvonne van Duyn v Home Office*, ECLI:EU:C:1974:133, para. 18).

22 Communication from the Commission to the Council and the European Parliament on the special measures concerning the movement and residence of citizens of the Union which are justified on grounds of public policy, public security or public health, COM/99/0372 final, point. 3.1.1.

23 Article 27(2) of the Citizens' Rights Directive.

24 Case 67/74 *Carmelo Angelo Bonsignore v Oberstadtdirektor der Stadt Köln*, ECLI:EU:C:1975:34, para. 7.

25 Case C-348/96 *Criminal proceedings against Donatella Calfa*, ECLI:EU:C:1999:6, paras. 25-27; Case C-408/03 *Commission v Belgium*, ECLI:EU:C:2006:192, paras. 68-72.

26 Case C-331/16 *K. v Staatssecretaris van Veiligheid en Justitie and H.F. v Belgische Staat*, ECLI:EU:C:2018:296, para. 52; Case C-371/08 *Nural Ziebell v Land Baden-Württemberg*, ECLI:EU:2011:809, para. 82.

the Court have stated that the same case-by-case assessment applies to measures justified by public health grounds. Interestingly, the Commission 1999 Communication on Directive 64/221 provides that "Member States may not set any general requirement that before entry into the country citizens of another Member State need to provide proof that they are not suffering from any illness mentioned in the Annex [of the Directive]".[27] However, Member States' practice of requiring documents which certify that the individual entering the country has a negative coronavirus test is not in conflict with this statement, as it is not a 'general', but a 'specific' requirement, which obliges individuals to certify that they do not have COVID-19 and not any disease with epidemic potential.

Additionally, the Communication provides that "the public health grounds are somewhat outdated given the current level of integration of the European Union and the development of new means to handle public health problems" and continues that "therefore, restrictions of free movement can no longer be considered as necessary and effective means of solving public health problems".[28] Even though the 1999 Communication refers to Directive 64/221, which was repealed by the Citizens' Rights Directive, the Commission 2009 Guidance on the Citizens' Rights Directive confirms that "the content 1999 Communication is still generally valid".[29] Unfortunately, the 2009 Guidance does not provide any further guidance on the use of public health justifications.

The COVID-19 pandemic has shown that public health restrictions are still important and necessary and that they cannot always be based on individual threats and case-by-case assessment. Coronavirus has symptoms and is transmitted and spreads in a way different from other infectious diseases we have known so far. Consequently, public health restrictions could not be based on individualised risk assessment – by considering each individual separately, based on visible symptoms or the fact that the person has had a confirmed exposure to coronavirus. COVID-19 has triggered the adoption of much more general and systematic restrictions, encompassing millions of individuals

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27 Communication from the Commission to the Council and the European Parliament on the special measures concerning the movement and residence of citizens of the Union which are justified on grounds of public policy, public security or public health, COM/99/0372 final, point. 3.1.3.

28 Ibid, point 3.1.3.

29 Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM/2009/0313 final, point 3.

within certain regions or states, without regard to confirmed infection or exposure to coronavirus. The question whether more targeted restrictions, such as those based on widespread testing and mass screening could achieve the same degree of public health protection is linked to the issue of proportionality of the adopted restrictions, which has been discussed in the previous sections. If or until the time when such methods start being used, COVID-19 will continue to showcase as a disease which has increased the gap between public health and public policy/security justifications by completely stepping out of individualised risk assessment and case-by-case approach.

IV. Precautionary Principle and Proportionality of COVID-19 Mobility Restrictions

The previous section has confirmed that public health can be invoked as a legitimate justification for COVID-19 mobility restrictions. However, as stated previously, national restrictions are only admissible provided they satisfy the principle of proportionality. The aim of this section is to problematize the application of the principle of proportionality to COVID-19 free movement restrictions and link it to the use of precautionary principle by suggesting that the reliance on precautionary principle in the adoption of restrictive measures transforms the application of the principle of proportionality. After a short introduction about the uniqueness of the application of precautionary principle to COVID-19 in the following paragraphs, sub-section IV.1 will reveal that precautionary principle has been relied on in the EU COVID-19 mobility-related documents. Sub-section IV.2 will explain the functioning of precautionary principle in the context of the pandemic by discussing two crucial components of precautionary approach towards COVID-19: scientific risk assessment of COVID-19 and its political risk management. Sub-section IV.3 will link the findings about the use of precautionary principle in COVID-19 mobility policies to the principle of proportionality by discussing the impact of the use of precautionary principle on the proportionality of COVID-19 free movement restrictions.

In short, precautionary principle allows decision-makers to adopt restrictive measures when potentially dangerous effects deriving from a phenomenon, product or process for the environment, human, animal or plant health have been identified and scientific evidence about the risk are insufficient, incon-

clusive or uncertain.[30] As will be displayed, the EU (and worldwide) approach towards the COVID-19 pandemic can be viewed as a triumph and regeneration of the previously much-disputed precautionary approach. Even one of the

[30] According to the Communication from the Commission on the precautionary principle (COM(2000) 1 final, para. 4), "recourse to the precautionary principle presupposes that potentially dangerous effects deriving from a phenomenon, product or process have been identified, and that scientific evaluation does not allow the risk to be determined with sufficient certainty." The Communication further elaborates (para. 3) that precautionary principle covers "those specific circumstances where scientific evidence is insufficient, inconclusive or uncertain and there are indications through preliminary objective scientific evaluation that there are reasonable grounds for concern that the potentially dangerous effects on the environment, human, animal or plant health may be inconsistent with the chosen level of protection."

There is no single universal or EU-wide definition of precautionary principle. Different versions exist at the international, EU and national levels. Definitions mainly vary depending on the degree of scientific uncertainty needed to trigger the application of precautionary principle, the level of commitment it creates on the side of decision-makers and the level of seriousness of the potential hazard. Apart from the European Commission, UN (Rio Declaration) and the European Environmental Agency have put forward their definitions. In addition, the Court of Justice has developed its interpretation of precautionary principle, which is consistent with the definition put forward by the Commission Communication, In its BSE case, the Court established that "where there is uncertainty as to the existence or extent of risks to human health, the institutions may take protective measures without having to wait until the reality and seriousness of those risks become fully apparent." (Cases C-180/96 *UK v. Commission*, ECLI:EU:C:1998:192, para. 99; C-333/08 *European Commission v French Republic*, ECLI:EU:C:2010:44, para. 91 and Case C-77/09 *Gowan Comércio Internacional e Serviços Lda v Ministero della Salute*, ECLI:EU:C:2010:803, para. 73).

There is rich literature on precautionary principle in the EU. Some valuable writings contributions include: Alberto Alemanno, 'The Shaping of the Precautionary Principle by European Courts: From Scientific Uncertainty to Legal Uncertainty', Bocconi Legal Studies Research Paper no. 1007404, 2007; Mike Feintuck, 'Precautionary Maybe, But What's the Principle? The Precautionary Principle, The Regulation of Risk, and The Public Domain', 32 Journal of Law and Society, 2005, pp. 371-398; Elizabeth C. Fisher, (2007) Risk: Regulation and Administrative Constitutionalism, Hart Publishing, 2007 (Chapter 6); Giandomenico Majone, 'The precautionary principle and its policy implications', Journal of Common Market Studies 40 (1), 2002, 89–109; Joanne Scott and Ellen Vos, 'The juridification of uncertainty: Observations on the ambivalence of the precautionary principle within the EU and the WTO', in: Christian Joerges and Renaud Dehousse (eds.) *Good Governance in Europe's Integrated Market*. OUP, pp. 253–286; Katie Steele, 'The Precautionary Principle: A New Approach to Public Decision-Making', Law, Probability and Risk, Vol. 5, Issue 1, 2006, pp. 19-31; Joakim Zander, *The Application of the Precautionary Principle in Practice: Comparative Dimensions*, CUP, 2010.

most fierce US critics of precautionary principle openly admitted that it is absolutely justified in the face of scientific uncertainty linked to COVID-19.[31]

COVID-19 policies in the EU are the first time that precautionary principle has been applied to such an extent and with such severity to restrict free movement of persons, as a response to a communicable disease.[32] Even though restrictive measures affecting free movement of persons in the EU were also imposed to prevent the spread of SARS in 2003, the measures enacted seventeen years ago are incomparable to the ones adopted in 2020, both in terms of

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31 Cass R. Sunstein, who is one of the leading critics of precautionary principle (see Cass R. Sunsetin, *Laws of Fear: Beyond the Precautionary Principle*, CUP, 2005.), admitted it was justitied in relation to COVID-19 (see Cass R. Sunstein, 'This Time the Numbers Show We Can't Be Too Careful', 26 March 2020, Bloomberg). For Sunsetin criticism of precauationary principle, see: Cass R. Sunstein, *Laws of Fear: Beyond the Precautionary Principle*, CUP, 2005).

32 The EU-level application of the precautionary principle up until the emergence of COVID-19 reveals that it has been used in situations of scientific uncertainty linked to different types of risks. In the early years, it was, first implicitly and then openly, applied to environmental risks such as climate change, fish-stock management, genetically modified organisms, the use of antimicrobials as growth promoters, etc. For the implicit reliance on the precautionary principle of the area of environment, see the EU's Environmental Action Programme from 1973 (Declaration of the Council of the European Communities and of the representatives of the Governments of the Member States meeting in the Council of 22 November 1973 on the programme of action of the European Communities on the environment, OJ C 112, 20.12.1973, p. 1–53, para. C.1). On the other hand, the EU's Environmental Action Plan from 1987 explicitly mentioned precaution (Resolution of the Council of the European Communities and of the representatives of the Governments of the Member States, meeting within the Council of 19 October 1987 on the continuation and implementation of a European Community policy and action programme on the environment (1987-1992), OJ C 328, 7.12.1987, p. 1–44, paras. 4.4.3. and 4.4.8.). Precautionary principle was inserted in EU Treaties by the Treaty of Maastricht, stating that 'Community policy on the environment … shall be based on the precautionary principle' (then Art. 130r(2), now Art. 191(2) TFEU). The BSE crisis ('mad-cow disease' crisis) prompted the European Commission to issue its Communication on precautionary principle and initiated the process of the introduction of precautionary principle to human health risks in different areas of EU law, such as internal market (see Green Paper on the General Principles of Food Law in the European Union, dated 30 April 1997 (COM(97) 176 final)) and spreading to areas such as fisheries (see Regulation 1380/2013 on the Common Fisheries Policy, dated 11 December 2013), social policy (see Directive 2004/37/EC on the protection of workers from the risks related to exposure to carcinogens or mutagens at work, dated 29 April 2004), transport (see Regulation 782/2003 on the prohibition of organotin compounds on ships, dated 14 April 2003), area of freedoms, security and justice (see Regulation 864/2007 on the law applicable to non-contractual obligations (Rome II), dated 11 July 2007) and so on.

their scope and rigidity.[33] The COVID-19 pandemic is also one of the rare cases in which precautionary principle has been used not as a method to consider risks that might be incurred by acting (for example by putting a new product on the market), but the ones that would result from non-acting, i.e. from not imposing restrictions on free movement.

1. Precautionary Principle in the EU COVID-19 Mobility-Related Documents

Even though EU documents related to COVID-19 rarely expressly mention precautionary principle, there is no doubt that the EU institutions have endorsed the precautionary approach by tolerating and approving national restrictions to free movement of persons and Schengen and by implicitly acknowledging the precautionary approach. The analysis of key Commission and Council documents on COVID-19 mobility policies from spring and summer 2020 reveals that only one of these documents makes explicit reference to precautionary principle. This is the Joint European Roadmap towards lifting COVID-19 containment measures, which states that "the restrictive measures introduced by Member States … have been based on available information in relation to the characteristics of the epidemiology of the disease and followed a precautionary approach" and continues that "the Roadmap builds on the expertise and the advice provided by the European Centre for Disease Prevention and Control (ECDC) and the Commission's Advisory Panel on COVID-19 and takes into account the experience and outlook from a number of Member States as well as guidance from the World Health Organization (WHO)".[34] The Roadmap also, on several occasions, states that it is "based on science", thus acknowledging the importance of scientific risk assessment for the COVID-19 political decision-making. As explained in the subsequent sections, scientific evaluation is a necessary integral part of precautionary approach. Consequently, such wording of the Roadmap also has a dual effect: it supports the reference the Roadmap makes to precautionary approach and confirms that Member States' actions must be supported by scientific evidence in order to be proportionate.

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33 For the overview of the anti-SARS measures imposed in 2003, see 'Measures undertaken by Member States and Accession Countries to control the outbreak of SARS', Report by the Commission, 5 June 2003, 280503V3.
So far, precautionary principle has mostly been applied in relation to a number of different challenges, such as climate change, fish-stock management, genetically modified organisms, the use of antimicrobials as growth promoters, etc.

34 Joint European Roadmap towards lifting COVID-19 containment measures, 2020/C 126/01, C/2020/2419, OJ C 126, 17.4.2020, p. 1–11.

Other EU COVID-19 mobility-related documents from spring and summer 2020 do not make explicit reference to precautionary principle. However, even without explicit reference to precaution, these documents and the whole EU and Member States' approach to COVID-19 restrictions has been triggered by the concern about the risks COVID-19 for public health and was characterised by a high degree of scientific uncertainty caused by the lack of conclusive data about the disease. The fact that a number of EU documents do not make explicit reference to precautionary principle does not refute this conclusion. On the contrary, as confirmed by the Court of Justice in its previous case-law, "the lack of express reference to the precautionary principle" … "does not mean that that institution did not rely on that principle … in order to prevent the alleged risks".[35]

Additionally, a number of EU COVID-19 mobility-related documents use a number of terms that can be associated both to proportionality analysis and to precautionary approach, such as: 'protection', 'preventive measures', 'science', 'risk assessment,' 'risk management', 'ECDC', 'WHO' and balancing of different criteria, including the epidemiological situation, when making COVID-19 policy choices. Council Conclusions on COVID-19 from 20 February 2020 underline the importance of coordination of "contact tracing and risk communication" measures, as well as "sharing of information on national preventive and preparatory measures within the Health Security Committee and Early Warning System".[36] They stress the importance of "the work of ECDC on technical guidance regarding … risk assessment" and call upon the Commission to facilitate Member States' cooperation on "surveillance, risk assessment (and) risk management", while emphasising the importance of "scientific information" and "scientific advice from ECDC and WHO".[37] Similarly, Commission Guidance on the implementation of the temporary restriction on non-essential travel to the EU and Commission Communication on the third assessment of the application of the temporary restriction on non-essential travel to the EU

35 Case T-392/02 *Solvay Pharmaceuticals BV v Council of the European Union*, ECLI identifier: ECLI:EU:T:2003:277, para. 124.

36 Council Conclusions on COVID-19, 2020/C 57/04, ST/6038/2020/INIT, OJ C 57, 20.2.2020, p. 4–7., point 6.

37 Council Conclusions on COVID-19, 2020/C 57/04, ST/6038/2020/INIT, OJ C 57, 20.2.2020, p. 4–7., points 9 and 16.

emphasise the importance of reliance on ECDC's work.[38] Equally, Guidelines for border management measures to protect health and ensure the availability of goods and essential services and European Council Conclusions from 10 March 2020 strongly rely on science, while the Guidelines expressly provide that "restrictions to the transport of goods and passengers on grounds of public health" must be "science-based and supported by WHO and ECDC recommendations".[39]

Whereas Commission Guidelines concerning the exercise of the free movement of workers during COVID-19 outbreak do not make direct or indirect reference to precaution, science, risk assessment or other terms directly associated to precautionary principle, they emphasize the importance of non-discrimination and proportionality, as the principles that have to be respected when adopting precautionary measures, as elaborated further below.[40] Finally, Commission Communication "Towards a phased and coordinated approach for restoring freedom of movement and lifting internal border controls" underlines not only the importance of ECDC's scientific advise and risk assessment, but also emphasizes that "the process towards the lifting of travel restrictions and internal border controls will require the weighing and balancing of different criteria, taking into account the specific epidemiological situations in each Member State, which may in turn vary between areas and regions".[41] As will be discussed further in the text, the precautionary approach in general and in the context of the COVID-19 pandemic is characterised exactly by such a balancing approach. Political decisions on COVID-19 mobility restrictions are taken by relying on scientific evaluation of the disease

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38 Communication from the Commission: COVID-19: Guidance on the implementation of the temporary restriction on non-essential travel to the EU, on the facilitation of transit arrangements for the repatriation of EU citizens, and on the effects on visa policy 2020/C 102 I/02, C/2020/2050, OJ C 102I, 30.3.2020, p. 3–11; Communication from the Commission to the European Parliament, the European Council and the Council on the third assessment of the application of the temporary restriction on non-essential travel to the EU, COM/2020/399 final.

39 Guidelines for border management measures to protect health and ensure the availability of goods and essential services, C(2020) 1753 final, 16.3.2020, point 1; Conclusions by the President of the European Council following the video conference on COVID-19, 138/20, 10.03.2020.

40 Communication from the Commission: Towards a phased and coordinated approach for restoring freedom of movement and lifting internal border controls — COVID-19, 2020/C 169/03, C/2020/3250, OJ C 169, 15.5.2020, p. 30–37.

41 Communication from the Commission: Towards a phased and coordinated approach for restoring freedom of movement and lifting internal border controls — COVID-19, 2020/C 169/03, C/2020/3250, OJ C 169, 15.5.2020, p. 30–37.

as a starting point, but the final political decisions on precautionary measures are taken by weighing public health concerns with social, economic and other important interests.

2. Precautionary Approach towards COVID-19

The following section will explain the functioning of precautionary principle in the context of the pandemic by discussing the interface between two crucial components of precautionary approach: scientific risk assessment of COVID-19 and its risk management. Namely, precautionary principle takes a structured approach to the risk. The initial step – scientific risk assessment – is performed by scientists, whereas further steps – risk management and risk communication – are taken by decision-makers.[42] This section will show that the response to the COVID-19 pandemic reflects this interface between science and politics.

a) Risk Assessment of COVID-19: The Importance of Science

The COVID-19 pandemic has confirmed the importance of scientific risk assessment for political decision-making in situations of high risk for human health. The EU's acceptance of Member States' COVID-19-related restrictions (as well as national decisions to impose these restrictions) has been driven by medical science. Never in human history have decision-makers and the wider public paid so much attention to the findings of epidemiologists and virologists and laid so much trust in them. However, due to an extremely short time span since the emergence of coronavirus and so many unknowns associated to its spread, scientific findings could not be conclusive. This created a situation of scientific uncertainty, with, nevertheless, reasonable grounds for concern that the virus could create real harm to human health.[43] All these factors – the performance of scientific evaluation, the existence of scientific uncer-

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42 According to the Commission Communication on the precautionary principle, the precautionary, structured approach to the analysis of risk "comprises three elements: risk assessment, risk management, risk communication." (Communication from the Commission on the precautionary principle, COM(2000) 1 final, para. 4.).

43 The EU does not specify the degree of scientific uncertainty that needs to exist in order to trigger the application of precautionary principle. On the other hand, Principle 15 of the Rio Declaration provides that 'lack of full scientific certainty' shall not be used as a reason for postponing to adopt precautionary measures.

tainty, and the identification of negative effects for human health – are the prerequisites for invoking precautionary principle and they were all satisfied in relation to coronavirus.[44]

Scientific risk assessment of COVID-19 was, at the EU level, performed by the European Centre for Disease Prevention and Control (ECDC).[45] ECDC is an EU agency created in 2004 and based in Stockholm, whose mission is to identify and assess risks and communicate current and emerging threats to human health from communicable diseases and other sources.[46] Considering the fact that the Union has only supporting competence in relation to the protection and improvement of human health, the ECDC's work complements and does not replace the work of national centres of disease control, with whom it cooperates and coordinates its work.[47] However, the ECDC has an important role in the pandemic, as it gathers and prepares all EU data on the pandemic and disseminates recommendations for good practice.

In addition to its cooperation with national disease control authorities, in its work, the ECDC also relies on the findings of WHO, which became particularly relevant in the ECDC's risk assessment of COVID-19. The contrast between the ECDC's and WHO's initial findings on COVID-19 and the ones published with the spread of coronavirus, accurately demonstrates the high

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44 These prerequisites for invoking precautionary principle have been identified in Communication from the Commission on the precautionary principle, COM(2000) 1 final, para. 5.1.3. According to the Communication, precautionary principle can be invoked only if potential adverse effects of a particular phenomenon, product or process have been identified for health or environment, and provided a comprehensive assessment of the risk to health or environment has been performed based on the most reliable scientific data available and the most recent results of international research (Regulation (EC) No 851/2004 of the European Parliament and of the Council of 21 April 2004 establishing a European Centre for disease prevention and control, OJ L 142, 30.4.2004, p. 1–11).

45 Regulation (EC) No 851/2004 of the European Parliament and of the Council of 21 April 2004 establishing a European Centre for disease prevention and control, OJ L 142, 30.4.2004, p. 1–11.

46 Art. 3(1) of Regulation 851/2004.

47 For a different approach, stating that the EU has more powers to create health law in response to COVID-19 than it has actually used, see Kai P. Purnhagen, Anniek De Ruijter, Mark L. Flear, Tamara K. Hervey and Alexia Herwig, 'More Competences than You Knew? The Web of Health Competence for European Union Action in Response to the COVID-19 Outbreak', European Journal of Risk Regulation, 11(2), 2020, pp. 297-306. For a suggestion that the EU COVID-19 related Guidelines (discussed in section IV.1.) represent an attempt by the EU to operationalise untested competences in the area of health policy, see Alberto Alemanno, 'The European Response to COVID-19: From Regulatory Emulation to Regulatory Coordination?', European Journal of Risk Regulation, 11(2), 2020, pp. 307-316.

degree of scientific uncertainty associated with this novel disease. The ECDC's first risk assessment of COVID-19 from 9 January provided that, since there was no indication of human-to-human transmission and since no cases were found outside of Wuhan, the risk of its introduction and spread within the EU was considered low to very low.[48]. This wording accurately shows the limited nature of scientific data on coronavirus in Europe at the beginning of January 2020. In contrast, the ECDC's risk assessment from 2 March 2020 considered that the risk associated with COVID-19 infections in the EU was "moderate to high, based on the probability of transmission and the impact of the disease".[49] In the same Report, the ECDC acknowledged the existence of "significant uncertainties" in its evaluation, "due to many unknowns … regarding the virulence/pathogenicity, the mode of transmission, the reservoir and the source of infection of COVID-19".[50]

Interestingly, when advocating which measures should be used to mitigate the impact of the pandemic, neither the ECDC nor WHO encourage the use of border closures and travel restrictions. In its Guidelines for the use of non-pharmaceutical countermeasures to delay and mitigate the impact of the COVID-19 pandemic, from 10 February 2020 the ECDC stated that "available evidence … does not support recommending border closures which will cause significant secondary effects and societal and economic disruption in the EU".[51] The Guidelines further provide that "border closures may delay the

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48 European Centre for Disease Prevention and Control, 'Pneumonia cases possibly associated with a novel coronavirus in Wuhan, China', 9 January 2020, ECDC: Stockholm, 2020. p. 2.

49 European Centre for Disease Prevention and Control, 'Outbreak of novel coronavirus disease 2019 (COVID-19): increased transmission globally – fifth update 2 March 2020', 2 March 2020, ECDC: Stockholm, 2020, p. 5.

50 European Centre for Disease Prevention and Control, 'Outbreak of novel coronavirus disease 2019 (COVID-19): increased transmission globally – fifth update 2 March 2020', 2 March 2020, ECDC: Stockholm, 2020, p. 4.

51 European Centre for Disease Prevention and Control (ECDC), 'Guidelines for the use of non-pharmaceutical measures to delay and mitigate the impact of 2019-nCoV', 2020, p. 8. The Guidelines further refer to IHR and Directive 2004/38, by stating that border closures are regulated internationally by International Health Regulations (World Health Organization (WHO), International Health Regulations (2005), second edition. Geneva: WHO; 2005) and that free movement within the EU may be limited for public health reasons within the limites set by the Treaties and in accordance with Art. 29 of Directive 2004/38 (Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ L 158, 30.4.2004, p. 77–123).
On the other hand, the ECDC considers that broad domestic travel restrictions, within a country or region, may have a small positive impact in delaying an epidemic only if they are implemented during the early, containment phase of the epidemic.

introduction of the virus into a country only if they are almost complete and when they are rapidly implemented during the early phases, which is feasible only in specific contexts (e.g. for small, isolated, island nations)".[52] The ECDC's stance towards border closures was not isolated. It relied on the position of WHO according to which "border closure is generally not recommended unless required by national law in extraordinary circumstances during a severe pandemic, and countries implementing this measure should notify WHO as required by the IHR".[53] The Commission acknowledged the WHO's position in its Communication on Temporary Restriction on Non-Essential Travel to the EU, but, nevertheless, recommended to the European Council to close the external borders.[54] The ECDC's risk assessment from 23 April 2020 still recognises that substantial uncertainty regarding the epidemiological characteristics of COVID-19 continue to persist and that the effectiveness of different measures remains unclear, since many countries around the world introduced interventions *en bloc*.[55] The latest ECDC' risk assessment, at the time of writing this paper, from 10 August 2020, continues to emphasize that "available evidence does not support border closures", since COVID-19 "cannot be controlled by means of border closures" and that "measures to effectively contract-trace travellers crossing borders are needed and these should be reinforced in the coming period".[56]

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52 European Centre for Disease Prevention and Control (ECDC), 'Guidelines for the use of non-pharmaceutical measures to delay and mitigate the impact of 2019-nCoV', 2020, p. 8. See alsoElena Sánchez Nicolás, 'EU experts: closing borders "ineffective" for coronavirus', EuObserver, 28 February 2020 (available at: <https://euobserver.com/coronavirus/147576> - last accessed on 20 May 2020).

53 World Health Organization (WHO), Non-pharmaceutical public health measures for mitigating the risk and impact of epidemic and pandemic influenza, Licence: CC BY-NC-SA 3.0 IGO, 2019, p. 68.

54 In the Communication, the Commission stated that "while travel restrictions are generally not seen by the World Health Organisation as the most effective way of countering a pandemic, the rapid spread of COVID-19 makes it essential that the EU and Member States take urgent, immediate and concerted action not only to protect the public health of our populations, but also to prevent the virus from further spreading from the EU to other countries, as has been observed in recent weeks."
(Communication from the Commission to the European Parliament, the European Council and the Council: COVID-19: Temporary Restriction on Non-Essential Travel to the EU, COM/2020/115 final, 16.3.2020.).

55 Coronavirus disease 2019 (COVID-19) in the EU/EEA and the UK – ninth update, 23 April 2020. Stockholm: ECDC; 2020, p. 17.

56 Coronavirus disease 2019 (COVID-19) in the EU/EEA and the UK – eleventh update: resurgence of cases, 10 August 2020. Stockholm:ECDC; 2020, p. 19.

b) *Risk Management of COVID-19: Political Discretion*

Despite both the ECDC's and WHO's scepticism towards border closures, national responses to the COVID-19 pandemic in the EU and across the world included a high degree of travel restrictions and bans. This asymmetry between scientific findings of the European and world health organisations, and national political choices reflects the functioning of precautionary principle. Provided scientific evaluation identifies risk for human health, but scientific uncertainty remains, the choice whether to adopt precautionary measures and, if so, to determine the type and degree of severity of such measures is no longer in the realm of science, but political discretion. This does not mean that precautionary measures can be discretionary or based on a hypothetical risk. They need to be underpinned by sound scientific assessment of the existence of a real risk.[57] However, the final decision whether and to which measures to resort, without having to wait until the seriousness of the risks to human health becomes fully apparent, lies in the hands of politicians, not scientists.[58] Scientific risk assessment underpins precautionary measures, but does not predetermine their choice or type.

The response towards COVID-19 pandemic illustrates this interface between scientific evaluation and political discretion.[59] In the COVID-19 world, scientific models could measure morbidity and mortality risks based on scientific – still inconclusive and uncertain – findings of coronavirus behaviour and its spread, but they could not tell us how our society wants to deal with the virus and what implications we are ready to bear. These decisions had to be taken by political leaders, who had to make a balancing exercise between risks to pub-

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57 Precautionary principle cannot be invoked in case of a hypothetical or imaginary risk (see cases T-13//99 Pfizer Animal Health v Council, ECLI:EU:T:2002:209, para. 143 and T-229/04 *Kingdom of Sweden v Commission of the European Communities*, ECLI:EU:T:2007:217, para 161). See also Didier Bourguignon, 'Precautionary Principle: Definitions, applications and governance', European Parliamentary Research Service, 2015, PE 573.876, p. 9.

58 As stated by the Court of Justice in Solvay Pharmaceuticals, "in the field of public health, the precautionary principle implies that, where there is uncertainty as to the existence or extent of risks to human health, the institutions may take precautionary measures without having to wait until the reality and seriousness of those risks become fully apparent" (Case T-392/02 *Solvay Pharmaceuticals BV v Council of the European Union*, ECLI identifier: ECLI:EU:T:2003:277, para. 122).

59 On the challenges related to the interface between science and policy, see: Sybille van den Hove, 'A rationale for science–policy interfaces', Elsevier, Futures 39, 2007, pp. 807–826.

lic health and societal risk tolerance, when deciding on COVID-19 responses.[60] Ultimately, these decisions also had to be made by each individual person, when making a choice whether to go to a store (provided this was a matter of choice) or take a walk in the park. Scientific risk assessment was and continues to be performed by medical experts, whereas, risk management – or the choice how to deal with these risks – lies in the hands of decision-makers, in the first place, but also in the hands of our communities (in cases where community members voluntarily decide to try to protect each other) and, ultimately, with each individual person. Political leaders had to make a choice, while taking into consideration social behaviour and attitude towards COVID-19 risks at the macro and micro level.

Decision-makers had to make two interconnected choices. First, they had to decide whether to act or not, based on the examination of benefits and costs of action or lack of action.[61] Second, in the affirmative, they had to decide on how to act, i.e. which precautionary measures to adopt.[62] There is a general agreement that precautionary principle does not call for specific measures – such as bans or reversing the burden of proof – or lead to a pre-determined solution. In addition, there is no general agreement which method should be used to determine when to apply precautionary measures.[63] This setting gave decision-makers considerable flexibility in deciding whether and which types of

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60 As stated by the Court of Justice in Pfizer, "where measures for the protection of human health are concerned, the outcome of that balancing exercise will depend ... on the level of risk which the authority deems unacceptable for society" (T-13//99 Pfizer Animal Health v Council, ECLI:EU:T:2002:209, para. 161).

61 According to the Commission Communication, the examination of benefits and costs should include, where appropriate and feasible, an economic cost/benefit analysis (Communication from the Commission on the precautionary principle, COM(2000) 1 final, para. 6). However, the cost-benefit analysis is often considered to take a different approach, when compared to precautionary principle. On the debate between the pros and costs of precautionary principle in comparison to cost-benefit analysis, in the context of COVID-19, see Cahal Moran, 'A Time for Precaution: Rethinking Economics', Rethinking Economics, 2020 (available at: <https://www.rethinkeconomics.org/journal/a-time-for-precaution/> - last accessed on 17 May 2020).

62 For the importance of the distinction between risk assessment and risk management, and between the decisions whether to act and how to act, see Commission Communication, para. 5.

63 As summarised by the European Parliament Research Service, different methods include cost-benefit analysis, risk trade-off analysis, cost-effectiveness analysis, pros and cons analysis of action and inaction, etc. (Didier Bourguignon, 'Precautionary Principle: Definitions, applications and governance', European Parliamentary Research Service, 2015, PE 573.876, p. 13).

COVID-19 measures to apply.[64] As a result, not all EU Member States chose the same approach. Unlike most Member States, which resorted to rigorous measures from the very start, Sweden opted for a more relaxed approach, including at its borders which were not closed for EEA nationals,[65] whereas the UK first chose a "herd immunity" strategy and then, under the pressure of scientific community and the wider public, switched to stricter measures.[66]

The differences in the Member States' approach towards coronavirus show that the EU's understanding of the level of political commitment created by precautionary principle is a medium one: the risk the virus created for human health justified but did not oblige action or dictate the type of measures.[67] The EU's medium approach finds a middle ground in-between two extremes: a completely non-committing approach contending that uncertainty does not

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64 For the interpretation of precautionary principle as an open-ended and flexible principle which helps decision-makers to make prudent decisions, see: World Commission on the Ethics of Scientific Knowledge and Technology, 'The Precautionary Principle', UNESCO 2005, p. 21 (available at: <https://unesdoc.unesco.org/ark:/48223/pf0000139578> - last accessed on 20 May 2020). However, some authors caution that the criteria for the application of precautionary principle provided in the Commission Communication need to be followed more consistently that the Communication needs to be updated (see Ragnar Löfstedt, 'The precautionary principle in the EU: Why a formal review is long overdue', Risk Management 16(3), 2014, pp. 149-151).

65 Tae Hoon Kim, 'Why Sweden is unlikely to make a U-turn on its controversial Covid-19 strategy', The Guardian, 22 May 2020 (available at: <https://www.theguardian.com/commentisfree/2020/may/22/sweden-u-turn-controversial-covid-19-strategy> - last accessed on 23 May 2020). On the other hand, according to Financial Times, Sweden the highest COVID-19 death toll (see Richard Milne, 'Sweden' death toll unnerves its Nordic neighbours', Financial Times, 20 May 2020 (available at: <https://www.ft.com/content/46733256-5a84-4429-89e0-8cce9d4095e4> - last accessed on 29 May 2020).

66 For the critique of the "herd immunity" approach, see David Conn and Paul Lewis, 'Documents contradict UK government stance on COVID19 "herd immunity"', The Guardian, 12 April 2020 (available at: <https://www.theguardian.com/world/2020/apr/12/documents-contradict-uk-government-stance-on-covid-19-herd-immunity> - last accessed on 23 May 2020);

67 For the classification of definitions based on the level of commitment, see Jonathan B. Wiener & Michael D. Rogers, 'Comparing Precaution in the United States and Europe', 5 *Journal of Risk Research* (2002), pp. 320-321.

justify inaction, but nothing more than that,[68] and the one where uncertainty necessitates action.[69] Such a medium modus operandi is in line with the functioning of public health restrictions to free movement of persons in the EU. As analysed in the following section, public health may be used as a justification for restrictions of free movement, but not at all costs: the measure is acceptable only provided it is proportionate to the public health aim it pursues.

3. Proportionality of COVID-19 Mobility Restrictions

When choosing the types of precautionary measures, decision-makers are bound by international, European and national standards. The satisfaction of the principle of proportionality is one of the standards that has to be satisfied by precautionary measures which restrict free movement, both from the perspective of EU internal market rules and the rules on the functioning of precautionary principle. EU internal market law renders a free movement restriction acceptable only provided it is justifiable by one of the acceptable grounds and proportionate, meaning that it is suitable for the achievement of the desired aim, such as public health (suitability test), that the desired aim could not have been reached by a less restrictive measure (necessity test), and

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68 For the example of a weaker definition, claiming that uncertainty does not justify inaction, see Principle 15 of the Rio Declaration, which provides that "In order to protect the environment, the precautionary approach shall be widely applied by States according to their abilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation." (UNCED, Rio Declaration on Environment and Development (1992) U.N. Doc. A/CONF.151/5/Rev. 1, 31 I.L.M. 874.).

69 The most rigorous approach which shifts the burden of proof is visible in the Commission's prior approval mechanism, which requires the producer to go through a complicated procedure before the placing on the market of certain products, such as drugs, pesticides or food additives, which are considered "a priori" hazardous or which are potentially hazardous at a certain level of absorption (Commission Communication on precautionary principle, para. 6.4, p. 20.).

that the measure is reasonable, considering other competing interests and the degree of interference to free movement of persons (proportionality *stricto sensu*).[70]

On the other hand, both the Commission Communication on the precautionary principle and the related case-law of the Court of Justice set proportionality as one of the requirements that have to be satisfied by precautionary measures.[71] The Communication provides a detailed list of criteria that have to be met by each precautionary measure, by stating that such measures should be "proportional to the chosen level of protection, non-discriminatory in their application, consistent with similar measures already taken, based on an examination of the potential benefits and costs of action or lack of action (including, where appropriate and feasible, an economic cost/benefit analysis), subject to review, in the light of new scientific data, and capable of assigning responsibility for producing the scientific evidence necessary for a more

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70 In public health case, the Court of Justice often conducts only the first two tests and leaves out proportionality *stricto sensu*. On the functioning of the principle of proportionality and the tests of suitability, necessity and proportionality 'stricto sensu' it entails, see the Opinion of AG Maduro in Case C-434/04, *Criminal proceedings against Jan-Erik Anders Ahokainen and Mati Leppik*, ECLI:EU:C:2006:462. See also the chapter on 'The Principle of Proportionality: Review of Community Measures' in Takis Tridimas, The General Principles of EU Law, OUP, 2007; Alison L Young and Gráinne de Búrca, 'Proportionality', in General Principles of Law: European and Comparative Perspectives, Hart Publishing, 2017.

71 The Court of Justice emphasized the importance of proportionality of precautionary measures by claiming that "in exercising their discretion relating to the protection of public health, the Member States must comply with the principle of proportionality" (Case C-88/07 *Commission of the European Communities v Kingdom of Spain*, ECLI:EU:C:2009:123, para. 88; see also T-13//99 *Pfizer Animal Health v Council*, ECLI:EU:T:2002:209 paras. 163 and 410-411). The Court also pointed to the importance of non-discrimination by stating that "precautionary principle justifies the adoption of restrictive measures, provided they are non-discriminatory and objective" (Cases C-333/08 *European Commission v French Republic*, ECLI:EU:C:2010:44, para. 93 and Case C-77/09 *Gowan Comércio Internacional e Serviços Lda v Ministero della Salute*, ECLI:EU:C:2010:803, para. 76; C-446/08 *Solgar Vitamin's France and Others v Ministre de l'Économie, des Finances et de l'Emploi and Others*, ECLI:EU:C:2010:233, para. 70).

comprehensive risk assessment".[72] Decision-makers' choice of COVID-19 policies had to be in line with these criteria and it is questionable whether this was always the case.[73]

The satisfaction of proportionality requirement of COVID-19 mobility restrictions is particularly problematic. This section aims to examine the proportionality of mobility restrictions and link the analysis to the findings about the use of precautionary principle in COVID-19 mobility policies. It will be argued that reliance on precaution in the adoption of COVID-19 mobility restrictions transforms the application of the principle of proportionality, in particular its test of necessity, by lowering the standard of what is 'necessary', due to scientific uncertainty entailed within precautionary approach.

As explained in section II, the imposed COVID-19 mobility restrictions consisted of two groups of measures: the reintroduction of internal border controls and various types of travel restrictions and bans on entry and exit to/from national territories. The Schengen Borders Code explicitly provides that internal border controls can be reintroduced only as last resort measures and only provided they fulfil the proportionality requirements, meaning that their scope and duration does not exceed what is strictly necessary to respond to the serious threat.[74] Whereas the reintroduction of internal border checks probably satisfies the proportionality requirements, it is arguable whether the same could be claimed for all national travel restrictions and bans.

However, the precautionary nature of COVID-19 mobility restrictions (and of any other precautionary measure) transforms the proportionality analysis that has to be performed to check their compliance with EU law. This is due to the limited scope and uncertain character of evidence that was available to the legislator when imposing COVID-19 restrictions. Evaluating whether a partic-

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72 Communication from the Commission on the precautionary principle, COM(2000) 1 final, para. 6.
Despite its non-binding nature, the Commission Communication sets a valuable framework for the use of precautionary measures. For the contributions and the shortcomings of the Commission Communication, see John D. Graham and Susan Hsia, 'Europe's precautionary principle: Promise and pitfalls', *Journal of Risk Research* 5 (4), 2002 371–390. On the application of the criteria from the Communication in case-law, see Michael D. Rogers, 'Risk management and the record of the precautionary principle in EU case law', Journal of Risk Research 14 (4), 2011, pp. 467–484.

73 For the importance of learning a lesson from the COVID-19 pandemic and of making decision-makers accountable to the public for their departures from risk regulatory principles, see Alberto Alemanno, 'Taming COVID-19 by Regulation: An Opportunity for Self-Reflection', European Journal of Risk Regulation, 11(2), 2020, pp. 187-194.

74 Art. 25(1) and 25(2) of Schengen Borders Code.

ular travel ban is proportionate to the level of protection of human health it affords has to be assessed against a high degree of scientific uncertainty associated to the pandemic. It is relatively easy to argue that travel bans were suitable for the protection of public health, since they contributed to the reduction of the number of coronavirus infections by minimising the number of personal contacts and transmissions. However, the lack of reliable and certain scientific evidence that was available to decision-makers at the time of imposing restrictive measures renders the criterion of necessity much more flexible. Scientific uncertainty – inherent in any precautionary measure – lowers the threshold that has to be satisfied when assessing the legality of the legislator's choice of the restrictive measure. The legislator is, thus, expected to look at the limited and uncertain scientific evidence that was available at the time of the decision and reasonably conclude that no less restrictive and equally effective measure could have been taken. Due to the uncertain effectiveness of different restrictive options, the legislator will be tolerated a higher level of discretion, as long as the choice of the measure is reasonable, considering other legislative choices. Consequently, scientific uncertainty associated to COVID-19 and to any other precautionary measure, juxtaposes precautionary principle and the principle of proportionality – while enabling the former, it transforms the latter, by requiring a lower degree of necessity.

One of the COVID-19 mobility measures which is problematic from the perspective of its proportionality – primarily suitability and necessity – is the creation of special border corridors, which were set up by some Member States, for thousands of seasonal workers.[75] The way such mobility corridors were arranged, without sufficient regard to public health precautions, can be viewed as inconsistent with other COVID-19 mobility restrictions, thus challenging the suitability of those measures and departing from the general idea that free movement should temporarily be sacrificed for the benefit of public health. On the other hand, in case it was possible to organise such mobility corridors while respecting all public health standards, one cannot but wonder why it would not be possible to do the same on a wider scale, which calls into question the necessity of travel bans.

Further, the creation of 'travel bubbles', whereby a group of states allow each other's citizens and residents to enter freely, could again in certain cases be problematic from the perspective of the principles of proportionality and non-discrimination. 'Travel bubbles' are discriminatory in character, since they

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[75] Bejan, Raluca, "COVID-19 and Disposable Migrant Workers", Verffassungsblog, 16 April 2020 (available at: <https://verfassungsblog.de/covid-19-and-disposable-migrant-workers/> - last accessed on 15 June 2020).

treat certain Member States and their nationals more favourably than others, but they can be justified and suitable, provided the Member States creating the bubble have similar and controllable coronavirus situations, by sharing similar, low rates of coronavirus infection.[76] The Commission recognised this by stating that "where a Member State decides to allow travel into its territory or to specific regions and areas within its territory, it should do so in a non-discriminatory manner – allowing travel from all areas, regions or countries in the EU with similar epidemiological conditions" and continued that the lifting of restrictions must apply "without discrimination, to all EU citizens and to all residents of that Member State regardless of their nationality, and should be applied to all parts of the Union in a similar epidemiological situation".[77] On the other hand, the creation of 'travel bubbles' among Member States with a different epidemiological situation, or allowing 'travel bubbles' with only some Member States that share similar, low rates of infection, and not with others, would again not be suitable for the attainment of public health due to inconsistency of the approach.

COVID-19 mobility restrictions also problematize the application of the third proportionality test: proportionality '*stricto sensu*', which requires that the adopted restrictions are reasonable, considering other social interests and, therefore, necessitates a balancing exercise between the benefits for public health and the harm caused to free movement and other social interests. The balancing exercise, entailed within the principle of proportionality, is also contained within the political risk management part of precautionary approach, whereby decision-makers have to make a choice whether to act and how. The importance of balancing has been recognised in several EU COVID-19-related documents, when stating that "the decision to end restrictive measures is a multidimensional policy decision, involving balancing public health benefits against other social and economic impacts".[78]

The decision-makers' obligation to balance among different social interests shows that scientific data are just one – though indispensible – of the factors that determined political choices of COVID-19 precautionary measures. When

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[76] Such a 'travel bubble' was created by the Baltic states on 15 May 2020 (see Euractiv, "Baltics open Europe's first pandemic 'travel bubble' as curbs ease", 15 May 2020 (available at: <https://www.euractiv.com/section/justice-home-affairs/news/baltics-open-europes-first-pandemic-travel-bubble-as-curbs-ease/> - last accessed on 15 June 2020).

[77] Communication from the Commission: Towards a phased and coordinated approach for restoring freedom of movement and lifting internal border controls — COVID-19, 2020/C 169/03, C/2020/3250, OJ C 169, 15.5.2020, p. 30–37.

[78] Joint European Roadmap towards lifting COVID-19 containment measures, 2020/C 126/01, C/2020/2419, OJ C 126, 17.4.2020, p. 1–11., point 4.1.

responding to the COVID-19 pandemic, political leaders had to balance among a range of important considerations, human health being just one of them. Political decisions were made by taking into account a number of other factors, most important being the preservation of national healthcare systems against the risk of collapse due to limited healthcare capacities. In addition, they could not ignore the negative economic and social consequences of precautionary measures, as well as public health risks they created for the population, especially for the most vulnerable and older ones who became more susceptible to mental health problems caused by physical distancing and lockdowns and to other health problem caused by the postponement of medical examinations and treatments which did not require immediate and urgent attention.

Divergences in the choice of precautionary measures and their changes reflect not only the alterations in the number of infections and mortality, but also the differences in the outcomes of the balancing exercise, influenced by states' economic and social endurance and healthcare capacities. For this reason it is not surprising that the initial COVID-19 policies in most Member States gave complete precedence to the protection of public health over economic and other social interests – in line with the case-law on precautionary principle – whereas subsequent approaches become more receptive towards the balancing of public health and other economic and social interests.[79] It also means that a new COVID-19 wave of infections does not have to result in the same degree and type of travel restrictions and bans as the ones in winter/spring 2020.[80] This opens up the question whether travel bans adopted so far were proportionate '*stricto sensu*', considering the fact that their adoption and lifting was not always consistent with the alterations in the number of coronavirus infections in different Member States. Consequently, some Member States whose economies depend on tourism imposed more severe travel restrictions in winter/spring 2020, at the time when their coronavirus infec-

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79 According to the Court of Justice in Solvay Pharmaceuticals, the choice whether and what type of precautionary measures to take must "comply with the principle that the protection of public health, safety and the environment is to take precedence over economic interests" (Case T-392/02 *Solvay Pharmaceuticals BV v Council of the European Union*, ECLI identifier: ECLI:EU:T:2003:277, para. 125).

80 According to the ECDC, the second wave of coronavirus infections is inevitable and it is only questionable when and how big the wave will be (Euractiv, "'Not if but when': European health boss warns of virus second wave", 22 May 2020 (available at: <https://www.euractiv.com/section/coronavirus/news/not-if-but-when-european-health-boss-warns-of-virus-second-wave/?fbclid=IwAR24vA_s6VMxFi27Q45ApBalBEhoswNNilqhs-70wEJdY-dudxpGVNkMbZRQ> - last accessed on 29 May 2020).

tions were relatively low in a number of Member States, lifted them later on and decided to keep them lifted in summer 2020, to promote their tourist season, despite a considerable increase in the number of infections.

Nevertheless, it has to be acknowledged that the balancing among different social interests in the COVID-19 circumstances was extremely burdensome for a number of reasons. First, it is generally difficult to make trade-offs and find a compromise between the protection of public health, on the one hand, and the protection of fundamental freedoms and rights that had to be restricted, on the other hand. Second, decisions were difficult because of urgency caused by a high degree and speed of infectiveness of coronavirus and so many unknowns associated to it, and partly due to the difficulty to quantitatively measure its effects when comparing different precautionary measures. Similar to the problems encountered with the performance of the test of necessity, scientific uncertainty associated to COVID-19 made the balancing exercise also extremely challenging.

Third, the question whether travel bans were reasonable, considering other competing interests might vary depending on how wealthy a society is and how long it can withstand the economic consequences of lockdowns. The changing attitude towards COVID-19 has become visible in the past few months in which the political rhetoric turned from "we have to shut down for the virus" to "we have to dance with the virus". The answer to this question might also vary among EU Member States, based on their societal and cultural preferences, as different societies might have different expectations, fears and priorities. The ECDC recognised the importance of respecting the level of societal tolerance of the anticipated COVID-19 risks by stating that "societal norms and values underpinning freedom of movement and travel will need to be weighed against precautionary principles and the public acceptance of risks", thus confirming the fact that "what may be acceptable and feasible in one setting may not be in another".[81] In this context, one of the explanations why the Swedish response to the COVID-19 pandemic was much more relaxed than in the rest of Europe is based on the presumption that the level of social and institutional trust in Sweden is much higher than in most EU Member

[81] European Centre for Disease Prevention and Control. Considerations relating to social distancing measures in response to the COVID-19 epidemic. Stockholm: ECDC; 2020, p. 5. See also para. 5.2.1. of the Commission Communication stating that "the appropriate response in a given situation is thus the result of an eminently political decision, a function of the risk level that is 'acceptable' to the society on which the risk is imposed.".

States, due to its historical, political, social and cultural mores.[82] This, in effect, enabled Swedish decision-makers to adopt measures which rested on individual responsibility and mutual trust, instead of strict lockdowns.

Finally, the understanding whether a particular COVID-19 mobility restriction is reasonable or not might also vary among different social groups, depending on what they perceive as a threat. For a retired 75-year old person with chronic health problems, or any other individual belonging to a COVID-19 risk group, any measure which reduces the threat of coronavirus for his or her life and health might be reasonable, no matter what side effects. On the other hand, from the perspective of a young and healthy individual, who has lost his or her job or the source of income from tourism or seasonal work, the costs of border closures might outweigh their benefits. In addition, one's past experience, geographical proximity to infected regions and increased media exposure of coronavirus may also influence individual preferences associated to COVID-19 mobility restrictions.[83] As a result, one society, social group or individual might be willing to pay a higher cost to protect human health than another, which can, in effect, lead to different views on whether free movement restrictions were reasonable, thus influencing political choices of the types and degree of severity of the adopted restriction.

It has to be acknowledged that balancing among different social interests is not a peculiarity of COVID-19 mobility restrictions. On the contrary, balancing has to be performed by policy-makers every time they adopt a new measure and they are frequently confronted with diverse expectations from different social groups. However, in the COVID-19 circumstances, the balancing exercise is much more difficult than usually due to the severity, duration and scientific uncertainty associated to COVID-19 and due to the powerful impact COVID-19 policies make on our societies. It is not surprising that over time – as side effects of precautionary measures are becoming more palpable and measurable – public attitudes towards suitability, necessity and reasonableness of

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82 Lars Trägårdh and Umut Özkirimli, 'Why might Sweden's Covid-19 policy work? Trust between citizens and state', The Guardian, 21 April 2020 (available at: <https://www.theguardian.com/world/commentisfree/2020/apr/21/sweden-covid-19-policy-trust-citizens-state#maincontent> - last accessed on 29 May 2020). See also Nima Khorrami, 'Sweden did it differently – but is it working?', EuObserver, 6 May 2020 (available at: <https://euobserver.com/opinion/148260> - last accessed on 29 May 2020).

83 For the discussion on the importance of taking into account values and socio-emotional issues that may be associated to risks, see International Risk Governance Council (IRGC), 'Introduction to the IRGC Risk Governance Framework, revised version'. Lausanne: EPFL International Risk Governance Center, 2017.

the adopted measures are becoming more and more divergent. In this context, political leaders will have a difficult task of defending the adopted measures both before the public and before courts.

V. Conclusion

Coronavirus has generated a public health emergency of such magnitude and severity, never previously encountered by the EU and worldwide. It has put into jeopardy not only human lives and health, but also the viability of our health systems, economies and societies. The pandemic has resulted in significant social and system shifts, including visible changes of EU law. This text aimed to discuss some of these legal changes, by focusing on the roles of public health restrictions, precautionary principle and the principle of proportionality. The discussion has revealed that the EU has taken a precautionary approach towards the COVID-19 pandemic and that the implementation of precautionary principle transforms the application of the principle of proportionality to COVID-19 mobility restrictions. The text has also shown that COVID-19 has altered our understanding of public health restrictions, due to the fact that it has certain characteristics which differentiate if from other infectious diseases we have know so far and that it has, consequently, increased the difference between the conditions for the applicability of public health restrictions, when compared to public policy and public security restrictions.

The text has pointed to the challenges in finding the right balance between disease control and protection of fundamental freedoms, and between the level of health risks and societal risk tolerance. However, the weaknesses of COVID-19 mobility restrictions lie not only in the challenges they pose to the functioning of the EU internal market, but also in their inability to respond to the needs of contemporary societies and social cohesion. COVID-19 points to the need to prepare our public health systems for future pandemics and adjust our legal systems accordingly.

The Changing Nature of CFSP Sanctions: Evolution and Assessment

Clara Portela

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Introduction

The EU has resorted to sanctions in the framework of its Common Foreign and Security Policy (CFSP) to respond to diverse security challenges in its neighbourhood and beyond with remarkable frequency in recent years: from the Russian invasion of Ukraine to democratic backsliding in Nicaragua or illegal drilling off the coast of Cyprus. Moreover, it has recently diversified its sanctions practice, which used to be country-based, to encompass horizontal sanctions regimes, such as the blacklist of perpetrators of cyberattacks. A sanctions regime designed to address human rights violations worldwide was adopted in 2020, and a new one tackling grand corruption is currently under consideration.[1] Brussels is applying sanctions to address challenges of a novel

[1] *Von der Leyen*, U., State of the Union Address, 14 September 2022, available at: <https://ec.europa.eu/commission/presscorner/detail/en/speech_22_5493>.

nature, such as the misappropriation of state assets in third countries.[2] Most importantly, the EU has been wielding sanctions in order to oppose policies by global powers like China and, most prominently, Russia.[3]

The present chapter reviews the EU's use of sanctions in its CFSP. The first section offers an overview of their evolution over time and outlines the procedures for adoption and implementation of the measures. The second section looks at the evaluation of sanctions, elucidating the mechanisms through which sanctions are expected to operate and the objectives they intend to achieve. A third section analyses the goals of CFSP sanctions according to the EU discourse, and briefly reviews internal evaluation practices. Lastly, a concluding section reflects on the feasibility of evaluating CFSP sanctions and its implications for EU foreign policy.

I. CFSP SANCTIONS: An overview

1. The Evolving Practice of CFSP sanctions

When the UNSC mandated sanctions against Rhodesia in the 1960s, the member states of the then EC implemented them via national legislation. However, national acts implementing the UNSC Resolution differed in coverage, rendering this method unsatisfactory. Member states thus switched to the implementation of sanctions through the Community in the interest of their uniform implementation. They first agreed on the imposition of measures within the intergovernmental framework of European Political Cooperation (EPC), and subsequently adopted a Community Regulation for their implementation. Initial examples of sanctions regimes included those against the USSR in 1980 after the invasion of Afghanistan, and against Argentina in 1982 during the Falkland crisis. This autonomous EU practice took place in the framework of foreign policy co-ordination in the EPC, which evolved into the CFSP.[4]

The 1980s were a formative period in which sanctions imposition under the EPC was characterised by suboptimal compliance and, occasionally, instances of defection or lack of participation. After the Cold War, sanctions activity increased sharply, transforming them into one of the principal EU foreign pol-

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2 Council Decision (CFSP) 2019/1894 of 11 November 2019 concerning restrictive measures in view of Turkey's unauthorised drilling activities in the Eastern Mediterranean, ST/13262/2019/INIT, OJ L 291, 12 November 2019, 47–53.

3 *Helwig, N./Jokela, J./Portela, C.*, EU-Sanktionspolitik in geopolitischen Zeiten, Zeitschrift für Integration, 4/2020, pp. 278-94.

4 *Portela, C.* European Union Sanctions and Foreign Policy, Routledge, 2010, Abingdon.

icy tools. The CFSP, launched at that time, saw their formalization as legally binding instruments. Sanctions usually responded to democratic backsliding, human rights breaches, or armed conflicts such as the Yugoslav wars. As a result of the historical evolution, CFSP sanctions practice developed into three distinct strands: Firstly, it implements sanctions regimes mandated by the UNSC, virtually acting as an 'implementing agency' for Europe.[5] Secondly, the EU determines and implements its own sanctions in the absence of a UN mandate. This is referred to as 'autonomous practice' and has gained in sophistication over the years. Thirdly, the EU often supplements UNSC regimes with additional sanctions that go beyond the letter of the UNSC resolutions, a phenomenon labelled 'gold-plating'[6]: In Iran and North Korea, UN sanctions resolutions provided a basis for more far-reaching unilateral measures.[7]

CFSP sanctions enjoyed little visibility at the time. Most measures did not affect the economy as a whole – neither that of the EU nor those of the target countries. They mainly consisted of arms embargoes, visa bans and asset freezes on a few individuals, a combination that replicates UN sanctions habits. Economic bans, such as the flight ban on the former Yugoslavia or the gems embargo on Myanmar, remained rare.[8] EU sanctions are traditionally targeted, although the EU did not officially commit to this notion until the release of the Basic Principles on the Use of Restrictive Measures in 2004.[9] CFSP sanctions policy experienced a qualitative leap in 2010. Firstly, the EU started imposing economic sanctions. The EU agreed sanctions on Iran that supplemented UN measures, including an oil embargo and far-reaching financial restrictions replicating US sanctions. This constituted a novelty as they adversely affected European enterprises, hitting some sectors badly. This was followed by sanctions against Côte d'Ivoire following the presidential elections of 2010, which saw unprecedented measures such as a ban on the import of cocoa and the blacklisting of the country's main harbours.[10] In Libya, the EU supplemented UNSC measures with additional designations as well as a ban on equipment for internal repression. Subsequently, it prohibited dealings with

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5 *Portela*, C., National implementation of United Nations Security Council sanctions: Towards fragmentation, International Journal, 65(1), 2009, pp. 13-30.

6 *Taylor*, B., Sanctions as Grand Strategy, 2010, IISS, London.

7 *Portela*, C., Sanctions in EU Foreign Policy, in Helwig, N., Jokela, J., Portela, C. (eds.), Sharpening EU sanctions policy, FIIA Report 63, 2020, FIIA: Helsinki.

8 *Portela*, C. (2010).

9 Council of the EU, Basic principles on the use of restrictive measures (sanctions), 10198/1/04 REV 1, Brussels, 7 June 2004, available at <https://data.consilium.europa.eu/doc/document/ST-10198-2004-REV-1/en/pdf>.

10 *Vines*, A., The effectiveness of UN and EU sanctions: Lessons for the twenty-first century, International Affairs 88(4), 2012, pp. 867-77.

Libyan financial entities, the Libyan National Oil Corporation and five of its subsidiaries as well as energy firms, and eventually blacklisted six Libyan harbours.[11] In Syria, the EU deployed its entire sanctions toolbox in just a few months, including a ban on the import of Syrian oil and gas.[12] In 2014, the EU responded to the annexation of Crimea and to Russian military support for the destabilization activities of the separatist forces in Eastern Ukraine with a varied sanctions package, representing the first serious instance of economic restrictions against Moscow. Whereas the EU initially interpreted the concept of sanctions rather narrowly during the 1990s, it is increasingly enacting economic sanctions.[13]

In addition, EU sanctions policy has also seen new goals. In the 2000s, the measures on Iran and North Korea constitute the first instances of EU sanctions addressing the proliferation of WMD. In the last decade, the asset freezes imposed on Egypt, Tunisia and Ukraine after their revolutionary transitions are the first EU blacklists to address the misappropriation of state assets, and the only sanctions imposed upon deposed leaders after they left office.[14] In addition, it has made increased use of supplementary sanctions complementing measures by the UNSC. Most recently, the EU has adopted a new sanctions technique: Modelled on US sanctions practice, thematic sanctions regimes allow for the listing of entities and individuals even in the absence of an international crisis.[15] While horizontal sanctions regimes coexist with country regimes, they allow for the blacklisting of private entities disconnected from state authorities. So far, horizontal sanctions regimes have been enacted to respond to cyber-attacks, the use of chemical weapons, and severe human rights violations.[16]

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11 *König*, N., The EU and the Libyan crisis. In quest of coherence?, International Spectator, 46(4), 2011, pp. 11-30.

12 *Portela*, C., The EU Sanctions Operation against Syria: Conflict management by other means?, Revista UNISCI 23(1), 2012, pp. 151-158.

13 *Portela*, C., Are EU sanctions 'targeted'?, Cambridge Review of International Affairs, 29(3), 2016, pp. 912-929.

14 *Portela*, C., Las sanciones PESC como instrumento en la lucha contra la corrupción y la promoción de la buena gobernanza en la política exterior de la UE, in: Sanz, S. (ed.), La Unión Europea y el reto del Estado de Derecho, Aranzadi-Thomson Reuters, 2022, pp. 157-177.

15 *Eckes*, C., EU global human rights sanctions regime: is the genie out of the bottle?, Journal of Contemporary European Studies, 30(2), 2022, pp. 255-269.

16 *Portela*, C., The EU's human rights sanctions regime: Unfinished business?, Revista General de Derecho Europeo [General Journal of European Law], 54, 2021, pp. 19-44.

2. Decision-making and implementation of CFSP sanctions

The decision-making process leading to the enactment of sanctions features two stages, constituting a cross-pillar mechanism unique in the EU machinery. The procedure invariably starts with the adoption of a political decision in the intergovernmental CFSP.[17] Proposals for sanctions enactment are tabled by the High Representative or the member states. Normally, the impulse originates from the Council Working Group dealing with the geographical area where the crisis unfolds. Once the geographical Working Group agrees that sanctions should be imposed, the file is transferred to the Council Working Party on External Relations, which is in charge of drafting the relevant legislation. Only in certain sensitive files, the impulse has emanated from the European Council, especially after the entry into force of the Treaty of Lisbon.[18] This was the case with the sanctions imposed on Russia, but also with the horizontal regime against cyberattacks and against the employment of chemical weapons.

Once adopted, the text becomes a Council Decision under the CFSP. In cases where the measures agreed are economic or financial in nature, this act must be followed by a Regulation. The draft regulation, which is tabled by the High Representative jointly with the Commission,[19] must be agreed upon by qualified majority. Absent economic or financial implications, the CFSP decision suffices. Both acts are agreed upon by the Council RELEX working group. The addition or deletion of designations generally requires the adoption of new legislation.

The "two-step procedure" was put in place in order to bridge the division between the competence for external trade of the Community and the member states' prerogative in the foreign policy realm. This peculiar procedure may generate an anomalous time gap between both pieces of legislation, with the implementing regulation sometimes being adopted several weeks after the CFSP decision. In the past, some member states reportedly took advantage of the separate negotiation of the regulation to weaken the measures agreed

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17 *Koutrakos*, P., Trade, Foreign Policy and Defence in EU Constitutional Law, Hart, 2001, Oxford.

18 *Szép*, V., New intergovernmentalism meets EU sanctions policy: The European Council orchestrates the restrictive measures imposed against Russia, Journal of European Integration, 42(6), 2020, pp. 855-871.

19 *Gestri*, M., Sanctions imposed by the European Union: Legal and institutional aspects, in: Ronzitti, N. (ed.), Coercive Diplomacy, Sanctions and International Law, Brill Nijhoff, Leiden, 2016, pp. 70-102.

in the previous CFSP decision.[20] Nowadays there is little evidence that the negotiation of the regulation is used to undermine measures agreed during the CFSP stage. By contrast, member states endeavour to specify the bans in the CFSP document rather than waiting for the negotiation of the regulation.[21] While this approach has sped up the process, it reduces the Commission's latitude. Nowadays, in line with the recommendation of the Guidelines,[22] both legal acts are adopted simultaneously. This has done away with potential time gap between the release of the two acts.

While sanctions legislation is adopted centrally in Brussels, the system for granting exemptions is de-centralized. Even though these provisions are common to all EU states, every member state enjoys discretion in clearing requests for exemptions. The granting of exemptions to travel bans follows a different system, the 'no-objection procedure', whereby the Council must be notified in writing when any member state wishes to grant an exemption. The exemption shall be deemed to be granted unless another member raises an objection within 48 hours of receiving notification of the proposed exemption. With the only exception of this mechanism, national authorities are required to report to the Commission on their activities.[23] Should a member state fail to adopt the necessary implementing legislation laying down penalties for sanctions violations, the Commission could initiate an infringement procedure.[24] Yet, this has never occurred, suggesting that the latitude of member states in implementation is largely respected. Discrepancies in national implementation of different member states, albeit long detected,[25] became a concern in the context of the sanctions packages adopted in response to Russia's invasion of Ukraine

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20 *Buchet de Neuilly*, Y., European Union's external relations fields: the multipillar issue of economic sanctions against Serbia, in: Knodt, M. and Princen, S. (eds.), Understanding the European Union's external relations, Routledge, Abingdon, 2003, pp. 92-106.

21 *Poeschke*, O., Maastrichts langer Schatten: Das auswärtige Handeln der EU – Verschiebungen im institutionellen Gefüge?, Hamburg Review of Social Sciences, 3(1), 2008, pp. 37-69.

22 Council of the EU, Guidelines on the implementation and evaluation of restrictive measures (sanctions), 5664/18, Brussels, 4 May 2018, available at <https://data.consilium.europa.eu/doc/document/ST-5664-2018-INIT/en/pdf>.

23 *Gestri* (2016), p. 92.

24 *Gestri* (2016), 94.

25 *Drulakova, R./Prikryl*, P., The implementation of sanctions imposed by the European Union, Central European Journal of International and Security Studies, 10(1), 2016, pp., 134-160; *Golumbic, C./ Ruff, R.*, Who do I call for an EU sanctions exception? Why the EU economic sanctions regime should centralize licensing, Georgetown Journal of International Law, 44, 2013, pp. 1007-53.

in 2022, as they may give rise to inconsistencies.[26] In response, the European Commission proposed the inclusion of sanctions violation as a "Eurocrime" under Art. 83(1) TEU, a proposal that has already been adopted.[27]

II. The operation and evaluation of international sanctions

Having introduced CFSP sanctions, we now turn to the question of how useful they are. In order to discuss their evaluation, we first need to look at how international sanctions operate and what goals they purport to achieve.

1. The theory of sanctions

A discussion on the evaluation of the effectiveness of sanctions must be preceded by an overview of the expected operation of sanctions (or sanctions theory), as well as a determination of the functions they fulfil in international relations. The standard mechanism for the operation of sanctions was formulated by peace scholar *Johan Galtung* in a seminal study on sanctions against Southern Rhodesia in the 1960s. Galtung delineated the expected mode of operation of sanctions, which implied that the economic harm produced by sanctions generates popular discontent, which pressures the rulers to conform to sender demands in order to restore the previous wealth. Thus, the leadership faces a choice between giving in to the sender and being unseated. According to *Galtung*, the theory foresees that there is a limit to how much value deprivation the system can stand, and that once this limit is reached, then political disintegration will eventually lead to surrender or willingness to negotiate.[28] *Galtung* criticized the 'naive theory' of sanctions on account of its flawed assumptions, in view of their frequent failure. Sanctions have not always led to economic downturn as the target economy adjusted to new circumstances. Popular discontent with sanctions sometimes translates into animosity towards the sender rather than the domestic leadership, producing the so-called 'rally-around-the-flag effect'.[29] Economic sanctions can also

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26 Genocide Network, Prosecution of sanctions (restrictive measures) violations in national jurisdictions: A comparative analysis, EUROJUST, 2021, The Hague.

27 Council Decision (EU) 2022/2332 of 28 November 2022 on identifying the violation of Union restrictive measures as an area of crime that meets the criteria specified in Article 83(1) of the Treaty on the Functioning of the European Union, ST/10287/2022/REV/1, OJ L 308, 29.11.2022, p. 18-21.

28 *Galtung*, J., On the Effects of International Economic Sanctions, with examples from the case of Rhodesia, World Politics, 19(3), 1967, pp. 378–416, p. 388.

29 *Galtung* (1967).

be counterproductive:[30] perverse effects include an increase in corruption in societies under sanctions as they promote public tolerance for lawbreaking. Another effect can be the tightening of governmental control over essential supplies in the form of rationing.[31]

The advent of targeted sanctions in 1990s heralded a certain departure from the causal logic explained above. The harm produced by targeted sanctions focuses on the leaderships or the elites that support them, transposing the logic of the naive theory to the individual or elite level.[32] The mode of operation of sanctions is closely linked to the question of the purposes and functions of sanctions. Sanctions are not exclusively intended to compel a change in the political behaviour of leaders. Scholarship has long established that compliance is not the only, and not even the primary aim of sanctions, but that they fulfil other functions. These include the desire to demonstrate the sender resolve, anticipating or deflecting criticism, maintaining certain patterns of behaviour in international affairs, deterring further engagement in the objectionable actions by the target and third parties, or promoting subversion in the target.[33] They weaken the economic and military potential of the targeted state – along the lines of the notion of containment in strategic studies. They also serve to assuage domestic audiences.[34] Sanctions stigmatise target policies,[35] and serve to uphold international norms and to support international structures like the UN.[36] They also serve the purpose of positioning actors in strategic terms with regard to a dispute,[37] and can strengthen the interna-

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30 *Peksen*, D., When do imposed economic sanctions work? A critical review of the sanctions effectiveness literature, Defence and Peace Economics, 30(6), 2019, pp. 635-647.

31 See respectively, *Andreas*, P., Criminalising consequences of sanctions: Embargo busting and its legacy, International Studies Quarterly, 49(2), 2005, pp. 335-360; *Cortright*, D./*Lopez*, G., The Sanctions Decade. Assessing UN Strategies in the 1990s, Lynne Rienner, 2000, Boulder.

32 *Brzoska*, M., From dumb to smart? Recent reforms of UN sanctions, Global Governance, 9(4), 2003, pp. 519-535; *Portela*, C. (2010).

33 *Barber*, J., Economic Sanctions as a Policy Instrument, International Affairs, 55, 1979, pp. 367-384; *Lindsay*, J., Trade Sanctions as Policy Instruments: A Re-Examination, International Studies Quarterly, 30(2), 1986, pp. 153-173.

34 *Barber* (1979); *Lindsay* (1986).

35 *Elliott*, K., Assessing UN sanctions after the cold war: New and evolving standards of measurement, International Journal, 65(1), 2010, pp. 85-97.

36 *Hoffmann*, F., The Functions of Economic Sanctions: A Comparative Analysis, Journal of Peace Research, 4(2), 1967, pp. 140–160.

37 *Krause*, J., Western economic and political sanctions as instruments of strategic competition with Russia, in: Ronzitti, N. (Ed.), Coercive Diplomacy, Sanctions and International Law, Brill Nijhoff, Leiden, 2016, pp. 270-286; *Taylor* (2010).

tional profile of senders.[38] Despite the increasing scholarly recognition of the multiplicity of sanctions roles,[39] most of the specialised literature continues to evaluate sanctions on the basis of their ability to coerce targets. Nevertheless, the ability of sanctions to bring about compliance continues to be a highly contentious matter, both in the scholarly and the policy debate.

2. Assessing sanctions success

Standard analyses of sanctions distinguish between 'economic' and 'political' effectiveness. The former refers to the effectiveness in inflicting disutility on the target while the latter refers to efficacy in compelling policy changes. There is no unified terminology: *Bergeijk* distinguishes 'effectiveness' from 'success',[40] whereas *Cortright* and *Lopez* speak of 'economic' and 'political' success.[41] Sanctions 'success' is routinely assessed on the basis of whether or not sanctions contribute to the achievement of stated policy objectives. The yardstick of a successful sanctions regime is an 'observable change in behaviour'. Policy outcomes are judged 'against the stated policy goal of the sender country'.[42]

The measurement of changes in behaviour against stated policy goals is fraught with difficulties. Sender countries do not always announce their goals unequivocally.[43] Until the late 1990s, EU sanctions were imposed without spelling out the policy goals pursued. Instead, documents typically included a description of the situation leading to sanctions enactment, often remaining silent on the policy changes that are expected from the target. The condemnation of certain policies can also be interpreted as the demand for their reversal. However, since the goals of sanctions regimes are often vague, it is presumed that they are imposed with a view to restoring the status quo ante.

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38 *Blavoukos, S./Bourantonis, D.*, Do Sanctions Strengthen the International Presence of the EU?, European Foreign Affairs Review, 19(3), 2014, pp. 393–410.

39 *Giumelli, F.*, The purposes of targeted sanctions, in Biersteker, T., Eckert, S. and Tourinho, M. (eds.), Targeted Sanctions. The effectiveness of UN Action, Cambridge University Press, Cambridge, 2016, pp. 38-59; *Gould-Davies, N.*, Russia, the West and sanctions, Survival, 62(1), 2020, pp. 7-28.

40 *Bergeijk, P. van*, Economic Diplomacy, Trade and Commercial Policy. Positive and Negative Sanctions in a New World Order, Edward Elgar, Aldershot, 1994, p. 23.

41 *Cortright/Lopez* (2000), p. 3.

42 *Hufbauer, G./Schott, J./Elliott, K.A.*, Economic Sanctions Reconsidered, Peterson Institute for International Economics: Washington D.C., 1985, p. 32.

43 *Hufbauer et al.* (1985), p. 31.

A further methodological challenge consists of drawing the line between the attainment of the policy goal and the contribution that sanctions made towards it, captured in the notions of 'policy outcome' and 'sanctions contribution'.[44] The determination as to whether a policy change is related to the imposition of sanctions is made based on public statements by officials from the sender country, supplemented by the assessment of country analysts.[45] Statements by decision-makers cannot be considered completely reliable sources, as both sides may be willing to promote different readings of the events. This is compounded by the challenge of controlling for concurrent policy tools. Some experts have voiced reservations about the feasibility of determining that sanctions were responsible for a specific outcome given that they are often used in conjunction with diplomacy and military threats. One author therefore puts forward three criteria for crediting sanctions with success: the target state concedes to a significant proportion of the coercer's demands; sanctions are threatened or applied before the target changes its behaviour; and no explanation with greater credibility exists for the target's change of behaviour.[46]

III. Evaluating CFSP sanctions

1. EU discourse on sanctions

In accordance with the procedure for evaluation put forward above, the functions and goals of CFSP sanctions ought to be interrogated. According to EU foreign policy discourse, what are sanctions for? While sanctions have increased their presence in EU policy documents since it adopted its first European Security Strategy (ESS) in 2003, their centrality as a tool in the EU's management of external challenges does not come to the fore in EU strategic discourse. The ESS of 2003 claims that countries which "have placed themselves outside the bounds of international society", have "sought isolation" or "persistently violate international norms" "should understand that there is a price to be paid, including in their relationship with the European Union".[47] The same document asserts that "proliferation may be…attacked through political, economic and other pressures", and that "conditionality and targeted trade

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44 *Hufbauer et al.* (1985).

45 *Hufbauer et al.* (1985), p. 2.

46 *Pape, R.*, Why Economic Sanctions Still Do Not Work, International Security, 23(1), 1998, pp. 66-77.

47 Council of the EU, European Security Strategy. A secure Europe in a better world, Brussels, 12 December 2003, p. 10.

measures remains an important feature in our policy that we should further reinforce".[48] It can be presumed that sanctions are implied in terms like 'economic pressures' or 'targeted trade measures'.

The 'Strategy against the Proliferation of Weapons of Mass Destruction (WMD)' from the same year states that when political dialogue and diplomatic pressure have failed, "coercive measures under Chapter VII of the UN Charter and international law (sanctions, selective or global, interceptions of shipments and, as appropriate, the use of force) could be envisioned".[49] Similarly, the Global Strategy of June 2016 claims: "A stronger Union requires investing in all dimensions of foreign policy…from trade and sanctions to diplomacy and development". It adds that "long-term work on pre-emptive peace, resilience and human rights must be tied to crisis response through…sanctions and diplomacy".[50] The Global Strategy portrays sanctions as instruments in the service of peace, obviating any hint of coercive employment: "Restrictive measures, coupled with diplomacy, are key tools to bring about peaceful change".[51] The Global Strategy never refers explicitly to sanctions in connection with nuclear proliferation: "We will use every means at our disposal to assist in resolving proliferation crises, as we successfully did on the Iranian nuclear programme".[52] No mention is made of the key role of sanctions in promoting the Iran nuclear deal, thanks to which the EU is now recognized as a non-proliferation actor.[53]

Documents on CFSP sanctions mostly tackle implementation: 'Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU',[54] as well as 'Best Practices on Effective Implementation of Financial Restrictive Measures'.[55] Yet, owing to their focus on implementation, they reveal little about the place that sanctions occupy in the EU's broader strategy. The key policy document is the 'Basic Principles on the Use of Restrictive Measures' of 2004, where the Council announces that it "will

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48 Council of the EU, Guidelines on the implementation and evaluation of restrictive measures (sanctions), 15579/03, Brussels, 8 December 2003, p. 7, p. 10.

49 Council of the EU (2003), p. 5.

50 Council of the EU (2003), p. 47, p. 51.

51 Council of the EU (2003), p. 32.

52 Council of the EU (2003), pp. 41-42.

53 *Alcaro, R./Bassiri Tabrizi*, A., European and Iran's nuclear issue: The labours and sorrows of a supporting actor, International Spectator, 49(3), 2014, pp. 14-20.

54 Council of the EU (2003), Council of the EU (2018).

55 Council of the EU, EU Best Practices for the effective implementation of restrictive measures (10254/15), 2015.

impose autonomous EU sanctions in support of efforts to fight terrorism and the proliferation of weapons of mass destruction and…to uphold respect for human rights, democracy, the rule of law and good governance".[56]

While general strategic documents offer sparse information on the purposes and roles of CFSP sanctions in EU foreign policy, the bold sanctions packages adopted by Brussels following the 2022 Russian invasion of Ukraine have offered ample opportunity to key decision makers to expand on their views of sanctions. Commission President *Ursula Von der Leyen* profiled herself as a leader of the sanctions response, benefiting from the key role played by the Commission in the design of measures. *Von der Leyen* announced every new sanctions round alongside High Representative for the Union's Foreign Policy and Security Affairs, *Josep Borrell*. In this context, EU discourse became more bellicose.[57] Commission President *von der Leyen* stated that sanctions aimed to 'cripple Putin's ability to finance his war machine'[58]. She described the fourth package of sanctions as aiming 'to further isolate Russia and drain the resources it uses to finance this […] war'. She spoke of 'pressuring Russian elites close to Putin as well as their families and enablers' and mentioned the determination to 'stop the group close to Putin and the architects of his war' and 'hit a central sector of Russia's system, deprive it of billions of export revenues and ensure that our citizens are not subsidising Putin's war'[59]. For his part, HR *Borrell* highlighted that, in addition to limiting the economic resources of the target country, sanctions fulfil a symbolic function by messaging the unacceptability of its behaviour: 'The political signal is now very strong: Europe is willing to take significant economic risks to coerce Russia for its invasion and to extend its political margin of manoeuvre *vis-à-vis* Moscow in the future'[60]. The joint imposition of sanctions allows the EU to portray itself as a unified entity – 'the EU stands firmly with the brave people of Ukraine'— thanks to 'sanctions *we* have adopted'[61]. It also aligns Brussels with its global

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56 Council of the EU, Basic principles on the use of restrictive measures (Sanctions), Brussels, 7 June 2004, p. 2.

57 *Portela, C./Kluge, J.*, Slow-acting tools, Brief 22, EUISS, 2022, Paris.

58 European Commission (2022a), Statement by President von der Leyen on further measures to react to Russia's invasion of Ukraine, 26 February 2022, available at: <https://ec.europa.eu/commission/presscorner/detail/en/statement_22_1422>.

59 European Commission (2022b), Statement by President von der Leyen on the fourth package of restrictive measures against Russia, 11 March 2022, available at: <https://ec.europa.eu/commission/presscorner/detail/es/statement_22_1724>.

60 *Borrell, J.*, Beyond sanctions: what future for Russia?, Working Paper 6/22, Instituto Complutense de Estudios Internacionales, 2022, available at: <https://www.ucm.es/icei/file/wp0622-1?ver>.

61 European Commission (2022a), emphasis added.

allies in what is presented as a joint endeavour: 'the EU and our partners in the G7 continue to work in lockstep to ramp up the economic pressure against the Kremlin'[62]. Most evidently, the normative intent of sanctions finds expression in *Borrell*'s statement that 'Russia cannot grossly violate international law and, at the same time, expect to benefit from the privileges of being part of the international economic order'[63].

2. Assessing efficacy

Despite the formidable challenges involved in measuring the effectiveness of sanctions, attempts have been made at assessing their success. Various analyses found success rates comparable to those of other senders, which oscillate between 10 and 30% of the total number of attempts.[64] A comparative evaluation concluded that CFSP sanctions tend to be less successful than aid suspensions in the context of the EU's development policy.[65] Recent analyses have attempted to evaluate two functions of sanctions in addition to their coercive intent, suggesting that their containment and signalling capacity display a higher level of effectiveness.[66] Preliminary assessments of EU sanctions on Russia do not suggest that they are more than moderately successful.[67] However, their diverging outcomes largely result from the different methodologies they follow.

Routinely, EU institutions do not have a mandate to monitor the effects of CFSP sanctions beyond the duties of the relevant desk officers and the geographical working groups.[68] No agreed metrics exist for such monitoring, and evaluations have been conducted on an ad-hoc basis.[69] The sanctions against Russia of 2014 marked a departure from regular practice: Following the enactment of the measures, the Commission started to evaluate their impact on the

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62 Ibid.

63 Ibid.

64 *Brzoska*, M., Research on the effectiveness of international sanctions, in: Hegemann, H., Heller, R., Kahl, M. (eds.), Studying 'effectiveness' in International Relations, Budrich, 2013, Opladen, pp. 143–60.

65 *Portela* (2010).

66 *Biersteker et al.* (2016); *Moret, E. et al.*, The New Deterrent, Graduate Institute, 2016, Geneva.

67 *Christie, E.*, The design and impact of Western economic sanctions against Russia, RUSI Journal, 161(3), 2016, pp. 52-64; *Connolly, R.*, The Empire strikes back. Economic statecraft and the securitisation of political economy in Russia, Europe-Asia Studies, 68(4), 2016, pp. 750-773; *Gould-Davies* (2020); *Moret et al.* (2016).

68 *Vries, A. de/Portela, C./Guijarro, B.*, Improving the effectiveness of sanctions: A checklist for the EU, CEPS special report No 95, Centre for European Policy Studies, 2014, Brussels.

69 Interview, quoted in *Portela* 2010.

Russian economy and their effects on the economies of its own member states. Importantly, no monitoring of possible unintended consequences, including humanitarian effects is conducted. Nevertheless, the monitoring exercise taking place under the Russia sanctions regime is conceived as a new task to be added to the general duties of the desk officers rather than as the core mission of dedicated staff. The sanctions units at the European External Action Service and the Commission lack a mandate to monitor impacts.

IV. Final considerations

The overview presented in this chapter renders a rich but complex picture of CFSP sanctions and their evaluation. Firstly, we have established that, as with every public policy, the objectives of the sanctions should be ascertained before any evaluation can be conducted. However, taking the current sanctions against Russia as an illustration, we find that the objectives of CFSP sanctions are very diverse. To judge by the EU's own discourse, they do not seem to be guided by a single logic. On the one hand, there is an attempt to target the sanctions to key decision-makers and their associated elites and industries, on the other hand, there is a deliberate attempt to reduce the budget available to fund the war machine with measures that will inevitably sink the living standards of average citizens. In terms of economic intent, the CFSP sanctions combine a targeted logic with a comprehensive logic. Secondly, the standard methodology for sanctions evaluation assesses sanctions effectiveness along one dimension only – namely, the ability of sanctions to coerce a policy change. Some recent innovation allows for the assessment of sanctions along three dimensions, adding international messaging and containment;[70] however, these do not exhaust the multiple goals pursued by the EU in light of its leaders' discourse. Moreover, EU discourse appears to emphasise the quality of sanctions as a "price tag", i.e. as a price to pay for breaching internationally agreed principles, an idea present both in the ESS and in recent discourse. This reading of sanctions makes their impacts virtually irrelevant, as the penalty effect is accomplished automatically upon imposition. Or put differently, the impact is deployed automatically upon the enactment of the sanctions. Our scarce knowledge of how the EU assesses sanctions impacts deprives us from a potentially useful source of information. In the case of the Russia sanctions, the Commission undertakes regular monitoring of eco-

[70] *Biersteker et al.* (2016); *Moret et al.* (2016).

nomic impact only, but the evaluation of political impacts ultimately remains in the hands of the European Council,[71] and performed in closed-door meetings which render evaluation criteria obscure.

The development of CFSP sanctions appears to have been accompanied, at a first stage, by an emphasis on implementation, which has recently developed into a growing interest in enforcement. Yet, the evaluation of the measures has not received much attention – the assessment of economic impacts is undertaken at the national level and by the Commission. However, the assessment of political effectiveness remains de-centralised, and little evidence exists that any assessments of CFSP sanctions have been conducted by national bureaucracies before the 2014 turning point. The lack of attention granted to the evaluation of political effects in the pre-2014 era may have had detrimental effects for current sanctions exercises. Notably, the long-standing practice of imposing sanctions against individuals rather than economic sanctions has never been evaluated, which raises questions about their suitability. What is the point of persisting with sanctions techniques without collecting systematic information about their impacts (or lack thereof)? Some preliminary insights from academic research on cases like Cote d'Ivoire or Zimbabwe indicate that sanctions on members of a small elite may foster group cohesion. Moreover, many individuals report having been blacklisted without any prior warning, which suggests that the EU refrained from threatening the listing in order to obtain political concessions before enacting the designation.[72] These observations point to an inadequate use of individual sanctions, possibly amounting to missed opportunities to help resolve the political crises in both countries. With the increased interest in CFSP sanctions in the aftermath of the Russian invasion of Ukraine, the hope is that an enhanced use of research can be made for the benefit of improving CFSP sanctions design and evaluation practices.

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71 *Portela et al.* (2020).

72 *Portela, C./Van Laer, T.*, The design and impact of individual sanctions: Evidence from elites in Côte d'Ivoire and Zimbabwe, Politics and Governance, 10(1), 2022, pp. 26-35.

The War in Ukraine and Europe: A Situational Analysis and Negotiation Perspectives

Michael Ambühl/Nora Meier

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I. Introduction

For many, Russia's brutal war of aggression on Ukraine came as a surprise, either because the likelihood of an attack was dismissed fundamentally or because it was not expected on this scale. The shock – even after several months of open hostilities – still runs deep and the respect for the Ukrainian people, the military and the government, who have presented a resolute and united front against the aggressor since the beginning of the war remains high. It is probably not least due to this spirit of resistance that Ukraine – contrary to Putin's initial expectations – has been able to hold its ground so far. However, given the ongoing duration of the war, the large-scale destruction of the country and the increasing number of casualties, it is worth considering ways out of this situation. This requires deliberation and the weighing of strategies and outcomes.

II. Game Theoretical Analysis

1. Chicken Game

To outline these underlying processes, we begin with a game-theoretical analysis based on the so-called *Chicken Game*. Such an analysis enables a thorough examination of the situation and in doing so provides insights into the conflict. In the Chicken Game, two cars are racing towards each other on a narrow road. Each driver can either swerve or keep racing. Both strategies are undesirable however: (i) swerving first results in being labeled a coward (or "chicken") or (ii) to keep racing – hoping, the other one swerves first – means both will end up dying. Consequently, it does not pay off for either party to even enter this game.

However, what to do if the game has already started and the cars are bumper to bumper? Such a situation requires a modification of the Chicken Game. We consider three strategies for each of the two drivers: (i) continue to push, (ii) swerve, or (iii) stop pushing to find a way out together. In the following section, we will apply this starting point to the war in Ukraine. We call the newly designed game "*Salgina Game*" in reference to the Salginatobel bridge in the Prättigau in Eastern Switzerland.[1] It is a single-lane bridge, where crossing is also not possible but where swerving – in contrast to the Chicken Game – ends deadly, namely in a fatal fall of 90 meters into the canyon.

2. Salgina Game

The two drivers – representing Russia and Ukraine – face each other in the middle of the single-lane bridge. In analogy to the above three strategies, both can either: (i) *fight* (continue to push), (ii) *surrender* (swerve) or (iii) *negotiate* (stop pushing to find a way out together). This results in a matrix of a total of nine (32) possible combinations of strategies or outcomes. While all nine combinations are theoretically possible, some are more likely than others. For both countries, each of the nine combinations is evaluated independently – from what is perceived as *their* point of view – on a scale of 1-9. The combination that represents the worst outcome for a state receives 1 point (lowest individual pay-off). The best outcome is assigned 9 points (highest individual pay-off).

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[1] It is 90 m high and 133 m long and was designed by Swiss civil engineer Robert Maillart, built between 1929 and 1930. Due to its unique design, the «American Society of Civil Engineers» declared the Salginatobel bridge an «International Historic Civil Engineering Landmark» in 1991, available at: <https://www.salginatobelbridge.com>.

It is not the goal of the model to indicate what the actors should ideally do. We describe the decision-making situation of the parties. Thus, it is *not* a normative model, but a descriptive one. The analysis leads to the following:

Ukraine achieves the highest individual payoff (9) if it continues to fight while Russia surrenders (AB). The opposite is true for Russia (BA). In both cases however, one wins only if the other suffers a complete defeat (1). In reality, these two cases (AB and BA) represent the achievement of the maximum goals declared by the two parties. For Ukraine, this is the expulsion of Russian troops from its entire territory (AB) and for Russia, it is the occupation of all of Ukraine (BA). In our opinion, neither of these maximum goals seems feasible, at least not in the near future. For one, regardless of what international law says, Russia is likely not willing to give up Crimea. In addition to its higher strategic importance, Crimea has been more strongly integrated into the Russian Federation than, for instance, the Donbass. And at the same time, we believe that Ukraine cannot rely on endless, unconditional support of the West in

		Russia		
		fight	surrender	negotiate
Ukraine	fight	5 5 [Nash 1] (AA) [Pareto inferior]	9 1 (AB)	7 4 (AC)
	surrender	1 9 (BA)	3 3 (BB)	2 6 (BC)
	negotiate	4 7 (CA)	6 2 (CB)	8 8 [Nash 2] (CC) [Pareto]

establishing the pre-2014 borders as Russia's nuclear arsenal ultimately prevents the Western supply of heavy weaponry needed for this purpose.[2] For the other, Russia lacks the military, political and economic capacity to fully invade Ukraine. Thus – our hypothesis – in reality, AB and BA do not seem as probable outcomes.

If both continue to fight (AA, 5 each), it results in what is known as a *Nash equilibrium*, meaning that neither Ukraine nor Russia can gain anything if it alone changed its strategy.[3] We call the equilibrium in (AA) *Nash equilibrium 1 [Nash 1]*. AA is not a so-called *Pareto optimum* (in which neither party can improve their outcome *without* worsening the outcome for the other); it is *Pareto inferior*. AA can only be improved for both, if Ukraine and Russia started to negotiate (CC, 8 each). The strategy combination CC is also a Nash equilibrium – *Nash equilibrium 2 [Nash 2]*. However, on the contrary to AA, this is a *Pareto optimum*.[4] As we argue that neither Ukraine nor Russia will achieve their maximum goals (9), joint negotiations (CC) thus have the highest realistic individual (8) as well as highest collective pay-off (16). From that perspective, negotiations would therefore be in the interest of both parties. The game theoretical analysis shows nicely the "Salgina Dilemma". Both parties are currently in AA, a Nash equilibrium. No one wants to leave *unilaterally* such an equilibrium situation as they would worsen their respective situation (going down from 5 to 1 or to 4). They can both improve their situation only by *jointly* moving to CC. By doing so, they would benefit from a Pareto improvement. This in contrast to the so-called *Prisoner's Dilemma*, in which the departure from the Nash equilibrium also constitutes a Pareto improvement, but in which the new situation is not a (stable) Nash equilibrium. So much for the game-theoretical analysis. The more practical considerations follow below.

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2 Hence, ironically enough, here nuclear weapons have become "enablers" rather than "preventers" as was their original goal. A NATO membership of Ukraine – and thus a direct involvement of the West due to the mutual defense clause – does not seem to be a possible scenario in the near future.

3 The Nash equilibrium is named after mathematician John Nash, see *Osborne, Martin J./Rubinstein, Ariel*, A Course in Game Theory, Cambridge/London 1994.

4 *Osborne/Rubinstein*, pp. 14-29.

III. Conflict Ripeness

When is it time to negotiate? According to William Zartman, this is a question of conflict ripeness.[5] The latter is not given until the parties find it more effective to pursue their goals through negotiations than through other means. Before a conflict is ripe, military enforcement is often used to achieve a certain goal. Conflict ripeness can be influenced externally and internally.

We argue that in the context of the war in Ukraine, the willingness of both to negotiate (CC) must be preceded by the recognition that achieving their maximum goals (AB, BA) might not be possible in the short term and that pursuing them against better judgement comes at too high a price (civilly, politically, and economically).[6] With this recognition, the parties will start to negotiate. Without it, negotiations will not take place. The West, too, can influence this readiness from the outside. By means of (i) maintaining and tightening sanctions against Russia, (ii) continuing with arms supply for Ukraine to improve their negotiation position and prevent a Russian annexation. However, it should also (iii) create opportunities to prepare the ground for negotiations.

After horrific incidents and illegal acts of war (such as Bucha, Isjum, and the annexations of the four Ukrainian territories), it is often argued that negotiations are no longer possible. Three reasons in particular are frequently put forward as justification for this, which will be invalidated below. (i) It is suggested that negotiations cannot be conducted with parties who act in violation of international law or are untrustworthy. However, in difficult situations, a party should consider to negotiate even with the devil.[7] A postponement of actually opportune negotiations due to some (albeit blatant) misconduct on the part of the other party, may be detrimental to one's own interests. And if the other side cannot be trusted, appropriate countermeasures must be formulated in the event of non-compliance with the negotiated agreement. The less trust there is, the more severe these countermeasures must be designed. (ii) Furthermore, it is often argued that engaging in negotiations after such events is too weak a reaction vis-à-vis a violation of international law. However, from a general point of view, negotiations do not need to be seen as "already a first concession". In cleverly prepared and skillfully conducted negotiations accompanied by flanking measures, better results can be achieved than on the battlefield. (iii) Finally, a decision to negotiate is often presented as irreversible.

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5 *Zartman I., William*, Ripeness: The Hurting Stalemate and Beyond, in: Stern/Druckman (eds.), International Conflict Resolution after the Cold War, Washington 2000, pp. 225-245.

6 The assessment of when a price is too high is a difficult consideration. Depending on the party, the individual aspects are also weighted differently.

7 *Mnookin H., Robert*, Bargaining with the Devil, New York 2010.

This is not the case. In particular the stronger party has the option of returning to the battlefield at any time – even during negotiations, should no satisfactory compromise emerge. Thus, nothing seems lost by attempting to negotiate; on the contrary, it is an opportunity to limit the damage of war, at least temporarily.

To this end, the United Nations (UN) would theoretically provide a framework for dialogue. However, its core body, the UN Security Council (UNSC) – responsible for ensuring international peace and security – is blocked by Russia's veto-right. An alternative platform to promote diplomacy is therefore necessary and should be proposed, ideally by an international actor with high credibility and a certain authority.

IV. Negotiation Content

As soon as the parties come to the conclusion that it is no longer worthwhile for them to pursue their goals militarily, negotiations will ensue. In the following section, possible elements of such a diplomatic solution are discussed. These elements are structured around three main parts.

1. Bilateral Agreements (UA – RU)

The first part consists of two bilateral agreements between Ukraine and Russia, (i) a *ceasefire agreement* and (ii) a *political settlement*. In our view, the former should also include a definition of the line of control and the modalities of an international monitoring process to keep track of any violations. More comprehensive elements and modalities of living in the same neighborhood would then have to be negotiated in the *political settlement agreement*. The focus here would arguably be on *neutrality* and on *autonomy* of certain Ukrainian regions. As a contribution to peace and stability in the region, Ukraine could agree to a declaration that would provide for an *armed* but not necessarily *permanent neutrality*. In our opinion, the declaration could include a provision that would provide for the terms of reference to be periodically reviewed. This would take into account that the concept of neutrality serves a specific purpose in a particular context. It is not to be understood as an end in itself and the neutrality declaration should therefore be designed in a way that it can be adapted to changing circumstances. The advantages of such a flexible approach can be demonstrated by looking at Switzerland's 200-year history of neutrality. For instance, Switzerland opened its airspace for the overflight of a peacekeeping mission during the Bosnian war in 1995 and is currently participating in sanctions against Russia. A rigid understanding of neutrality would

not have allowed for such actions. Similarly, the inclusion of monitoring would leave open the possibility for Ukraine to abandon its (previously imposed) neutrality status should Russia's position – concerning NATO's eastward expansion – change in the future.

In addition to neutrality, the question of *autonomy* of certain Ukrainian territories would likely have to be discussed in the context of a political settlement. By offering levels of autonomy with increased minority rights for Russian speaking areas (e.g., political, cultural, linguistic), Ukraine could show some flexibility without prematurely sacrificing any territory, as demanded by Russia. This would allow Ukraine to enter the negotiations in a face-saving manner, primarily vis-à-vis its own population. In our opinion, the content of an autonomy debate would particularly include questions of (i) *state structure and the division of competences*, as well as (ii) *individual degrees of autonomy and self-determination rights*.

In terms of *state structure*, there are two distinct forms: federalist and unitary systems. On one hand, *federalism* is based on the division of state tasks between different political levels (a central unit and various subunits). In addition to the vertical separation of powers, the advantage of such a system is the ability to protect minorities, which despite diversity in an overall state, allows for integration and unity. Thus, for instance, appropriate status – including territorial sovereignty – may be granted to minorities forming a majority in a subunit. On the other hand, in a *unitary state*, state power lies with a central government only. The latter delegates certain competencies to political subunits and orders the implementation of decisions made at the central level. This tends to make the consideration of specifics of the population more difficult.[8]

Regarding the identification of the *degrees of autonomy*, there are various existing models along the spectrum of the internal dimension of the right of self-determination that could be consulted for inspiration (e.g. Greenland and South Tyrol).[9] This means that none of these models violates the principle of territorial integrity of the parent state. However, at the same time, they take into account the specifics of their own population and grant the minorities –

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[8] This does not imply however, that autonomy does not exist in unitary state. *Hausteiner, Eva Marlene*, Föderation als Bundesstaat? Begriffliche Traditionen, politische Alternativen, in: Aus Politik und Zeitgeschichte (APuZ), bpb 2015, pp. 3-8.

[9] *Ackrén, Maria*, The Political Parties in Greenland and Their Development, in: Hänni/Belser/Waldmann, States Falling Apart? Bern 2015, pp. 317-335; *Alber, Elisabeth*, Qualified Autonomy vs. Secessionist Discourses in Europe: The Case of South Tyrol, in Hänni/Belser/Waldmann, States Falling Apart? Bern 2015, pp. 267-296.

based on their right to self-determination – a way to exercise their political and cultural rights.[10] If such autonomy models were ever to include higher levels of self-determination, e.g. a secession, there might be some advantages to an implementation in a federal state structure.[11]

To that end, aside from its federal system and direct democratic voting devices, Switzerland has gained valuable conflict management experience with the secession of the so-called Jura region from the Canton of Berne (federal subunit). The resolution of this conflict ultimately involved the design of a three-stage process that would guarantee for a maximum number of affected individuals to exercise their right to self-determination.[12] Although different circumstances, comparing notes could thus be useful.

2. Security Guarantees (Allies – UA)

The second part of a diplomatic solution could then focus on *security guarantees* and would be adopted between Ukraine and its allies, for instance, the Ukraine Defense Contact Group[13] ("Ramstein Group"). Without the latter, the political settlement above would likely have little value, as was the case with previous agreements (Budapest 1994, Minsk 2015). Russian consent in this regard is not only not necessary, but irrelevant. The biggest guarantee for Ukraine would be NATO accession. However, membership in the Western military alliance is unlikely in the near future. On one hand, this is due to Russia's strong rejection of NATO's eastward expansion. On the other hand, following an admission of Ukraine, NATO members would be obligated to provide military assistance to Ukraine under the principle of collective security (Art. 5 of NATO Treaty) in case of an attack.[14] A direct confrontation between NATO and Russia – two nuclear powers – would thus no longer be inconceivable.

Therefore, we would suggest for the security guarantees to include a politico-economic (non-military) equivalent to Art. 5 of the NATO Treaty. Such a provision could assume a substitute function for a currently unfeasible NATO membership with the purpose to clearly outline the consequences of breach-

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10 UN or OSCE-managed referendum could be considered to implement such models.

11 *Burgess, Michael*, Divided We Stand; Autonomy or Secession in Federation?, in: Hänni/Belser/Waldmann, States Falling Apart? Bern 2015, pp. 15-35.

12 *Maggetti-Waser, Maurizio/Fang-Bär, Alexandra*, The Birth of a New Canton: An Example for the Implementation of the Right to Self-Determination, in: Hänni/Belser/Waldmann, States Falling Apart? Bern 2015, pp. 337-368.

13 This group was established in April 2022 on the German air base in Ramstein, available at: <https://www.defense.gov/News/News-Stories/Article/Article/3007229/>.

14 See: <https://www.nato.int/cps/en/natolive/official_texts_17120.htm>.

ing the political settlement agreement. Implications would have to be severe enough to prevent future misconduct: a mechanism that would automatically lead to the re-installment or toughening of previous sanctions in the event of treaty violations ("snapback"). Inspired by the provision in the 2015 nuclear agreement with Iran ("Joint Comprehensive Plan of Action").[15] Also included in the security guarantee agreement could be plans for the reconstruction of Ukraine.

3. Multilateral Initiatives

Finally, in a third part, we would propose for new *multilateral initiatives* to reform two important security frameworks. First, a new European security architecture is needed – to be based on a renewed set of rules to reinforce peaceful coexistence on the European continent. Negotiations on these rules could take place at a multilateral conference, a sort of "Helsinki 2" inspired by the Helsinki Conference on security and cooperation in Europe in 1975, during which the participating states formulated ten principles governing their relations and cooperation in various areas. For a relaunch, neutral Switzerland may be considered as a potential venue, since after its recent decision to join NATO, Finland may no longer be an acceptable host country to all.

Second, as indicated above, the UNSC's inability to act brings into focus the need for reform of the UN's collective security system, in particular, a change of the veto right of the five permanent UNSC members (P5). Their joint lack of interest in the abolition of their own privileges has been demonstrated many times before. The difficulty of such a possible reform is therefore predictable. However, in the past, successful changes in the international system have always been implemented after wars: the end of the Thirty Years War in 1648 brought the Westphalian system, which laid the basis for the fundamental principle of "sovereign equality of states"; the end of the Napoleonic wars in 1815 allowed the creation of a balance of power, the end of World War I brought the establishment of the League of Nations; and the end of World War II brought the founding of the UN. Russia's war in Ukraine could thus also prove to be an opportunity. If not for a comprehensive reform, then at least to restart the debate. The fact that the aggressor in a war can block the very system responsible for guaranteeing international peace and security should be sufficient cause. A restriction of the use of the veto right should be reached in the minimum.

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[15] See: <https://www.eeas.europa.eu/sites/default/files/iran_joint-comprehensive-plan-of-action_en.pdf>.

V. Conclusions

There is a war going on in Europe. The defense of Ukraine against Russia's illegal attack is therefore also a European matter that requires a strong united response from the West, in particular from Europe. By means of sanctions and arms deliveries, Ukraine can be indirectly and directly supported in improving its negotiation position.

Naturally, it is not possible to anticipate future developments in this war. For one, we cannot know if Ukraine can maintain its current [end of November 2022] military success. For the other, the use of nuclear weapons (although unlikely) by Putin cannot be ruled out, in particular in case he should feel pushed to the wall and come under pressure domestically. Thus, even if these and other future developments are not foreseeable today, the analysis and reflections presented here could serve as a contribution to preparing the grounds for a dialogue and possible negotiations down the line.

Future of the Economic and Monetary Union*

Christos V. Gortsos

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* The cut-off date for information included in this paper is 20 August 2022.

I. Introductory Remarks

The Economic and Monetary Union (EMU) was established by the Treaty of Maastricht of 7 February 1992,[1] which was then embedded into the Treaty establishing the European Community (TEC).[2] Currently, it is mainly governed by the Treaty on the Functioning of the European Union (TFEU);[3] participation therein is confined to the Member States meeting specific economic and legal 'convergence criteria'.[4] The EMU, which started operating on 1 January 1999, is asymmetric by design (and remains so): Whereas in the context of the monetary union the EU has exclusive competence (*inter alia*) in relation to monetary policy-related issues for the Member States participating therein, the same does not hold true in the context of the economic union, where (the other) economic policies remain national, the EU having a mere coordinating competence.[5] In particular:

First, in the monetary union, which is undoubtedly the core of the EMU, a European System of Central Banks (ESCB) was established, consisting of the European Central Bank (ECB) and the national central banks (NCBs) of all Member States; part of that is the 'Eurosystem', composed of the ECB and the NCBs of the Member States whose currency is the euro.[6] The basic tasks of the (ECB within the) Eurosystem, whose primary objective is to maintain

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1 Treaty on European Union, signed at Maastricht on 7 February 1992, OJ C 191, 29 July 1992, pp. 1-112.

2 Consolidated version, OJ C 321, 29 December2006, pp. 47-200. For a detailed presentation of the road towards the EMU, see *Bini-Smaghi, L./Padoa-Schioppa, T./Papadia, F.*, The Transition to EMU in the Maastricht Treaty, Essays in International Finance, No 194, Princeton University, 1994 Princeton, N.J.; and *Issing, O.*, The Birth of the Euro, Cambridge University Press, 2008 Cambridge.

3 Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, OJ C 202, 7 June 2016, pp. 47-200.

4 TFEU, Articles 130-131 and 140(1). Those not meeting these criteria are referred to as 'Member States with a derogation', and also include Denmark, the only (anymore) Member State with an opt-out clause from the monetary union under the conditions laid down in Protocol (No 16) (Consolidated version, OJ C 202, 7 June 2016, p. 287) annexed to the Treaty on European Union (TEU) (Consolidated version, OJ C 202, 7 June 2016, pp. 13-45) and the TFEU (jointly, the Treaties). Appliable to these Member States are Arts 139-144.

5 TFEU, Articles 3(1), point (c) and 5(1), respectively.

6 Ibid., Article 282(1). The operation of the ECB, the ESCB and the Eurosystem is governed by the TFEU and the Statute of the ESCB and the ECB (hereinafter the 'ESCB/ECB Statute') (Consolidated version, OJ C 202, 7 June 2016, pp. 230-250). Article 14.3 of that Statute governs the relationship between the ECB and the NCBs of the Member States whose currency is the euro. It is noted that both the ESCB and the Eurosystem do not have legal personality.

price stability,[7] include the definition and implementation of the single monetary policy;[8] the conduct of foreign-exchange operations (single foreign-exchange policy);[9] the holding and management of Member States' official foreign reserves; and the promotion of the smooth operation of payment systems.[10]

The ECB has also been endowed with other tasks, such as the issuance of banknotes and coins denominated in euro (the single euro area currency[11]) and the contribution to the smooth conduct of policies pursued by the national authorities relating to the prudential supervision of credit institutions and the financial system's stability.[12] However, it is not acting as a lender of last resort to credit institutions established in the euro area. Such lending to sol-

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7 TFEU, Article 127(1) first sentence (*inter alia*). See also below (under III.1.a)) on the Eurosystem's secondary objective.

8 Responsible for its formulation is the ECB Governing Council (GC), which must adopt Guidelines for the implementation of intermediate monetary objectives, key interest rates and the supply of reserves in the Eurosystem (ESCB/ECB Statute, Article 12.1, first sub-paragraph, second sentence).

9 This must be consistent with Article 219 TFEU. If the euro is freely floating in exchange-rate markets (as currently), this task is carried out by the Eurosystem in cooperation with the Council (as composed by the Ministers of the Member States whose currency is the euro, the 'Eurogroup') (Article 219(2)).

10 TFEU, Article 127(2). On these tasks, see *Gortsos, Ch. V.*, European Central Banking Law – The Role of the European Central Bank and National Central Banks under European Law, Palgrave Macmillan Studies in Banking and Financial Institutions, Palgrave Macmillan, Cham – Switzerland, 2020 (*Gortsos* (2020)), pp. 281-320, with extensive further references. In their conduct, the ECB enjoys a high degree of functional, personal, financial, and operational independence, albeit subject to accountability and transparency (ibid., Articles 130, 282(3), third-fourth sentences, 283(2), third sub-paragraph and 284(3)). In respect to personal independence, see also CJEU, Judgment of 26 February 2019, Ilmārs Rimšēvičs and European Central Bank v Republic of Latvia, C-202/18 and C-238/18, ECLI:EU:C:2019:139. Similar provisions apply to NCBs (their institutional independence being a key legal convergence criterion, TFEU, Article 131).

11 TFEU, Article 128. The euro is the currency of the EMU (TEU, Article 3(4) TEU) and is a single and not a common currency (TFEU, Article 119(2)), which substituted for the (former national) currencies of the Member States participating in the euro area at an *irrevocably* fixed rate (ibid., Article 140(3)). Concurrently, the euro is the national currency of those Member States by virtue of national law.

12 Ibid., Article 127(5); see indicatively *Psaroudakis, G.*, The Scope of Financial Stability Considerations in the Fulfilment of the Mandate of the ECB/Eurosystem, Journal of Financial Regulation, Vol. 4, 2018, pp. 119-156, pp. 155-156.

vent credit institutions exposed to severe liquidity problems is provided by the NCBs of the Member State in which they are incorporated under the conditions governing the Emergency Liquidity Assistance (ELA) Mechanism.[13]

Second, the concept of the economic union, as defined in the TFEU,[14] refers to the adoption of an economic policy which is based, *inter alia*, on the close coordination of Member States' economic policies. Hence, unlike in the case of the monetary union, where a *single* currency and a *single* monetary and foreign policy have been established, Member States' economic policy (or, more precisely, dimensions thereof other than the monetary and foreign exchange policies, such as fiscal policy) was not "europeanised" and no Member State (even if having adopted the euro) lost autonomy in its conduct.[15] However, this autonomy is significantly constrained by the institutional framework of the economic union, which is composed of provisions governing, *on the one hand*, the close coordination of Member States' economic policies and, *on the other hand*, fiscal discipline. The latter consists of a procedure for monitoring excessive government deficits and of the imposition upon Member States of certain prohibitions with respect to the financing of their public expenses, including the 'no-bail-out' clause not allowing their direct financing by the other Member States or by the EU.

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13 Its role is delimitated by Article 14.4 ESCB/ECB Statute; see *Gortsos* (2020), pp. 388-399, with extensive further references. On the economics of the monetary union, see *De Grauwe*, P., Economics of Monetary Union, 13th Edition, Oxford University Press, Oxford – New York, 2020.

14 TFEU, Article 119(1); see also Article 120.

15 A single economic policy, which would become an exclusive EU competence, as the monetary policy, when and if achieved, would mean that Member States would no longer enjoy, in essence, any degree of freedom in the conduct of their macroeconomic policy in general. Therefore, the decision for full economic unification in such form would have to be made along considerations for a genuine EU political integration.

This institutional framework also contains provisions on economic solidarity.[16] However, until the 2010 outbreak of the euro area fiscal/sovereign crisis, it did not govern the management of such crises in extreme-case scenarios as that.[17]

II. The Impact of the Three Major Crises During the Period 2007-202

1. The Global Financial Crisis (GFC)

a) Recourse by the ECB within the Eurosystem to unconventional monetary policy measures

The onset of the (2007-2009) GFC[18] showed that the key problem of concern to the ECB was not the risk of inflation but that of very low inflation (disinflation). Given that the GC had defined (since the start of the Eurosystem' operation) price stability as a year-on-year increase in the Harmonised Index of Consumer Prices (HICP) for the euro area of below, *but close to*, 2%,[19] the fact that price levels remained persistently below this benchmark rendered necessary for the ECB, like other central banks around the world, to adjust its monetary policy to address the risks of low inflation.

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16 TFEU, Articles 121 (on economic policy coordination), 123-126 (fiscal discipline) and 122 (economic solidarity). The rules laid down in Articles 122 and 126 are further specified in Council Regulations (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies and (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure (both of 7 July 1997 (OJ L 209, 2 *August* 1997, *pp.* 1-5 *and* 6-11, *respectively*) and as in force), which constitute the two pillars of the Stability and Growth Pact (SGP); see indicatively *Keppenne*, J.-P., EU Fiscal Governance of the Member States: The Stability and Growth Pact and Beyond, in Amtenbrink, F. and Hermann, Ch. (eds.): Oxford Handbook on the EU Law of Economic and Monetary Union, Oxford University Press, 2020 Oxford, Chapter 28, pp. 813-849.

17 See on this further below, under II.2.b).

18 For an overview of the causes of this crisis, see *Gortsos*, *Ch.* V., Fundamentals of Public International Financial Law: International Banking Law within the System of Public International Financial Law, Schriften des Europa-Instituts der Universität des Saarlandes – Rechtswissenschaft, Nomos Verlag, 2012 Baden-Baden, pp. 127-130, with extensive further references.

19 Under this quantitative definition, price stability "*shall be maintained over the medium term*" (a precondition for sustained growth). Its publication aims at building credibility for the strategy required to safeguard the efficiency of monetary policy and grant transparency. See also below (under III.1.a)) in relation to the ECB's new monetary policy strategy.

In this respect, in order to bolster liquidity in the euro area economy, it gradually cut the rate for its main refinancing operations (MROs); extended the maturity of its longer-term refinancing operations (LTROs); provided liquidity in foreign currency, particularly in US dollars and yen; carried out massive purchases of covered bonds denominated in euro; and markedly broadened the pool of assets eligible by the Eurosystem as collateral in the conduct of its credit transactions in the context of its single monetary policy.[20] In addition, it decided to have recourse to quantitative easing (QE), containing 'unconventional' monetary policy instruments and mainly asset purchase programmes (APPs).[21] Its first APP was the covered bond purchase programme of 2 July 2009 (CBPP).[22] This was then followed, on 14 May 2010, by the Securities Markets Programme (SMP),[23] which was terminated in 2012, and pursuant to which the ECB could, upon a CG Decision purchase, *inter alia*, Member States' sovereign bonds in the secondary market. ECB purchases of such bonds in the primary market (that is, upon their issuance) is prohibited.[24]

b) The creation of the European System of Financial Supervision (ESFS) and the role of the ECB therein

The scale and intensity of the GCF have also highlighted that price stability is not sufficient for financial stability and, thus the need to enhance the (then) existing EU regulatory and supervisory framework relating to the financial system. In this respect, on 25 February 2009, the High-Level Group on Financial Supervision in the EU, that was set up by the Commission and chaired by the France's former central banker Jacques *de Larosière*, submitted a Report

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20 See details in *Tuori, Kl.*, Monetary Policy (Objectives and Instruments), in: Amtenbrink, F./Hermann, Ch. (eds.): The EU Law of Economic and Monetary Union, Oxford University Press, 2020 Oxford, Chapter 22, pp. 615-698, pp. 642-652.

21 For an assessment, see *Smits, R.*, A central bank in times of crisis: the ECB's developing role in the EU's currency union, in: Conti-Brown, P./Lastra, R.M. (eds.): Research Handbook on Central Banking, Research Handbooks in Financial Law, Edward Elgar Publishing, Cheltenham, UK – Northampton, MA, 2018 USA, Chapter 10, pp. 184-207; European Central Bank, The ECB's monetary policy stance during the financial crisis, ECB Monthly Bulletin, January 2010, pp. 63-71; and *Zilioli, Ch./Athanassiou, Ph. L.*, The European Central Bank, in: Schütze, R. and Tridimas, T. (eds.): Oxford Principles European Union Law – Volume I: The European Union Legal Order, Oxford University Press, 2018 Oxford, Part III: Institutional Framework, Chapter 19, pp. 610-650, pp. 633-644.

22 Decision of the ECB of 2 July 2009 on the implementation of the covered bond purchase programme (ECB/2009/16), 2009/522/EC, OJ L175, 4 July 2009, pp. 18-19.

23 Decision of the ECB of 14 May 2010 establishing a securities markets programme (ECB/2010/5), 2010/281/EU, OJ L 124, 20 May 2010, pp. 8-9.

24 TFEU, Article 123(1).

(the '*de Larosière* Report'),[25] which included specific recommendations which led to the creation of the 'European System of Financial Supervision' (ESFS) that became operational on 1 January 2011.

The ESFS, which applies to all EU Member States, consists of the three (so-called) 'European Supervisory Authorities' (ESAs) and of the European Systemic Risk Board (ESRB), which has been tasked with the macroprudential oversight of the EU financial system to address systemic vulnerabilities.[26] In respect to the operation of the ESRB it was also decided to activate, for the first time, Article 127(6) TFEU, pursuant to which the Council may, by a unanimous Regulation, confer 'specific tasks' upon the ECB concerning policies relating to the prudential supervision of credit institutions[27] and other financial firms with the exception of insurance undertakings.[28] On the basis of this enabling clause, the ECB has been assigned specific tasks in the field of financial macroprudential oversight by a Council Regulation,[29] taking into account the close links between monetary and macroprudential policies.[30]

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25 Available at: <https://ec.europa.eu/commission_barroso/president/pdf/statement%2020090225_en.pdf>. For an overview, see *Ferrarini*, *G./Chiodini*, *F.*, Regulating cross-border banks in Europe: a comment on the de Larosière report and a modest proposal, Capital Markets Law Journal, Vol. 4, 2009 Oxford University Press, pp. 123-140.

26 Regulation (EU) No 1092/2010 of the European Parliament and of the Council of 24 November 2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board, OJ L 331, 15 December 2010, pp. 1-11. On the ESFS, see indicatively *Gortsos* (2020), pp. 105-140.

27 In EU banking law, 'credit institution' means (in principle) an undertaking the business of which is to take deposits or other repayable funds from the public and to grant credits for its own account.

28 For an analysis of this provision, see *Gortsos* (2020), pp. 198-200.

29 Council Regulation (EU) No 1096/2010 of 17 November 2010 conferring specific tasks upon the European Central Bank concerning the functioning of the European Systemic Risk Board, OJ L 331, 15 December 2010, pp. 162-164. On these specific tasks, see *Gortsos* (2020), pp. 371-373.

30 The interaction between monetary policy and financial stability is well established; in this respect, in the aftermath of the GFC, the aim of monetary policy remained price stability and macroprudential policies were tasked with the preservation of financial stability; see indicatively *Lastra*, *R.M./Goodhart*, *Ch.*, Interaction between monetary and bank regulation, Monetary Dialogue Papers, European Parliament, September 2015, available at: <https://op.europa.eu/en/publication-detail/-/publication/3d05d3ec-fcb9-11e6-8a35-01aa75ed71a1/language-en>, pp. 37-54; and *Viñals*, *J./Blanchard*, *O./Tiwari*, *S.*, Monetary Policy and Financial Stability, IMF Policy Paper, IMF, September 2015, available at: <https://www.imf.org/external/np/pp/eng/2015/082815a.pdf>.

2. The fiscal crisis in the euro area

a) Further quantitative easing by the ECB within the Eurosystem

Following the onset of the fiscal crisis in the euro area in the spring of 2010,[31] several of the above-mentioned monetary policy measures were further strengthened: *first*, the rate for the ECB's MROs was further cut to 0% (a level held until July 2022[32]), while the maturity of LTROs was further extended and their use increased exponentially; *second*, the interest rate on the deposit facility entered into negative territory; and *third*, the pool of assets eligible as collateral was further broadened. In addition, the ECB provided foreign currency liquidity to domestic credit institutions by currency swap lines through swap agreements with several third country central banks.[33] The ECB proceeded also to the first increase (duplication) of its capital from 5.76 billion euros to 10.76 billion euros.[34]

Furthermore, on 6 September 2012, the ECB *announced* by a Press Release its Outright Monetary Transactions (OMT) Programme consisting of purchases of sovereign bonds of individual euro area Member States without access to the markets to address the risks of a prolongation of the low-inflation period in

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31 On this crisis and the policy responses thereto, see *Shambaugh*, J.C., The Euro's Three Crises, Brookings Papers on Economic Activity, Spring, The Brookings Institution, 2012, pp. 157-231, available at: <https://www.brookings.edu/~/media/Projects/BPEA/Spring2012/2012a_Shambaugh.pdf>; and *Hadjiemmanuil*, Ch., The Euro Area in Crisis, 2008-18, in: Amtenbrink, F./Hermann, Ch. (eds.): Oxford Handbook on the EU Law of Economic and Monetary Union, Oxford University Press, 2020 Oxford, Chapter 40, pp. 1253-1362 (also published in LSE Law, Society and Economy Working Papers 12/2019, available at: <https://ssrn.com/abstract=3413000>) (both with extensive further references). The author uses the term 'fiscal crisis' instead of the (more commonly used) terms 'debt crisis' and 'sovereign crisis' as more consistent with the fact that the Member States which, for different reasons each, were severely affected by this crisis (Greece, Portugal, Ireland, and Cyprus), were excluded from international interbank and capital markets and resorted to the (sovereign) lending of last resort facilities of the International Monetary Fund (IMF) and the newly built (during this crisis) EU facilities, violated the 'hard limit' (3%) deficit/GDP ratio laid down in primary EU law (TFEU, Article 126(2) and Article 1 of Protocol (No 12) "on the excessive deficit procedure", Consolidated version, OJ C 202, 7 June 2016, pp. 279-80).

32 See below, under III.1.b).

33 Available at: <https://www.ecb.europa.eu/explainers/tell-me-more/html/currency_swap_lines.en.html>. Such currency swap lines have traditionally been part of central banks' set of monetary policy instruments to fund market interventions, but in recent years have also become an important tool for preserving financial stability.

34 Decision of the European Central Bank of 13 December 2010 on the increase of the European Central Bank's capital (ECB/2010/26), 2011/20/EU, OJ L 11, 15 January 2011, p. 53.

the euro area; this was immediately after ECB President Draghi's statement that he would do "*whatever it takes to save the euro*".[35] The programme has given rise to intense debate, culminating in an *ultra vires* review by the German Federal Constitutional Court (FCC), which rejected constitutional complaints against it, holding that a programme of unlimited bond purchases amidst a fiscal crisis in the euro area does not violate German law.

Even though the OMT programme was never activated (yet), several other corporate and sovereign bond purchase programmes were designed (included in the so-called 'expanded asset purchase programme') to enhance the transmission of monetary policy, facilitate the provision of credit to the economy, and contribute to returning inflation rates to levels below but close to 2% over the medium term, consistent with the ECB's primary objective. *Inter alia*, it included the public sector purchase programme (PSPP),[36] under which the ECB and NCBs purchase eligible marketable debt securities in secondary markets from eligible counterparties albeit under specific conditions. The validity of the related ECB Decision was also contested before the German FCC, which referred for a preliminary ruling to the CJEU.[37]

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35 Available at: <https://www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html>. On this Programme, see indicatively *Hadjiemmanuil* (2020), pp. 1333-1335 and *Tuori* (2020), pp. 665-675. The FCC's decision was based on the judgement of the CJEU of 16 June 2015, Peter Gauweiler and others v Deutscher Bundestag – Gauweiler case, C-62/14, ECLI:EU:C:2015:400, which did not raise objections as to the compatibility of OMTs with EU law. It ruled that the ECB may, under exceptional circumstances, support euro area Member States facing acute financing problems by purchasing their sovereign bonds, albeit under specific framework conditions.

36 Decision (EU) 2015/774 of the European Central Bank of 4 March 2015 on a secondary markets public sector asset purchase programme (ECB/2015/10), OJ L 121, 14 May 2015, pp. 20-24. On this Programme, see *Tuori* (2020), pp. 675-686.

37 The judgment of the CJEU of 11 December 2018, Weiss and others, C-493/17, ECLI:EU:C:2018:1000,found no factor of such a kind as to affect the validity of the ECB Decision. However, in its judgement of 5 May 2020 (BVerfG, Judgment of the Second Senate, 2 BvR 859/15) the FCC declared the CJEU's judgement in the *Weiss Case* and the contested ECB Decisions *ultra vires* as having violated EU law by failing to correctly apply the proportionality principle, and not applicable in Germany (see on this, out of a vast existing literature, *D'Ambrosio, R./Messineo, D.*, The German Federal Constitutional Court and the Banking Union, Quaderni di Ricerca giuridica, No. 21, March 2021, available at: <https://www.bancaditalia.it/pubblicazioni/quaderni-giuridici/2021-0091/index.html>). On 2 December 2021, the Commission decided to close the infringement procedure against Germany (initiated earlier that year) concerning this FCC judgment.

b) *Strengthening the Economic Union regarding sovereign crisis management*

The fiscal crisis in the euro area revealed weaknesses in relation to the (then existing) institutional framework governing the economic union, since it did not contain any provisions for the management of such crises. In view, however, of the urgency to deal with the Greek fiscal crisis in April 2010 and the need to provide Greece with financial support (as it could longer refinance its debt in capital markets), it became necessary to establish, for the first time, a mechanism for the management of such crises, given also that the 'no-bail-out clause'[38] did not allow the direct refinancing of Member States' debt by the other Member States or the EU.

Under these conditions, on 11 May 2010, the Council established the "European Financial Stabilisation Mechanism" (EFSM), of 60 billion euros.[39] However, this last-resort solution was not credible and sustainable and hence, in June 2010, the euro area Member States signed an intergovernmental treaty (agreement) outside the EU framework which established the "European Financial Stability Facility" (EFSF).[40] The establishment of a permanent mechanism then was the next (necessary) step. Since, however, this required amendment to the TFEU, on 25 March 2011, the European Council adopted a Decision amending Article 136.[41] On that (solid legal) basis, on 2 February 2012, a new intergovernmental treaty was signed establishing the "European Stability Mechanism" (ESM) as an international financial institution, which succeeded the EFSF; that Treaty became operational in October 2012.[42]

Finally, on 1 January 2013, the intergovernmental "Treaty on Stability, Coordination and Governance in the [EMU]" (TSCG) entered into force (also known as the "Fiscal Pact").[43] Its objective is to further enhance the commitment made by the euro area Member States to comply with the TFEU provisions on fis-

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38 TFEU, Article 125(1).

39 Council Regulation (EU) No 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism, OJ L 118, 12 May 2010, pp. 1-4. This was adopted on the basis of Article 122(2) TFEU (on economic solidarity).

40 Use was immediately made by Greece and then by Ireland (in 2010 as well), and Portugal (in April 2011).

41 European Council Decision of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro, 2011/199/EU, OJ L 91, 6 April 2011, pp. 1-2.

42 The consolidated version of this Treaty is available at: <https://www.esm.europa.eu/legal-documents/esm-treaty>.

43 Available at: <https://www.consilium.europa.eu/media/20383/st00tscg26-el-12.pdf>.

cal discipline by application of a "balanced budget rule" and by anchoring into their legal orders the commitment to support the proposals of the Council and the Commission at every stage of the excessive deficit procedure.[44]

c) *The creation of the Banking Union (BU) and its first main pillar involving the ECB*

The creation of a European Banking Union (BU) in 2013 was dictated by the policy consideration that it was essential "*to break the vicious circle between banks and sovereigns*" amidst the euro area fiscal crisis.[45] The BU, and in particular its first main pillar, the Single Supervisory Mechanism (SSM), in which the ECB is the hub, is closely linked to the EMU.[46] The legal basis for its operation is (the above-mentioned) Article 127(6) TFEU, which was re-activated in 2013, when the Council adopted the Regulation establishing the SSM (SSMR).[47] By virtue of this legislative act, which applies mainly (but not exclusively) to

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44 This procedure is set out in Article 126 TFEU. On the economic union after these developments, see indicatively *Fabbrini*, F., Economic Governance in Europe: Comparative Paradoxes and Constitutional Challenges, Oxford Studies in European Law, Oxford University Press, 2016 Oxford; and the relevant contributions in: Amtenbrink, F./ Herrmann, Ch. (eds.): The EU Law of Economic and Monetary Union, Oxford University Press, 2020 Oxford.

45 Euro Area Summit Statement, 29 June 2012, first para., first sentence (available at: <https://consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/131359.pdf)>.

46 On the interaction between monetary policy and banking supervision, see indicatively *Eijffinger*, S./*Nijskens*, R., Monetary Policy and Banking Supervision, European Parliament, Directorate General for Internal Policies, 2012, available at: <https://www.europarl.europa.eu/studies>; and *Beck*, T./*Gros*, D., Monetary Policy and Banking Supervision: Coordination Instead of Separation, CEPS Policy Brief No. 286, 2013, available at: <https://ssrn.com/abstract=2189364>.

47 Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, OJ L 287, 29 October 2013, pp. 63-89. It is noted that, like the ESCB and the Eurosystem, the SSM does not have legal personality either. The BU project contains two further main pillars: the Single Resolution Mechanism (SRM), established by Regulation (EU) No 806/2014 of the co-legislators of 15 July 2014 (OJ L 225, 30 July 2014, pp. 1-90, SRMR); and the (still missing) European Deposit Insurance Scheme (EDIS), the perspective of which was set out in the 'Five Presidents Report' of 22 June 2015 "Completing Europe's [EMU]" (at: <https://ec.europa.eu/priorities/economic-monetary-union/docs/5-presidents-report_en.pdf>); see in this respect also below, under III.3. On the BU as in force, see details, inter alia, in the Commentary by Binder, J.-H./ Gortsos, Ch.V./ Lackhoff, K./Ohler, Ch. (eds.): Brussels Commentary on the Banking Union, C.H. Beck, 2022 München – Hart Publishing, Oxford – Nomos, Baden-Baden.

the euro area Member States,[48] 'specific tasks' were conferred upon the ECB concerning policies relating to the prudential supervision of credit institutions (and some other categories of supervised entities) with a view to contributing to the safety and soundness of credit institutions and the stability of the financial system.[49] Since November 2014, these specific tasks are, in principle, carried out for the Member States participating in the BU *directly* by the ECB for significant credit institutions and by NCAs for less significant ones (within the SSM).[50]

Taking, thus, into account the significant institutional developments in 2010 and 2013, the role of the ECB has been substantially enhanced. Apart from being a monetary authority within the Eurosystem, exercising the basic and other tasks set out in the TFEU,[51] the ECB has also specific tasks in relation to financial macroprudential oversight within the ESFS, as well as specific banking supervisory tasks within the SSM.

3. The pandemic crisis

a) Monetary policy developments

Due to the outbreak of the pandemic crisis, economic activity across the euro area would inevitably suffer a considerable contraction. Under this consideration, the ECB adopted, since early 2020, profound liquidity-supporting measures, aimed at preserving the smooth provision of credit to the economy in order to counter the serious risks to the euro area economic outlook *and* at ensuring that all its sectors would benefit from supportive financing conditions to absorb the implications of the pandemic. They were designed with a view to ensuring the Eurosystem's primary objective of price stability and

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48 By virtue of Article 7 SSMR, a non-participating Member State can join the SSM as from the date of entry into force of an ECB decision on close cooperation. This was the case for Bulgaria and Croatia, which joined in 2020.

49 Ibid., Article 1, first sub-paragraph. This objective is apparently different from the primary objective of the Eurosystem, i.e., maintaining price stability.

50 The determination of supervised entities as significant, is made in accordance with Article 6 SSMR and Articles 39-72 of the SSM 'Framework Regulation' of the ECB of 16 April 2014 (ECB/2014/17, OJ L 141, 14 May 2014, pp. 1-50). See on this also the Judgment of the CJEU of 16 May 2017, Landeskreditbank Baden-Württemberg – Förderbank v ECB, T-122/15, ECLI:EU:T:2017:337. It is noted that the specific tasks relating to the authorisation and the withdrawal of authorisations of credit institutions, as well as the assessment of acquisitions of qualifying holdings therein are carried out by the ECB even for less significant ones ('common procedures').

51 See under I above.

the proper functioning of the monetary policy transmission mechanism and included: *first*, amendments to some ECB legal acts governing the general monetary policy framework of the Eurosystem and the introduction of the so-called pandemic emergency longer-term refinancing operations (PELTROs); *second*, the introduction of a new and separate Asset Purchase Programme, the Pandemic Emergency Purchase Programme (PEPP) and amendments to some pre-existing APPs; and *third*, introduction of the Eurosystem repo facility for central banks and reactivation of swap lines with several third country central banks.[52] It is also noted that the key interest rates on the MROs, the marginal lending facility and the deposit facility, which had been set by the ECB, with effect from 18 September 2019, at 0%, 0.25% and -0.50% respectively, remained unchanged.[53]

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52 On all these measures, see *Gortsos, Ch. V.*, Legal Aspects of the Single Monetary Policy in the Euro Area: From the establishment of the Eurosystem to the current pandemic crisis, Third fully updated edition, February 2022, available at: <https://ssrn.com/abstract=3819726>, pp. 53-67 and *Zilioli, C./Riso, A.L.*, The response of central banks to the COVID-19 crisis: legal aspects of the ECB's monetary policy measures, in: Blair, W./ Zilioli, Ch./ Gortsos, Ch. V. (eds.): International Monetary and Banking Law in the post COVID-19 World, Oxford University Press, 2023 Oxford, Chapter 3 (forthcoming).

53 After a prolonged period of persistently low interest rates (a 'liquidity trap' situation in the jargon of Keynes), which lasted even longer due to the pandemic, a major policy challenge was to limit the financial excesses resulting from accommodative monetary policies, by managing the resulting negative financial impact to avoid repeating one of the main causes of the GFC (on the causes and consequences of persistently low interest rates, see indicatively Blan*chard, Ol./Summers, L.H.*, Rethinking Stabilisation Policy: Evolution or Revolution?, in: Blanchard, Ol./Summers, L.H. (2019, eds.): Evolution or Revolution? – Rethinking macroeconomic policy after the great recession, Peterson Institute for International Economics (PIIE), The MIT Press, Cambridge, Massachusetts – London, 2019 England, Introduction, pp. xi-xliii, pp. xxviii-xxvi). Inter alia, a territory of negative rates has significant negative impact on credit institutions' profitability usually facing (legal or business-related) limitations on passing on negative rates to their retail (in particular) depositors (see *Schnabel, Is.*, Going negative: the ECB's experience, 26 August 2020, available at: <https://www.ecb.europa.eu/press/key/date/2020/html/ecb.sp200826~77ce66626c.en.html>). In its Report "Lower for longer – macroprudential policy issues arising from the low interest rate environment" of 1 June 2021, the ESRB identified several areas of concern for the euro area owing to this environment and quite interestingly remarked that the pandemic may have increased the likelihood and persistence of a "low for long" scenario, making it "even lower for even longer" (see at: <https://www.esrb.europa.eu/news/pr/date/2021/html/esrb.pr210601~b459ba44ca.en.html>). As a matter of fact, however, this has not been the case (see below, under III.1.b)).

b) *The role of the ECB within the SSM*

Just before the outbreak of the pandemic, the EU banking system was quite robust. EU credit institutions were (on average) well capitalised and benefited from having implemented macroprudential buffers and liquidity ratios, which were introduced as international financial standards by the 2010 'Basel III regulatory framework' of the Basel Committee on Banking Supervision (the so-called "Basel III impact").[54] Furthermore, the accumulated stock of non-performing loans (NPLs, impaired assets), built up in the wake of the GFC and the subsequent fiscal (sovereign) crisis in the euro area (the so-called 'legacy NPLs'), had been significantly reduced and, overall, financial stability had been enhanced compared to the decade before.[55]

During the pandemic, given that the prudential banking regulatory framework contains certain elements of flexibility, and considering that making full use thereof was essential to overcome the financing pressures faced by firms and households, the ECB, as a banking supervisory authority within the SSM and complemented by the European Banking Authority (EBA),[56] adopted specific supervisory measures to ensure that credit institutions have the capacity to foster credit flows to households and businesses in a flexible way during (at least the initial phase of) the pandemic. It also adopted specific macroprudential measures, which were complemented and reinforced by similar mea-

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54 On this framework, see *Gortsos, Ch. V.*, Historical Evolution of Bank Capital Requirements in the European Union, in: Joosen, B./Lamandini, M./Tröger, T. (eds.): Capital and Liquidity Requirements for European Banks: CRRII and CRDV, Oxford EU Financial Regulation Series, Oxford University Press, 2022 Oxford, Part I, Chapter 1, pp. 3-42, pp. 18-28.

55 On the obstacles to NPL resolution in the EU and proposals for a comprehensive related strategy, see indicatively *Montanaro, E.*, Non-Performing Loans and the European Union Legal Framework, in: Chiti, M.P./Santoro, V. (eds.): The Palgrave Handbook of European Banking Union Law, Palgrave – Macmillan, 2019 USA, Chapter 10, pp. 213-246; and *Gortsos, Ch. V.*, Non-performing Loans – New risks and policies? What factors drive the performance of national asset management companies?, In-Depth Analysis, ECON Committee, European Parliament, March 2021, available at: <https://www.europarl.europa.eu/RegData/etudes/IDAN/2021/659647/IPOL_IDA(2021)659647_E.pdf> (with extensive further references).

56 The EBA, an inherent part of the ESFS, was established by Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority) (…), OJ L 331, 15 December 2010, pp. 12-47 (as in force).

sures swiftly taken by several euro area national macroprudential authorities to facilitate the absorption of credit losses, and support lending to the real sector of the economy.[57]

III. Current Developments and Challenges

1. On the Monetary Union

a) Key elements of the new (2021) monetary policy strategy of the Eurosystem

In July 2021, the GC of the ECB concluded its most recent review of the Eurosystem's monetary policy strategy.[58] The new strategy set out the means to achieve its primary objective to maintain price stability in the euro area, with reference to an appropriate set of monetary policy instruments, indicators, and intermediate targets, while also taking into account other considerations – without prejudice to price stability. In this respect, the GC considered that price stability is still best maintained by aiming for a 2% 'symmetric' inflation target over the medium term ('inflation targeting' meaning the achievement of a specific (usually low) inflation rate both in the short and in the medium term); hence, both negative and positive deviations of inflation from that target are considered as equally undesirable. To maintain this symmetry, persistent monetary policy action is required to avoid negative deviations from the inflation target becoming firmly established and unlikely to change, eventually including a *transitory* period in which inflation is moderately above target (since short-term deviations, as well as lags and uncertainty in the transmission of monetary policy to the economy and to inflation are inevitable).

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57 ECB: "Macroprudential measures taken by national authorities since the outbreak of the coronavirus pandemic", 26 May 2020 (available at: <https://www.ecb.europa.eu/pub/financial-stability/macroprudential-measures/html/index.en.html>). For details on all these measures, see *Gortsos, Ch. V.*, Threats to EU financial stability amidst the pandemic crisis, in Utrilla, D./Shabbir, An. (2021, eds.): EU Law in Times of Pandemic: The EU's Legal Response to COVID-19, EU Law Live Press, 2021, Chapter 24, pp. 311-321, with extensive further references.

58 Available at: <https://www.ecb.europa.eu/home/search/review/html/ecb.strategyreview_monpol_strategy_overview.en.html>. Its previous strategy review had been conducted in 2003. On the 2019 US Federal Reserve's (quite comparable) review of its own monetary policy framework, see at: <https://www.federalreserve.gov/monetarypolicy/review-of-monetary-policy-strategy-tools-and-communications.htm>.

Taking as a given the ECB's commitment to set its monetary policy to ensure that inflation stabilises at its 2% target in the medium term, the set of key ECB interest rates remains the primary monetary policy instrument, but other instruments such as APPs and LTROs will continue to be used, as appropriate, as well. In addition, even though the HICP remains the appropriate measure for assessing price stability, account will be also taken of inflation measures that include initial estimates of the cost of owner-occupied housing to supplement broader inflation measures.

Furthermore, monetary policy decisions, as well as the evaluation of their proportionality and potential side effects, will continue to be based on an integrated assessment of all relevant factors, which builds on the interdependent economic and monetary/financial analyses. For the sake of transparency, the communication of these decisions will be adapted to reflect the revised monetary policy strategy, complemented by layered and visualised versions of monetary policy communication[59] towards the wider public to ensure public understanding of and trust in the actions of the ECB.

The decision to incorporate climate change considerations into the policy framework due to the profound implications of this change for price stability[60] was also significant. In this respect, as part of the "Climate Action Plan" of 8 July 2021[61] and on the basis of the detailed "Roadmap of climate change-related actions" annexed thereto, the GC announced on 4 July 2022 its decision to take further steps to include climate change considerations in the monetary policy framework.[62] The concrete measures decided are designed in full accordance with the Eurosystem's primary objective, the aim to better take into account climate-related financial risk in its balance sheet and, with reference to the secondary objective, support the green transition of the economy in

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59 On communication in monetary policy, see *Lastra, R.M./Dietz, S.*, Communication in monetary policy, Monetary Dialogue Papers, European Parliament, February 2022, available at: <https://www.europarl.europa.eu/cmsdata/244613/1_LASTRA-DIETZ.pdf>.

60 See *Grünewald, S.*, The ECB's response to the COVID-19 crisis and its role in the green recovery, in: Gortsos, Ch. V./Ringe, W. G. (eds.): Financial stability amidst the pandemic crisis: on top of the wave, European Banking Institute (EBI), 2021, e-book, Chapter 8, pp. 263-286, available at: <https://ssrn.com/abstract=3877946>.

61 Available at: <https://www.ecb.europa.eu/press/pr/date/2021/html/ecb.pr210708_1~f104919225.en.html>; see *Zilioli, Ch.*, The New ECB Monetary Policy Strategy and the ECB's Roadmap of Climate Change-related Actions, EU Law Live Weekend Edition No 67, 17 July 2021, pp. 2-6, available at: <https://eulawlive.com/weekend-edition/weekend-edition-no67>.

62 Available at: <https://www.ecb.europa.eu/press/pr/date/2022/html/ecb.pr220704~4f48a72462.en.html>.

line with the EU's climate neutrality objectives, and provide incentives to companies and financial firms. These measures, which will be regularly reviewed and, if necessary adapted, relate to corporate bond holdings, the collateral framework, climate-related disclosure requirements for collateral, as well as enhanced risk assessment tools and management.[63]

In this respect it is worth noting that price stability maintenance is the primary but not the exclusive objective of the Eurosystem. The TFEU[64] clearly sets out that, without prejudice to this objective, the Eurosystem shall (also) support the "general economic policies in the EU" to contribute to the achievement of the EU objectives as laid down in Article 3 TEU, acting in accordance with the principle of an open market economy with free competition favouring an efficient allocation of resources (a statement of respect for market economics) and in compliance with the principles set out in Article 119(3) TFEU. On the other hand, the Eurosystem does not have a dual primary objective (as is the case with some other central banks, such as the US Federal Reserve System). This hierarchy of objectives implies that it can only pursue its secondary objectives if it has assured the primary one and must, thus, perform its tasks aimed at combatting inflation (or disinflation) and only if this is achieved at influencing growth, employment, environmental and other conditions.

b) Implementation of the new strategy amidst the 'inflation crisis' in 2022

After the prolonged period of very low inflation and even, for some quarters, negative inflation (deflation), the inflation rate started increasing in the euro area in 2021 (due to the rise in energy and commodity prices and supply chain bottlenecks) and then even more significantly in 2022, especially after Russia's invasion of Ukraine in February 2022.[65] Under these conditions, the GC

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63 For a detailed presentation of the new strategy, see indicatively *Reichlin, L./Adam, K./McKibbin, W.J./McMahon, M./Reis, R./Ricco, G./Weder di Mauro, C.*, The ECB strategy: The 2021 review and its future, CEPR, CEPR Press, September 2021 (also available at: <https://voxeu.org/content/ecb-strategy-2021-review-and-its-future>); and *Zilioli* (2021). The next assessment of the appropriateness of the ECB monetary policy strategy is expected in 2025.

64 TFEU, Article 127(1), second sentence.

65 The development within a very short period is remarkable: -0.3% in September 2020; 0.9% in January 2021; 5.1% in January 2022; 7.4% in March; and 8.9% in July (see at: <https://sdw.ecb.europa.eu>). On the main threat to euro area financial stability coming from the impact through, *inter alia*, higher inflation, see the ECB "Financial Stability Review" of May 2022, according to which financial stability conditions have deteriorated (available at: <https://www.ecb.europa.eu/pub/financial-stability/fsr/html/ecb.fsr202205~f207f46ea0.en.html>).

decided in its meeting of 21 July 2022 to raise, for the first time since September 2019, the three key ECB interest rates, with effect from 27 July, committed to ensure that the 2% 'symmetric' inflation target over the medium term under the new monetary policy strategy will be granted.[66]

Furthermore, apart from its decision to continue (under modified conditions) the APP and the PEPP, it approved its new "Transmission Protection Instrument" (TPI) for the effective transmission of monetary policy across all euro area Member States. This new instrument will be activated "*to counter unwarranted, disorderly market dynamics that pose a serious threat to the transmission of monetary policy across the euro area*", the scale of purchases thereunder not being *ex-ante* restricted; this will depend on the severity of the risks facing policy transmission. Under the conditionality attached to the TSI, the GC will comprehensively assess whether the euro area Member State in which purchases may be conducted under that program pursue sound and sustainable fiscal and macroeconomic policies based on a cumulative list of adjustable eligibility criteria. A judgement on whether the activation of purchases under the TPI is proportionate to the achievement of the Eurosystem's primary objective will also have to be made. If there is a durable improvement in transmission or an assessment has been made, that persistent tensions are due to fundamentals in a particular euro area Member State, purchases will be terminated.[67]

c) Towards a central bank digital currency (CBDC) in the euro area

Another significant novel element in the euro area central banking is the prospect of the Eurosystem issuing a central bank digital currency (CBDC). In accordance with the ECB "Report on a digital euro" of 2 October 2020,[68] this central bank money would be offered in digital form for use by citizens and businesses for retail payments (r-CBDC) and complement the current offering of cash and wholesale central bank deposits. In this respect, on 14 July

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66 The interest rate on the MROs was set at 0.5%, the interest rate on the marginal lending facility at 0.75% and that on the deposit facility at 0% (hence, exit from the era of negative interest rates) (available at: <https://www.ecb.europa.eu/press/pr/date/2022/html/ecb.mp220721~53e5bdd317.en.html>).

67 Available at: <https://www.ecb.europa.eu/press/pr/date/2022/html/ecb.pr220721~973e6e7273.en.html>. For a first assessment of the TPI, see *Nicolaides, Ph.*, The ECB's new "Transmission Protection Instrument": Discretion & Proportionality VS Transparency, EU Law Live Weekend Edition No 110, 30 July 2022, pp. 2-7, available at: <https://eulawlive.com/weekend-edition/weekend-edition-no67>.

68 Available at: <https://www.ecb.europa.eu/paym/digital_euro/report/html/index.en.html>.

2021, the GC launched the Eurosystem's 'digital euro project';[69] during the current investigation phase of that project, it will address key issues regarding the design and distribution of the digital euro, the objectives of which are a riskless, accessible, and efficient form of a CBDC.[70]

2. On the Economic Union

Pursuant to its Communication of 20 March 2020 "on the activation of the general escape clause of the Stability and Growth Pact",[71] the Commission assessed that the conditions for the use of this clause of the EU fiscal framework, namely a severe economic downturn in the euro area or the EU as a whole, were fulfilled;[72] overall fiscal guidance is being provided within this framework and as part of a streamlined "European Semester for economic policy coordination exercise".[73] The application of these fiscal rules is still suspended taking account of the current conditions. However, discussions have been initiated on the need for further institutional initiatives and even transformations – including, albeit in the medium term, on the application more flexible fiscal rules and policies to facilitate appropriate structural changes and support the transition to a "green economy" (an aspect of primary importance currently).

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69 See the ECB Press Release of 14 July 2021 "Eurosystem launches digital euro project", available at: <https://www.ecb.europa.eu/press/pr/date/2021/html/ecb.pr210714~d99198ea23.en.html>.

70 On the Eurosystem's power to issue a digital euro (and, if so, in what form) and whether this would and should possess legal tender status, see *Grünewald, S./Zellweger-Gutknecht, C./Geva, B.*, Digital Euro and ECB Powers, Common Market Law Review, 2021, 58, pp. 1029-1056, with extensive further references.

71 Communication from the Commission on the activation of the general escape clause of the Stability and Growth Pact, 20 March 2020, COM(2020) 123 final.

72 "Statement of EU ministers of finance on the [SGP] in light of the COVID-19 crisis", available at: <https://www.consilium.europa.eu/en/press/press-releases/2020/03/23/statement-of-eu-ministers-of-finance-on-the-stability-and-growth-pact-in-light-of-the-covid-19-crisis>.

73 The 'general escape clause' is laid down in several Articles of Council Regulations (EC) No 1466/97 and 1467/97 (SGP). The European Semester was introduced by Regulation (EU) No 1175/2011 of the European Parliament and of the Council of 16 November 2011 amending Council Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, OJ L 306, 23 November 2011, pp. 12-24, which amended the first above Regulation.

These considerations are set out, *inter alia*, in the Commission Communication of 19 October 2021 "The EU economy after COVID-19: implications for economic governance".[74] After assessing the impact of the changed conditions for economic governance after the crisis, the Commission raises specific issues/questions for the public debate on the framework that (should) govern economic governance based on the weaknesses identified and the challenges highlighted by the pandemic crisis. One of the most important among these questions is how the design, governance and operation of the recently established Recovery and Resilience Facility (RRF)[75] can inform the discussion on economic governance through improved ownership, mutual trust, the imposition of sanctions in case of infringements, as well as the interaction between the economic, labour and fiscal dimensions.[76]

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74 Communication from the Commission, The EU economy after COVID-19: implications for economic governance, 19 October 2021, COM(2021) 662 final. For various interesting positions on the future of EU economic governance in the field of fiscal policy (even before the pandemic), see *Buti*, M., Fiscal Policy in the European Economic and Monetary Union: An Evolving View, in: Blanchard, Ol./Summers, L.H. (eds.): Evolution or Revolution? – Rethinking macroeconomic policy after the great recession, Peterson Institute for International Economics (PIIE), The MIT Press, Cambridge, 2019 Massachusetts – London, England, Chapter 8, pp. 109-120; *Fabbrini*, F., Fiscal capacity, in: Fabbrini, F./Ventoruzzo, M. (eds.): Research Handbook of EU Economic Law, Edward Elgar Publishing, 2019 Cheltenham, UK – Northampton, MA, USA, Chapter 5, pp. 107-135; *Schlosser*, P., Europe's New Fiscal Union, Palgrave Macmillan Springer, 2019 Cham – Switzerland; *Drossos*, Y., The Flight of Icarus: European Legal Responses Resulting from the Financial Crisis, Hart Publishing, 2020 Oxford, Chapter 6; *Craig*, P./*Markakis*, M., EMU Reform, in: Amtenbrink, F./ Hermann, Ch. (eds.): Oxford Handbook on the EU Law of Economic and Monetary Union, Oxford University Press, 2020 Oxford, Chapter 42, pp. 1400-1448; pp. 1406-1428, as well as *Blanchard*, *Ol./Leandro*, *Ál./Zettelmeyer*, J., Ditch the EU's fiscal rules; develop fiscal standards instead, VOX EU Debate, VOX EU/CEPR, 22 April 2021, available at: <https://new.cepr.org/voxeu/columns/ditch-eus-fiscal-rules-develop-fiscal-standards-instead>, proposing the migration from fiscal rules to fiscal standards.

75 Set up by Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility, *OJ L 57, 18 February 2021, pp.* 17-75.

76 See European Commission (2021): "Questions and Answers: The Commission relaunches the review of its economic governance", 19 October, available at: <https://ec.europa.eu/commission/presscorner/detail/en/qanda_21_5322>. The time horizon for completing the process of revising the economic governance framework has been set at 2023.

3. On the Banking Union: the 'unfinished' agenda

Even though the first two main pillars of the BU are in place for a longer period now and their contribution in preserving financial stability in the euro area is considered positive, there are still some elements which constitute its 'unfinished agenda' and some of which are closely linked to the (so-called) 'medium-sized banks' resolution problem.[77] These include (mainly) the following:

First, the progress on adopting the Regulation establishing the EDIS on the basis of the (above-mentioned[78]) 2015 Commission's proposal has been slow. Although a roadmap for beginning political negotiations on the EDIS has been set up and a High-level working group to focus on the next steps has been set up,[79] even in its more recent meeting of 24 June 2022, the Euro Summit, which was mainly preoccupied with the economic implications of Russia's invasion of Ukraine, simply welcomed the commitment of the Eurogroup in inclusive format to subsequently identify in a consensual manner possible further measures with regard to the other outstanding elements to strengthen and complete the BU, including the EDIS.[80] Accordingly, in realistic terms, its establishment is not envisaged before the end of 2023.

Second, the harmonisation at EU level of the rules on credit institutions' winding up proceedings is also of primary concern. In this respect it noted that, under the framework in force governing the resolution of credit institution, if the third resolution condition (i.e., the public interest criterion) is not met,[81] the winding-up is conducted pursuant to the national legislation in the Member State where it is established since the relevant rules have not yet been harmonised.

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77 See on this indicatively *König*, E., A European solution to deal with failures of medium-sized banks in the Banking Union, Eurofi, 14 April 2021, available at: <https://www.srb.europa.eu/en/content/eurofi-article-elke-konig-european-solution-deal-failures-medium-sized-banks-banking-union>.

78 See above, under II.2.c).

79 See "Eurogroup Report to Leaders on EMU deepening", of 4 December 2018, available at: <https://www.consilium.europa.eu/en/press/press-releases/2018/12/04/eurogroup-report-to-leaders-on-emu-deepening/pdf>.

80 Euro Summit meeting (24 June 2022), Statement, point 3(b). The text of this Statement is available at: https://www.consilium.europa.eu/media/57443/20220624-euro-summit-statement-en.pdf. An aspect of importance is whether the use of EDIS would be allowed in resolution as well, along with the SRF.

81 SRMR, Article 18(1), point (c) and 18(5).

Third, another important aspect is the delay in the adoption of EU rules relating to sovereign bond-backed securities (SBBSs)[82] to contain systemic risk, mitigate financial fragmentation and, ultimately, reduce the 'bank-sovereign loop'. On 24 May 2018, the Commission submitted a related Proposal for a Regulation, whose objective would be to lay down an EU "general framework" for SBBSs in the EU,[83] whose finalisation is, however, still pending.

Finally, this author considers that an amendment to the ELA Mechanism,[84] which would allow the ECB to become a lender of last resort at least for the significant credit institutions it directly supervises within the SSM is a "missing fourth pillar" of the BU.[85]

The absence of a clear financial stability mandate in the TFEU (for the ECB in cooperation with another ot other EU institutions) is also a major concern. This aspect, nevertheless, is part of a longer-term agenda, since its implementation would require an amendment of the Treaties.

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82 See European Systemic Risk Board, Survey on sovereign bond-backed securities, Background document, European Systemic Risk Board High-Level Task Force on Safe Assets, 22 December 2016, available at: <https://www.esrb.europa.eu/pub/pdf/surveys/161222_survey_background_document.en.pdf>.

83 COM(2018) 839 final.

84 See under I above.

85 See *Gortsos* (2020), pp. 441-445 (also with reference to *Lastra and Goodhart* (2015), p. 50.

Western Balkans – Integration perspectives

Jelena Ceranic Perisic

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I. Introduction

At the Thessaloniki Summit in 2003, the European Council declared that the future of the Balkans was within the EU.[1] This political commitment by the heads of the state and prime ministers of the EU countries was understood as a strong incentive and a promise that the future of the region, within the EU, would be stable and prosperous.[2] However, 19 years after Thessaloniki Summit,

1 <https://ec.europa.eu/commission/presscorner/detail/en/PRES_03_163>.

2 *Kmezic*, M., Recalibrating the EU's Approach to the Western Balkans, European View 2020, pp. 54-61.

the Western Balkan countries – apart from Croatia – are still a long way from achieving full EU membership. Therefore, at the Council's meeting in November 2019, there was a common understanding of the usefulness of examining the effectiveness of the accession negotiation process.

Consequently, on 5 February 2020, the European Commission issued Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions proposing a new enlargement methodology named "Enhancing the accession process – A credible EU perspective for the Western Balkans".[3]

From the beginning of the new millennium, events at the global political level have affected both the EU and the WB countries. Those events that could be qualified at the same time as challenges and determinants of the integration process, are: three waves of enlargement in the last two decades, economic crisis, refugee crisis, Brexit, Covid 19 pandemic, and ongoing Ukrainian crisis. The complexity of the situation has led to a stalemate of the EU integration process.

Since the accession prospects of the Western Balkans countries have remained blurred, this paper presents an attempt to examine the broader context of European integrations of the Western Balkans, i.e., to analyse the perspectives of integrations through the prism of challenges that this process is facing. These challenges, which are at the same time the determinants (milestones), are under an umbrella of broader foreign policy development. They are all connected and mutually conditioned. Therefore, they cannot be analysed in isolation, but in interplay, i.e. as part of a mosaic.

For the purpose of this paper, three groups of challenges are identified and the paper's structure follows them. After short introductory notes (Part I.), the paper gives a brief overview of the challenges that the EU has been facing for the last two decades (Part II.). Thereafter, the challenges of Western Balkans countries' integrations are examined (Part III.). Finally, the paper focuses on challenges of a new enlargement methodology (Part IV.).

[3] Communication from the Commission to the European Parliament, the Council, the European Economic and SocialCommittee and the Committee of Regions, Enhancing the accession process – A credible EU perspective for the Western Balkans, COM(2020) 57 of 5 February 2020.

II. Challenges of the European Union

In the last two decades, the European Union has been facing a series of problems that affect its internal situation, including the enlargement policy. Since three waves of EU enlargement have taken place (2004/2007/2013), the EU faced a certain *enlargement fatigue*. In 2008, the EU faced the biggest economic crisis since its foundation. In 2015, the migrant crisis began. This migrant crisis is considered to be the biggest global refugee crisis of our time. In 2016, United Kingdom decided to leave the EU. At the beginning of 2020, global pandemic caused by the Covid-19 virus hit the whole world. Finally, the year 2022 is marked by the Ukrainian crisis, which is still ongoing.

Given that the EU crisis includes several different but related crises, it is often called poly-crisis.[4] Each component, i.e. the aspect of this crisis is complex in its own way, and none of these crises have been substantially overcome. Therefore, the overall picture is even more complicated.

Taking all this into account, it is not surprising that the European citizens have lost faith in EU structures and in the EU as a project in general. The democratic deficit poses a serious problem and a great threat to the future of European integration process.[5]

The integration process is not related only to the enlargement policy and integration mechanism, but it is also influenced by numerous external factors. For the purpose of this paper, all the challenges that the EU has been facing in the last twenty years can be divided into so-called internal challenges – dis(integration) challenges and external challenges.

1. Internal challenges – (Dis)integration challenges

When it comes to the internal challenges, which are also qualified as (dis)integration challenges, two completely opposite processes can be distinguished: *enlargement fatigue* and Brexit.

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4 <https://www.newpactforeurope.eu/documents/new_pact_for_europe_3rd_report.pdf?m=1512491941>.

5 The term 'democratic deficit' refers to a sense of the ordinary EU citizen of being disconnected from the EU institutions and its decision-making process.

a) Enlargement fatigue

From the very beginning of the EU integrations, it was clear that the idea of connecting European countries is much broader than the association of six countries in terms of production and trade in coal and steel. It was an open organization whose goal was primarily the economic connection of the countries of Western Europe, and then the creation of the Single market. Later those ideas were extended to other forms of integrations and the door was open to a larger number of Member States.[6]

On May 1, 2004, ten countries joined the EU: Poland, the Czech Republic, Slovakia, Hungary, Estonia, Latvia, Lithuania, Slovenia, Cyprus, and Malta. It was the biggest enlargement in the history of the EU integration process. On January 1, 2007, Romania and Bulgaria also joined the EU. Finally, on July 1, 2013, Croatia joined the EU. "Whereas previous enlargement rounds had each added a small number of generally well-prepared new members, the 'big bang' accession of 2004/2007 comprised ten post-communist countries that had only recently transitioned towards democratic governance and market economies."[7]

The preparation for the accession of these countries took a lot of time, resources and generally was exhausting for the Union on various levels. Consequently, the European Union has been facing a certain *enlargement fatigue* ensuing from the most recent enlargement waves in the first decade of the 21st century. Therefore, the willingness of the EU Member States to accept the Western Balkans countries in the European community of nations should also be taken into consideration.[8] All these factors affect the efficiency of the EU enlargement process.

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6 *Kosutic, B./Rakic, B./Milisavljevic, B.*, Uvod u pravo evropskih integracija, Beograd 2015, p. 171.

7 *Wunsch, N./Olszewka, N.*, From projection to introspection: enlargement discourses since the 'bing bang' accession, Journal of European Integration 2022, pp. 1-22, p. 3, doi.org/10.1080/07036337.2022.2085261.

8 *Rabrenovic, A./Ceranic, J.*, Alignment of the Serbian Law with the *aquis* communautaire – priorities, problems, perspectives, Belgrade 2012, p. 312.

b) Brexit

In the referendum held on June 23, 2016, the electorate of the United Kingdom (UK) voted to leave the European Union. It was the first time in the history of the European integrations that one country decided to leave the EU. Brexit arrived at a time when the Union was facing a multi-year crisis which contributed to the complexity of the situation.

The process of withdrawing from the EU was foreseen for the first time by the Lisbon Treaty. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.[9] A Member State which decides to withdraw shall notify the European Council of its intention. In the light of guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with the State, setting out the arrangements for its withdrawal, taking into account the framework for its future relationship with the Union.[10]

The negotiations between the EU and the UK on the terms of withdrawal, as well as on the framework for future cooperation, were conducted carefully and in detail. Since the UK joined the EU half a century ago, their economies have been closely linked. The geographical and economic interdependence of the UK and the EU is a reality, in other words, the UK can leave the EU but cannot move out of Europe.[11] The same may be applied to economies of the UK and the EU.

Negotiations on the terms of the UK's withdrawal from the EU were completed in December 2019, and the UK officially left the EU on January 31, 2020. However, the entire process of negotiations on terms of withdrawal has put an additional burden on the EU and its fragile enlargement policy. It seems that Brexit had consequences for some candidate countries and the people's support for European integrations in general.[12]

2. External challenges

In last two decades, many external factors have had an impact on the European Union, and consequently on its integration policy: economic crisis, refugee crisis, Covid 19 pandemic and ongoing Ukrainian crisis.

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9 Art. 50, para. 1 TEU.

10 Art. 50, para. 2 TEU.

11 <https://www.bruegel.org/report/europe-after-brexit-proposal-continental-partnership>.

12 See below, III.2.

a) Economic crisis

The global economic crisis hit both the EU and its Member States. Although the crisis started as economic one, it affected all segments of the economy and society.

In the first years of the crisis, Member States primarily focused on how to avoid the worst possible consequences, applying mostly *ad hoc* measures. Therefore, they completely neglected the implementation of the necessary structural reforms at both the EU and national levels. "From a pragmatic perspective, this may have been a rational way of dealing with the crisis, in the absence of a 'textbook' that decision-makers could turn to for guidance and given the lack of consensus between and within Member States. As a result, in most cases, the EU has only been able to address the symptoms of the crisis then to tackle their multiple root causes."[13]

Therefore, the EU is facing the profound collateral damage caused by the polycrisis at national, European, and global level. These unintended political, economic, social, and societal consequences limit the ability of the EU to take more assertive measures to address the fundamental causes of the crisis.

b) Refugee crisis

The phenomenon of a massive movement towards Europe of migrants and refugees from the Middle East, particularly from Syria in 2015/16 has been described as the worst refugee crisis of our time. This unforeseen mass influx situation put European solidarity to the test, both among receiving and transit countries, as well as towards refugees themselves. Although the necessity of formulating a common European response was recognized early on during the crisis of 2015, a comprehensive common policy was not implemented.[14] The response to the crisis can be characterized by an imbalance between solidarity and security.[15]

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13 <https://www.newpactforeurope.eu/documents/new_pact_for_europe_3rd_report.pdf?m=1512491941>.

14 *Ceranic Perisic*, J., Migration and Security – with a Special Emphasis on Serbia as a Transit Country, in: Kellerhals/Baumgartner (eds.), Challenges, risks and threats for security in Europe, Zurich 2019, pp. 43-64, p. 51.

15 <https://www.newpactforeurope.eu/documents/new_pact_for_europe_3rd_report.pdf?m=1512491941>.

The lack of intra-EU solidarity has been a major source of tension between EU countries, not only casting doubts over the future of Schengen, but having wider negative impact on cohesion within the EU. "Sharing the burden of refugee management is a litmus test for European solidarity".[16]

The governments of the EU Member States tried to respond effectively to the crisis, but it was difficult to reach a compromise because of the deep differences between their views. Two polar opposites remain irreconcilable: those who claim that Europeans have a moral, human, and legal obligation to support those in need of help and accommodation, and those who claim that Europe must protect itself from the large number of people trying to reach the European continent.

c) Covid 19 pandemic

The pandemic caused by the Covid-19 virus has kept the world in lockdown for many months, having significant impact on all aspects of life. One can provide insights into major changes of social reality – the international order, the understanding and realization of human rights and freedoms, the functioning of the political life and political institutions, the use of modern technologies in business, economic flows and people's preferences, the way of performing various jobs and activities of public servants, etc.[17] Consequently, the European integration process itself will inevitably also be modified.

d) Ukrainian crisis

Finally, nowadays we are facing the Ukrainian crisis. The consequences of the Ukrainian crisis are difficult to predict at the moment, especially since the conflicts are still ongoing. Nevertheless, it is certain that this crisis will have a significant impact on all aspects of political and social life not only at European, but also at global level. Therefore, the EU integration process will be largely affected, as well.

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16 <https://www.newpactforeurope.eu/documents/new_pact_for_europe_3rd_report.pdf?m=1512491941>.

17 *Djuric, V./Glintic, M.*, Rec urednika, in: Djuric/Glintic, (eds.), Pandemija Kovida 19: pravni izazovi i odgovori, Beograd 2021, p. 7.

III. Challenges of Western Balkans' integrations

Joining the European Union is in theory recognized as a process in which external conditioning is a key instrument of integration. In this process, the EU conditions membership by fulfilling a number of conditions, among which is the harmonization of the legal framework and practice with the *acquis communautaire*.[18] A particular challenge for countries wishing to join the EU is the fact that the conditions need to be met even before the promised reward – EU membership – is received, while at the same time the EU is the one that sets the conditions unilaterally.

The EU's conditionality has become both more demanding and (partly) more determinate. The EU has broadened the set of conditions, especially by expanding the 'enlargement acquis' beyond the regulatory public policy rules and into fundamental state-building, rule-of-law, administrative and economic reforms; it has improved the precision of its conditions in some of these areas; and it has strengthened its monitoring, feedback, and sanctioning mechanisms.

The term Western Balkans has geopolitical rather than geographical meaning. This term refers to Albania and the territory of former Yugoslavia, except Slovenia and Croatia. Originally, this term also referred to Croatia, until its accession to the EU in July 2013. Namely, the EU institutions have generally used the term Western Balkans referring to the Balkan area that includes countries that are still not members of the EU. Currently, these are (in alphabetic order): Albania, Bosnia and Herzegovina, Montenegro, North Macedonia, and Serbia.[19]

Not all Western Balkans countries are in the same position regarding EU integrations. For the current position of Western Balkans' countries, three different groups of countries can be distinguished. The aim of this chapter is not to analyse in detail the position of each country in the EU integration process, but to present a brief overview of the current challenges and perspectives of the whole Western Balkans region.

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18 *Knezevic Bojovic, A./Coric, V./Visekruna, A.*, European Union External Conditionality and Serbia's Regulatory Response, Srpska politicka misao 2019, pp. 233-235, p. 233.

19 The term Western Balkans also refers to Kosovo. However, the Constitution of the Republic of Serbia defines the Autonomous Province of Kosovo and Metohija as an integral part of Serbia, but with "substantial autonomy". Therefore, Kosovo is not included in this analysis.

1. Three groups of countries

The first group consists of countries that have already opened accession negotiations. Those are Serbia and Montenegro, and they are considered as front runners in the region. Serbia currently has 18 opened accession chapters, two of which have been provisionally closed. As regards Montenegro, after a decade of accession negotiations all the 33 screened chapters have been opened, three of which are provisionally closed.

In the second group are countries that have recently, on 19 July 2022, started accession talks after many years of vetoes and disputes. Those are North Macedonia and Albania. North Macedonia was granted candidate status back in 2005. However, for many years North Macedonia was unable to start accession negotiations due to the opposition of Greece, until it changed its name under the Prespa Agreement of 2018. Afterwards, France blocked the opening of accession negotiations with North Macedonia and Albania until a new enlargement methodology was agreed at the EU level. The next obstacle was the Bulgarian veto in 2020. Bulgaria has blocked any progress due to a dispute between the countries over some historical issues. This was overcome after North Macedonia and Bulgaria signed up to a French proposal that would make Macedonian an official language in the EU, change the country's constitution to acknowledge Bulgarians among the nation-building peoples, protect minority rights etc.[20] On the other hand, Albania received candidate status in 2014. The dispute between Bulgaria and North Macedonia stalled Albania's bid to become a member, after the EU had grouped both countries together in their accession bid. Albania is expected to start accession negotiations immediately, while North Macedonia will need to change the constitution first by including the Bulgarians among the other nation-building nations listed in it.

The third group includes only one country that has not yet received the status of a candidate country. Bosnia and Herzegovina has been recognized as a potential candidate for the EU integration since 2003. However, its status has not changed since then. It was only in 2016 that Bosnia and Herzegovina submitted its application to join the European Union.

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20 <https://www.euractiv.com/section/enlargement/news/explainer-next-steps-for-albania-north-macedonia-as-eu-agrees-starting-accession-talks/>.

2. Common challenges

Taking into account the previously mentioned challenges that the EU itself is facing,[21] the question arises as to how these challenges have influenced the integration process of the Western Balkans countries.

When the 2004/2007 enlargements took place, WB countries all had eyes on Thessaloniki Summit, and they were very optimistic. However, over time that enthusiasm waned. The question is: why? Mainly due to internal political turmoil in the countries, the fragile economies of the WB countries that may have felt the crisis even more than the EU, which was seriously linked to political changes (growth of the opposition parties, decline in public support of EU integration, etc.). "In sum, debates on EU enlargement have shifted from tentative optimism about the EU's transformative potential towards a growing wariness of the Union's ability to bring lasting change to its neighbours in recent years."[22]

Furthermore, these countries have not been able to respond to migrant crisis on their own. More or less, they have seen themselves in a project co-financing of solving migrant problems. The EU itself has sent the message to the WB countries, by keeping migrants on the edges of its borders, but in WB countries, that they are not yet ready for full membership.

Brexit has had an impact on the public opinion in WB, in terms of declining citizens' support for EU integration. Nevertheless, most of the population is still in favour of European integration.[23]

Finally, the Ukrainian crisis also has had an impact on the Western Balkans' integration process. Throughout much of the Western Balkans, economies have remained underdeveloped; dependent on aid, loans, and remittances; and prone to high level of state intervention. Moreover, the EU's unfinished business in the Balkan, coupled with diminished economic membership incentives, has opened the door to various political, economic and security alternatives.[24] This observation refers specially to Chinese financial investments, that occurred after the global economic crisis.

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21 See above II.

22 *Wunsch/Olszewska*, p. 13.

23 Recent stats show that 57% of citizens in Serbia is in favour of EU integration.

24 *Bieber, F./Tzifakis, N.*, The Influence of External Actors in the Western Balkans: Linkages and relations with non-Western countries, in: Bieber/Tzifakis (eds.), The Western Balkans in the World, London 2019, pp. 1-14.

In addition, WB countries have their own issues, which remain open in the long run, hindering their accession to the EU. There are two key issues in this regard that should be addressed. One is the status of Kosovo and the other is the political situation in Bosnia and Herzegovina. Its constitutional framework has stopped the war, but the question is how much it provides a basis for normal functioning of the state, and its capacities for EU integration.

Nevertheless, the WB countries have indeed made some commendable attempts to improve bilateral relations, although this does not seem like a major step forward from the European Union's perspective. In this context, the following should be mentioned: Macedonia has agreed to change the name of its country to North Macedonia.[25] Since the conclusion of the Brussels Agreement, Serbia has shown a fairly cooperative attitude towards the normalization of relations with Kosovo, which is a basic condition for the EU accession. Also, despite its neutral status, Serbia developed cooperation with NATO. Montenegro has been relatively successful in overcoming a serious political crisis, shifting the focus of domestic political issues from identity to economic development. Although the political situation is unstable, Albania has followed the same path.

3. Open Balkan initiative

These efforts resulted in the creation of the Open Balkans initiative, which implies respect of essential European values and European way of life. The Open Balkan was initiated in 2019 by the leaders of Albania, North Macedonia, and Serbia. It is an economic project aimed to establish free movement of goods, services, people, and capital in line with the EU Single market. In other words, the aim of the Open Balkan is to facilitate trade between members, remove barriers, allow workers to move and employ freely, goods and services to cross borders without delays and allocate the investments more efficiently. Border controls among three countries are planned to be removed by 2023. From June 2021 to June 2022, these three countries signed three Memorandums of understanding and ten interstate agreements.[26] Therefore, regardless of the modest progress of WB countries in last two years in the process

25 See above, III.1.

26 <https://pks.rs/open-balkan-sporazumi/potpisani-sporazumi>.

of European integrations, either individually or regionally, the creation of the Open Balkans initiative is an important step towards building stronger regional cooperation.[27]

The latest initiative of the French President Emanuel Macron on geopolitical union seems to correspond to such tendencies in the Balkans. In his speech given on the occasion of the Conference on the Future of Europe he raised the question about the organization of Europe from a political perspective and with a broader political perspective than the European Union, proposing the creation of a European Political Community.[28] This new European organization would allow democratic European nations that subscribe to European core shared values to find a new space for political and security cooperation, cooperation in energy sector, in transport, investments, infrastructures, the free movement of persons and in particular of youth. Joining would not prejudice future accession to the EU necessarily, and it would not be closed to those who left the EU. It would bring Europe together, respecting true geography, on the basis of its democratic values, with the desire to preserve the unity of continent and by preserving the strength and ambition of integration.[29]

On the one hand, the WB countries, through numerous, and from their point of view painful compromises, have shown an exceptional degree of cooperation. On the other hand, it is up to the European Union to determine whether this level of cooperation is sufficient. But it should be kept in mind that that compromises that express cooperation, which are not accompanied by the opening of certain perspectives, can fail, and instigate some latent conflicts. One can recall an old wisdom which says that the relationship between two sides depends on the one that is more developed in every sense, and in this context, it is not the Western Balkans.

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27 *Kovacikova, H.*, Western Balkans Regional Common Market. What Lessons Can Be Taught from EEA? – A Case Study from Public Procurement, Strani pravni zivot 2022, pp. 133-145, doi: 10.5937/spz64-29635.

28 *Mirel, P.*, In support of a new approach with the Western Balkans: Staged accession with a consolidation phase, European issues 2022, pp. 1-8, p. 1.

29 <https://presidence-francaise.consilium.europa.eu/en/news/speech-by-emmanuel-macron-at-the-closing-ceremony-of-the-conference-on-the-future-of-europe/>.

IV. Challenges of a new enlargement methodology

On 5 February 2020, the European Commission issued a Communication proposing a new enlargement methodology named "Enhancing the accession process – A credible EU perspective for the Western Balkans".[30] This methodology presents a step towards overcoming the impasse in the EU enlargement process triggered by the inability of the Council to open accession negotiations with North Macedonia and Albania in October 2019. France conditioned the opening of negotiations with North Macedonia on the adoption of a new methodology.[31]

The new enlargement methodology refers primarily to North Macedonia and Albania. However, it is clearly stated that proposed changes can be accommodated within existing negotiating frameworks, ensuring a level playing field in the region. Namely, negotiating frameworks for Serbia and Montenegro, two countries that have already started accession talks, will not be amended, but the proposed changes could be accommodated within the existing frameworks with the agreement of these two countries. Both Serbia and Montenegro accepted a new enlargement methodology.[32]

Despite successive reforms (such as the new approach on the rule of law, the focus on the fundamentals under the Commission's Western Balkans Strategy from 2018), the process needs to be better equipped to deal with structural weaknesses in the Western Balkans countries, in particular in the area of fundamentals. "It is of major importance to build more trust among all stakeholders and to enhance the accession process and to make it more effective."[33] A new enlargement methodology sets out concrete proposals for strengthening the whole accession process. The overall aim is to enhance credibility and trust on both sides and yield better results on the ground.

To achieve the objectives, the new methodology relies on four criteria and accompanying legal instruments.

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30 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Enhancing the accession process - A credible EU perspective for the Western Balkans, COM (2020) 57 final.

31 See above, III.1.

32 *Ceranic Perisic*, J., Prospects for Integration in the Western Balkans, in: Kellerhals/Baumgartner (eds.), Current Challenges of European Integration, Zurich 2021, pp. 95-113, p. 102.

33 COM (2020) 57 final.

1. Four criteria and accompanying legal instruments

The four criteria provided by the new enlargement methodology are: more credibility, a stronger political steer, a more dynamic process, and predictability (positive and negative conditionality). To meet each of these criteria, the methodology provides legal instruments. To ensure more credibility stronger focus should be put on fundamental reforms. For a stronger political steer, a new methodology provides high-level political and policy dialogue. To inject further dynamism into the process and to foster cross-fertilization of efforts beyond individual chapters, it is provided that the negotiating chapters will be organized in thematic clusters. These clusters follow broad themes such as good governance, internal market, economic competitiveness, etc. Finally, to meet the fourth criteria, predictability, both positive and negative incentives are envisaged, i.e., possibility of closer integration, increased funding and investments and sanctions.[34]

As for the novelty of the instruments envisaged by the new methodology, the fact is that they are not completely new. The focus on the rule of law within the accession process cannot be characterized as a novelty. In recent years, the Council's and the Commission's documents concerning the Western Balkans have repeatedly emphasized that the focus of accession negotiations should be on the rule of law. Regarding the regular holding of intergovernmental conferences, some aspects of this instrument are already known. However, the possibility for representatives of countries in the region to participate as observers in the key EU meetings on topics that are essential to them, is a novelty. As for the grouping of negotiating chapters into clusters, this instrument is undoubtedly new. It seems that it could contribute to speeding up the negotiation process, but only on the condition that some secondary issues in less important chapters do not impede the whole cluster.[35]

2. Instrument of positive incentives

To make the accession process more predictable, a new enlargement methodology envisages instruments of positive and negative incentives. As regards positive incentives, if countries move on reform priorities agreed in the negotiations sufficiently, this should lead to:

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34 COM (2020) 57 final.

35 <https://www.bruegel.org/2020/02/can-the-european-union-overcome-its-enlargement-impasse/>.

– Closer integration of the country with the European Union, work for accelerated integration and "phasing-in" to individual EU policies, the EU market and EU programs, while ensuring a level playing field.
– Increased funding and investments – including trough a performance-based and reform-oriented Instrument for Pre-accession (IPA) support and closer cooperation with international financial institutions (IFIs) to leverage support.[36]

This new instrument of positive incentives is controversial on various levels.

a) Novelty

The possibility of closer integration of a country with the European Union is not a complete novelty. Closer integration is just one of the modalities of differentiated integration, a phenomenon that has always existed in European integration. Numerous manifestations of differentiation derive from the Treaties and from secondary law. Special regimes, derogations, exceptions, and safeguard clauses are to be found in the Treaties right from the start of the integration process.[37]

The history of European integration testifies that whenever the external borders of the EU have been changed, in terms of increasing the number of Member States and consequently its diversity, the discussion on differentiated integration has been intensified. In this context, differentiated integration, based on the flexibility concept, should be taken as a new principle and a new tool for responding to differences in the enthusiasm and capabilities of the Member States to take on new tasks of policy integration.[38]

Comparison of the mentioned instrument of closer integration with the already known mechanism of enhanced cooperation provided by Treaties, brings to the conclusion that the key difference between them lies in the fact that the possibility of closer integration and "phasing-in" to individual EU policies and the EU market is offered without full EU membership. This is a real novelty in the EU integration process. Such a possibility has not been offered to any country in accession process so far.[39]

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36 COM (2020) 57 final.

37 *Ceranic, J.*, Differentiated integration – a good solution for the increasing EU heterogeneity?, in: Kellerhals/Baumgartner (eds.), Multi-speed Europe, Zurich 2012, pp. 13-26, p. 13.

38 *Wallace, H.*, Flexibility: A Tool of Integration or Restraint on Disintegration?, in: Neunreiter/Weiner (eds.), European Integration after Amsterdam, Institutional Dynamics and Prospects for Democracy, Oxford 2000, pp. 175-191.

39 *Ceranic Perisic, J.* (2021), p. 110.

As regards the EU Single Market, the question arises whether it is possible to participate in it without being an EU Member State? If one looks at the modalities of participation on the EU Single Market, one can find already existing different modalities of participation in the EU Internal Market without full EU membership.[40]

At this point one may recall the case of Switzerland, but not in order to compare the position of Switzerland within the Single market with the possibility of closer integration offered to the WB countries, but to shed light on different modalities of participation in the Single market (without full membership) that have already existed within the EU.

In terms of legal position regarding the EU *acquis*, the Swiss participation within the EU Internal market could be qualified as a type of closer integration or integration at its own speed.[41] In its relationship to the European Union, Switzerland follows the so-called *bilateral approach*.[42] Instead of a comprehensive integration, specific areas of mutual concern are regulated trough a framework of traditional international treaties and for a very limited purpose only.[43]

b) Feasibility

However, the instrument of closer cooperation offered by a new enlargement methodology is not challenging because of its novelty, but its feasibility. The possibility of "phasing-in" to individual EU policies, the EU market and EU programmes for the Western Balkans countries has opened a few practical questions. First and foremost, it remains to be seen how this "phasing-in" will operate in practice, especially when it comes to the decision-making process. Does it mean that the candidate country will be allowed to participate in the decision-making process in certain EU policies and to vote in the Council and in the European Parliament? Or does it mean that the representatives of that country will participate only as observers in the III.1. mentioned EU meetings?

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40 *Visekruna*, A., *The access to the EU financial market for the companies from non-member states, in: Duic/Petrasevic (eds.)*, EU and comparative law issues and challenges (ECLIC), vol. 2, Osijek 2018, pp. 656 – 671.

41 *Kellerhals*, A., Switzerland's relationship with the EU: integration at its own speed, in: Kellerhals/Baumgartner (eds.), Multi-speed Europe, Zurich 2012, pp. 147-164.

42 At present, this convolute of treaties comprises more than 100 agreements.

43 *Kellerhals*, A./*Baumgartner*, T., A different neighborhood policy: Switzerland's approach to European Integration, in: Kellerhals/Baumgartner (eds.), EU Neighborhood Policy – Survey and Perspectives, Zurich 2014, pp. 271-287, p 272.

One may recall the model of participation of EFTA countries (Norway, Iceland, and Liechtenstein) in the EU's Internal market without being members of the EU. These countries do not formally participate in the decision-making process. As a compensation for their absence from the formal decision-making stage in the Union, the Agreement affords them extensive room for consultations during the preparatory stage of the legislative process in the EU.[44] In this regard, it is not realistic to expect that the WB countries, within the framework of closer cooperation, could gain more than the EFTA countries in terms of participation in the decision-making process.

One of the dilemmas also concerns the sustainability of closer integration in individual EU policies, the EU market and EU programmes over time. Is it feasible that the candidate country participates partially in certain EU policies or only in some aspects of the EU Internal market? And for how long?[45] A new enlargement methodology does not provide any answer to these important questions.

c) Insufficient finances

Last but not least, the financial aspect of this instrument is controversial. Although a mechanism of benefits and sanctions is very welcome, it did not retain the French proposal to commit the structural funds/cohesion funds to pre-accession:

"The new method has therefore been deprived of a powerful financial incentive for reform. Because it will not be the 14.2 billion euro in budgetary aid to the Balkans from the IPA program between 2021 and 2027 that will lend credibility to the approach. Bulgaria, which is similar in size to Serbia, received almost six times more than the IPA allocated to the latter in the period 2014-2020. Admittedly, one is a member of the Union and the other is not. But the needs are the same. Such a difference will also increase the gap between members and candidates. And the rule that billions should be allocated to the new member at once is an economic and budgetary aberration. Therefore, even if revised, this negotiation process alone will not be sufficient to restore the credibility of the European Union, to stem emigration and external influences, or to help resolving disputes."[46]

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44 <https://www.efta.int/~/media/Files/Publications/Bulletins/eeadecisionshaping-bulletin.pdf>.

45 *Ceranic Perisic* (2021), p. 111.

46 *Mirel*, p. 6.

V. Concluding remarks

The Western Balkans' integration perspectives move in the following coordinates: the future of the EU itself; the outcome of the war in Ukraine; and the effectiveness of a new enlargement methodology. Despite its shortcomings, a new enlargement methodology, coupled with some additional financial support, can contribute to reinvigorating the accession process.

In this regard, and primarily bearing in mind deficiencies in terms of financing, some scholars have suggested a new approach based on three principles: ending the binary system of limited pre-accession assistance and then massive post-accession funds once a member; progressing towards accession in stages according to reforms achieved, with each stage giving access to increased funds; establishing a consolidation phase at the end of negotiations before full membership.[47]

In times of increasing global challenges, divisions and various political, economic, and financial alternatives, prospect for integration of Western Balkans might be "a geostrategic investment in a stable, strong, and united Europe".[48]

The Havel-like slogan "Europe as a Task",[49] chosen by the Czech Republic as the motto of its Presidency of the Council of the EU in 2022 is perceived not only as an opportunity to reflect together, but III.1. all as a call for accountability and determined action based on the values that European conscience requires Europeans to pursue. If Europeans want to live up to the expectations of this historical moment, the European triple challenge is to: rethink, rebuild and repower Europe.[50]

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47 *Lazarevic*, M., Away with the Enlargement Bogeyman, EPC 2018, pp. 1-12; *Mirel*, P., European Union – Western Balkans: in support of a revised negotiation framework, European Issues, 2018, p. 1-8; *Mirel*, pp. 6-7.

48 COM (2020) 57 final.

49 In 1996, Czech President Václav Havel, considered the future of European continent in his speech, entitled Europe as a Task, stressing that the tasks ahead of Europe deserve careful and thorough reflection.

50 <https://czech-presidency.consilium.europa.eu/media/fk3pihaw/eng_priorities.pdf>.

Moldova's Aspirations to the EU – A Small Country with a Big Heart

Viorel Cibotaru

With the great devastation of World War two, there was a single premise behind the creation of what is now the European Union: lasting peace. The EU must renew its commitment to this mission considering Russia's invasion of Ukraine. And enlargement is the most effective instrument that it can use to foster peace and bring stability to fragile eastern Europe.

The founding treaty of the EU allows any European state respecting human dignity, freedom, democracy, equality, the rule of law and human rights, and is committed to promoting them, may apply to become a member of the union. Moldova is committed to these values. It has demonstrated this the hard way.[1]

The refugee crisis following the onset of the war in Ukraine has affected the Republic of Moldova disproportionately, given its population and limited resources. With an estimated number of 600,000 people crossing the border from Ukraine since the beginning of the invasion and around 100,000 refugees remaining in the country, the management of these flows requires around 1 million EUR per day. The refugee population remaining in Moldova represents vulnerable groups – around 49,000 of the refugees are children, and the majority of adults are women and elderly.

The war in Ukraine has also resulted in significant macro-economic spillover effects on Moldova, hampering post-pandemic recovery efforts which had already been affected by a sharp increase in energy prices and rising inflation. Even before the war, the cost of gas had risen by 360%, while inflation reached 18%. Now, the country is facing additional risks for energy security and a sharper-than-anticipated increase in energy prices, disruptions to trade and food supply chains, and impact on migration and remittance flows. Macroeconomic analysis indicates that the war in Ukraine will result in a GDP decrease between 3% and 15% compared to the 'business-as-usual' scenario, depending on how downside risks materialise.

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[1] *Popescu, Nicu*, The EU has to expand its membership, The Economist, 16 June 2022, available at: <https://www-economist-com.ezproxy01.rhul.ac.uk/by-invitation/2022/06/14/moldovas-deputy-prime-minister-urges-the-eu-to-expand-its-membership>.

This crisis further weakens the country's institutions and makes it even more vulnerable to hybrid threats. In times of crisis, when resilience is key, corruption becomes a threat to the country's security. The Government started a comprehensive reform of the justice system and fight against corruption. The regional crisis slowed down the reform process and created additional risks for the initiated reforms, including legal changes, vetting and assets recovery process, but also news risks of corruption. Specifically, after the war in Ukraine started, anticorruption and intelligence institutions reported several attempts made by specific groups to corrupt judges in exchange of a decision on high profile cases.

The war in Ukraine has led to immediate increases in spending for the Moldovan government, particularly for the management of the refugee flows. Higher-than-expected inflation, the public sector energy bill, as well as the need to ensure food security also require immediate additional spending. Minimising and reversing the negative impact on our country requires swift, massive and quick financial and direct investment flows. There is an acute need to enhance the recovery and resilience of local companies, especially of SMEs, given the consequences of the war on trade flows.

On the financing side, the higher base rate and additional risks in the banking sector make refinancing of government securities challenging. The additional financing from the IMF and the World Bank will not suffice to cover the financing gap for 2022 and 2023. Moreover, debt sustainability analysis indicates that Moldova is close to the safe borrowing limits.

The Moldovan Government is therefore requesting a sizable increase of grant support to the budget. **The need for grant support is expected to rise to 405 million Euro if internal financing risks materialise.** Budget support is particularly important in light of challenges for quick absorption of funds in the short term. This would be critical for safeguarding existing fiscal space.

Lack of financing and high borrowing levels would jeopardise future economic development of Moldova. This would test the limits of social cohesion and aggravate Moldova's long-standing political fragmentation, generating instability in the region with potential reverse spill-over effects on the already precarious situation in Ukraine. Significant investment is also required in key interventions to ensure stability and reduce sectoral risks, such as energy efficiency and energy supply security, financing the private sector, especially small and medium enterprises, ensuring food security, building resilience against hybrid threats and enhancing social resilience. **The Moldovan Government is therefore requesting additional support for programs in these five key areas, amounting to 4,58 billion Euro for the period 2022-2024**.

Five key areas of additional support

Area	Brief Description of Programs (2022-2024)	Amount (million Eur)
Economic Resilience and Recovery	Facilitating access to finance, enhancing business capacities through digital transformation and innovation, improving competitiveness of local companies by integration in international value chains and improving quality infrastructure, creating incentives for small producers to move to the formal economy, and encouraging green transformation of enterprises.	1,090
Energy Efficiency and Security	Energy efficiency in the residential sector, public and private buildings, modernisation of the centralised heating system, construction of a new power generation source, construction of an incineration plant enabling the energy recovery of solid waste, and the introduction of solar-based lighting of streets and public places on a wide scale.	1,830
Food Security	Programs geared at offsetting taxes on diesel and fertilisers used in agriculture, as well as at supporting affected sectors (i.e. poultry, horticulture, wine production) to better access the European market	414
Borders, Public Security and Hybrid Threats	Consolidation of border controls, reducing the risks generated by trans-national and organised crime, increasing the resilience of the cybersecurity infrastructure and countering misinformation and fake news.	543
Social Resilience	Targeted compensation system (Energy Vulnerability Fund) to mitigate the impact of rising energy prices, consolidation of social services, and modernisation of the childcare system	700
Total		**4,577**

With the beginning of Russia's war of aggression on Ukrainian soil, Moldova immediately condemned the Russian invasion of our neighbor. Moldova respects the international rule of law and thus the international financial sanctions on Russia, and we voted to cast it out of several international forums.[2]

[2] *Popescu, Nicu*, The EU has to expand its membership, The Economist, 16 June 2022, available at: <https://www-economist-com.ezproxy01.rhul.ac.uk/by-invitation/2022/06/14/moldovas-deputy-prime-minister-urges-the-eu-to-expand-its-membership>.

In order to meet all conditions, a Roadmap for the implementation of priority actions in the field of home affairs following the granting of the status of a candidate country for accession to the European Union was adopted by the internal affairs authorities. It includes priority actions in the main areas of home affairs for the next 18 months, which are correlated with the main objectives that contribute to the achievement of:

- The UN 2030 Agenda for Sustainable Development and its objectives;
- Provisions of the RM-EU Association Agreement;
- Priorities of the RM-EU Association Agenda;
- The sectoral programs that come to implement the Development Strategy of the field of internal affairs for the years 2022-2030;
- The Action Plan for the implementation of the measures proposed by the European Commission in its Opinion on the application for the accession of the Republic of Moldova to the European Union, adopted on June 4, 2022 by the National Commission for European Integration;
- Regional and national security in the conditions generated by different types of crises.

The Roadmap includes actions with a major impact on society, including those involving or requiring budgetary sources or external assistance, and is based on 8 priority actions:

- Strengthening the fight against organized crime, based on detailed threat assessments, increased cooperation with EU regional and international partners and better coordination of law enforcement authorities.
- Increasing the safety of the population at home, in the community and in public spaces.
- Strengthening the integrated migration management system based on safe, orderly and regulated migration, through respect for human rights.
- Strengthening integrated state border management and aligning with Community requirements for the application of the provisions of the Schengen acquis.
- Making emergency and exceptional situation prevention measures more effective by increasing operational and response capacity.
- Developing the education/training process on the basis of European good practices in accordance with the needs of law enforcement authorities.
- Automating information, work and digitised service delivery processes to increase citizens' trust and security.
- Decreasing areas and numbers of people vulnerable to corruption by strengthening the climate of integrity and unified ordering of competencies to prevent and combat corruption within the internal affairs system.

As a supporter of democracy and against authoritarianism, Moldova applied for EU membership on March 3rd. Moldova seeks formal candidate status for membership. This EU bid is hardly news. For over 20 years, the EU has been an anchor for the peaceful, prosperous, and democratic development of Moldova.

Moldova has never abandoned its aim of European integration. Throughout Russian trade embargoes, oligarchic rule, political arm-twisting and gas crises, it remained steadfast. When its politicians failed to draw Moldova closer to the EU, its citizens reacted. Last year a Russia-leaning administration was defeated and voted out of office.

Moldova became independent in 1991. For the first time since then, all three branches of government are guided by the objective of achieving a breakthrough on the European path. Such a unique political conjuncture must be taken advantage of.

It is time that the EU to embraces Moldova. Stability and prosperity among the EU's neighbors mean stability and prosperity for all. EU enlargement is the best way forward for all and Moldova deserves inclusion. Its democratic institutions are functional, Moldova is committed to the rule of law, and aligned with EU foreign policy. Moreover, Moldova is prepared to enact further reforms and other measures necessary to join. It has already implemented significant parts of the acquis Communautaire – the body of legal rights and obligations that bind all EU countries – since the signing of the Association Agreement in 2014.

There exist relevant precedents in support of Moldova's application to join. In the 1980s Greece, Portugal and Spain joined what was then the European Community as a means of boosting their new democracies and modernizing their economies. The Thessaloniki Summit in 2003 opened the door to a European future for the western Balkans after the tragic Yugoslav wars in the 1990s. Their accession process might have been slow and imperfect, but it has stabilized the region politically and provided motivation for reforms.

There are economic reasons for the application as well. With a dramatic increase in the country's population – a 4% rise at the peak of the influx of refugees from Ukraine – Moldova's resources are overstretched. With an inflation rate of 18%, mainly because of a four-fold increase in energy prices. Investments, trade and supply chains are all affected. Covering the shortfall in revenue is no simple task.

To address these challenges, closer economic integration with the EU will help. The union is already Moldova's largest trading partner and accounts for 67% of its total exports. The EU is also a significant source of job-generating foreign direct investment.

Moldova is connected to the European Network of Transmission System Operators and taking steps to open electricity trading on the EU market. In addition, electricity interconnections with Romania are being built and the Iasi-Ungheni-Chisinau gas pipeline is operational. Most recently, Moldova has been included in the joint energy purchases under the REPowerEU plan, which aims to strengthen the continent's energy security. The accession process would help consolidate these ties, diversify away from dependency on Russian gas and modernize our economy.

Economic growth may also make a long-lasting settlement with the breakaway Transnistrian region more likely. Growing prosperity would make Moldova more attractive to its residents and the pitch of the separatist authorities less attractive.[3]

Moldova's foreign policy has been shaped by the European integration objective since 2005. Moldova's pro EU foreign policy, however, has suffered because of high level of corruption, anti-European factions domestically and even open attacks on the EU from influential political figures. Abillion-dollar banking fraud exposed systemic corruption problems and muted high expectations. From 2015, the EU and other international development partners started to apply stricter conditionality, linked the reform process, respect for democracy, rule of law and human rights. This was an important leverage factor for the governing elites in Moldova to stay on track of reforms and sanction them when democratic principles were violated. In recent years – when Moldova was governed by Plahotniuc and/or Dodon – under various configurations, the country grew increasingly isolated on the international arena. One claimed to implement a pro-Western foreign policy, and the other claimed to seek a 'balanced' foreign policy. Both failed to either bring Moldova closer to the EU or retain a healthy balance between East and West. Both exploited divisive geopolitical messaging to gain domestic and international advantages for personal benefits. Anti-Europeanism and anti-Russian sentiment are not significant mobilizing factors in domestic politics. Both did much to discredit the notions of either a 'pro-European', or a 'balanced' foreign policy, because these terms were used to disguise corruption and an incapacity to achieve

[3] *Popescu, Nicu*, The EU has to expand its membership, The Economist, 16 June 2022, available at: <https://www-economist-com.ezproxy01.rhul.ac.uk/by-invitation/2022/06/14/moldovas-deputy-prime-minister-urges-the-eu-to-expand-its-membership>.

results. Though disinformation still is a big challenge, Moldovan citizens have started to better decrypt the intentions hidden behind these narratives, striving for policies that help to address real systemic problems of the Republic of Moldova, such as corruption, politicized institutions and unfair justice. The unprecedented vote of almost one million citizens for Maia Sandu as President of the Republic of Moldova, is yet another confirmation of the new trend. Moldovan society is now opting for leaders that are inclusive, have a pro-reform and anticorruption agenda, inspiring internal transformations and promoting a positive foreign policy aimed at putting Moldova on the map of more resilient, developed and democratic European societies. The first 100 days in office of President Maia Sandu is paving a solid track towards this objective. The special strategic partnerships with Romania and Ukraine were relaunched. Romania was among the first EU countries to provide consistent support to address the pandemic crisis needs and provided the first lots of anti-COVID19 vaccines. The high-level political dialogue with the EU and its member-states including with France and Germany was reestablished aiming at advancing political association and economic integration, but also supporting the pro-reform agenda of the President. The new administration at the White House provides great momentum for an upgraded bilateral partnership with the US, which could rely on an even stronger support for Moldova's security, economic development, rule of law and anti-corruption efforts. However, the crisis environment significantly complicate Moldova's capacity to implement an efficient and result-oriented foreign policy.[4]

There is a large responsibility that lies on the shoulders of the EU's political leadership and its member states. The challenges require statesmanship, courage, and strategic vision beyond short-term calculations. Historic moments call for historic decisions. They will involve costs, but inaction and negligence will cost Europe more. Moldova is a small country of 3 million people. We will be either part of the EU or left in dangerous limbo. The window of opportunity is small. There is no time for hesitation.[5]

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4 *Popescu, Nicu/Groza Iulian*, Moldova's Foreign Policy: Smart diplomacy for a stronger country, IPRE, 7 May 2021, available at: <https://ipre.md/2021/05/07/moldovas-foreign-policy-smart-diplomacy-for-a-stronger-country/?lang=en>.

5 *Popescu, Nicu*, The EU has to expand its membership, The Economist, 16 June 2022, available at: <https://www-economist-com.ezproxy01.rhul.ac.uk/by-invitation/2022/06/14/moldovas-deputy-prime-minister-urges-the-eu-to-expand-its-membership>.

Confronting China, looking in the mirror: reflections on human rights and the rule of law in EU-China relations

Christelle Genoud/Eva Pils

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I. Introduction

For decades, the relationship between the European Union and its member states on the one hand, and the People's Republic of China ('China') on the other has been fraught with confrontation and contestation about human rights. Yet, there has also always been an optimistic expectation of improvement and an assumption of shared goals, attitudes and assumptions that have underpinned initiatives such as the various human rights and rule of law dialogues the EU and some of its member states have maintained with China.

On the European side, some of these axiomatic assumptions can be extrapolated, inter alia, from article 21 of the Treaty on European Union (TEU), which stipulates that 'The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.... The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to (a) safeguard its values, fundamental inter-

ests, security, independence and integrity; [and] (b) consolidate and support democracy, the rule of law, human rights and the principles of international law.'[1]

On the Chinese side, party state discourse is complex and has encompassed many assertions to the effect that China is a state under the rule of law that is committed to respecting and promoting human rights. Yet, the conceptions for domestic and global governance propagated especially under Xi Jinping also indicate a trend of autocratic closure. Under Xi Jinping, the Party-State has re-emphasised the total authority of the Chinese Communist Party ('the Party'), for example by writing the Mao-era phrase '*the Party leads everything*,' into the Party's Charter.[2] It also propagates a traditionalist *tianxia* ('all under heaven') conception of global governance harking back to China's external relations in the imperial era[3] and the vision of a 'shared future for mankind' (*renlei ming'yun gongtongti*).[4] These ideas sit uneasily with liberal democratic conceptions of governance, human rights, and the rule of law.

Increasingly, therefore, we must ask how, if at all, the EU and its member states can 'support democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law' in their interactions with the People's Republic of China, and if the axiomatic assumptions underpinning regular frameworks such as that of article 21 TEU might not be reflecting a

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1 European Union, Consolidated version of the Treaty on European Union, 26 October 2012, OJ C 326/13.

2 Xue Wanbo (薛万博), 怎样认识"党是领导一切的"写入党章？[How to understand that 'the Party leads everything' has been written into the Party Constitution?], CPC News, 25 January 2018, available at: <http://cpc.people.com.cn/n1/2018/0125/c123889-29787340.html>.

3 *Tingyang, Zhao*, A Political World Philosophy in Terms of All-under-Heaven (Tian-Xia), Diogenes 56, no. 1, 1 February 2009, pp. 5-18, doi:10.1177/0392192109102149; Melissa Williams, Rainer Forst & Zhao Tingyang in Conversation, "The Meanings of Democracy", Villa Aurora Thomas Mann House (VATMH), 10 January 2021, available at: <https://www.vatmh.org/en/eventreader/the-meanings-of-democracy-melissa-williams-rainer-forst-zhao-tingyang-in-conversation.html>; *Zeng Shen* (曾参), '礼记·大学'[The Great Learning], for a bilingual version, see e.g. <https://pages.ucsd.edu/~dkjordan/chin/Koong/GreatLearning.html>.

4 国际组织与全球治理_中国人大网 [National People's Congress website on international organisations and global governance], <http://www.npc.gov.cn/npc/c30834/202103/0d2a4aaaf5e7405b8bcce8135af07c90.shtml>; cf also Qiushi Magazine, 关于全球治理体系，习近平总书记怎么看 [What does General Party Secretary Xi Jinping think about global governance bodies], <http://www.qstheory.cn/zhuanqu/2020-12/28/c_1126921292.htm>.

misconception of the relationship between relevant systems of governance. This question concerns the EU's legal obligations, as much as the risks it faces, for instance risks of complicity with China's human rights violations.

In this article, we begin (II) by outlining central features of the Chinese party-state system of democratic dictatorship which, we argue, need to be considered in any normatively informed discussion of EU China relations, and which are also key to understanding the Chinese leadership's approach to global governance and to its international relations. We argue that there is continuity between China's domestic and global governance ideas and practices.

We then reflect on the ideas and practices that have characterised the EU's interactions with China, focusing on programs, initiatives, and activities related to human rights. We argue that the previously dominant idea of *change through commerce* has largely failed (III) and (IV) that the EU and its member states as well as actors within them must address a number of discrete human rights risks arising from their increasingly complex and varied interactions with the Chinese government and other Chinese counterparts.

In conclusion (V), we offer some thoughts on how to confront the Chinese government on its human rights violations, understand and mitigate risks of complicity with human rights violations, and understand our responsibilities in the context of China's transnational human rights violations.

II. What is Europe confronting? The genealogy of the party-state under Xi Jinping's leadership

If we were to characterise the nature of the Chinese system of governance by just one principle, that principle would have to be the unity of powers under party leadership. The notion that the Chinese Communist Party must 'lead on everything' is not only clearly articulated at the inception of the People's Republic of China;[5] it is also supported indirectly by an unequivocal rejection

[5] Guan Ling discusses Mao's definitions of the 'leadership of everything' principle in speeches on 30 January 1962 and in December 1973, see *Ling, Guan* (关岭), 春秋笔：毛主席语录写入十九大党章 [Spring and Autumn Notes: Chairman Mao's Quotations Written into the Party Constitution at 19th Party Congress], Duowei News, 30 October 2017, available at: <http://culture.dwnews.com/history/news/2017-10-30/60020382.html>.

of the principle of the separation of powers, or in other words, the idea that in genuinely democratic systems not only majoritarian decision-making, but also fundamental rights must be safeguarded by the power of the state.[6]

While a unity of powers principle was firmly entrenched and practice during the first three decades of the People's Republic of China, i.e. the Mao era, the ensuing reform and opening era led many to question the pre-existing system of governance. Not only was the fact that 'ruling the country in accordance with law' written into the revised 1982 Constitution, but also the enactment of many new laws underpinned by the general idea of curbing public power and the re-creation of legal institutions in many ways weakened the unity of powers under party rule. For example, the liberty of the person found expression not only in Article 37 of the 1982 Constitution, but also in the 1979 Criminal Procedure Law and its further revisions. Important shortcomings remained,[7] both at the level of the letter of the law, and at the level of the criminal process 'on the ground,' where it can be argued that the party state relies on legal rules and mechanisms when this is convenient, but continues to dispense with the use of laws and deploy arbitrary measures, including arbitrary detention, disappearance, and torture, for example to extract 'confessions.' But at a minimum, the recognition of certain fundamental rights in domestic legislation afforded advocates and critics a basis they could draw on to resist arbitrary uses of coercive power by the party state. The existence of legal rules supposedly limiting the power of the authorities to use violence in arbitrary fashion – certain forms of torture, for example, are not only prohibited, but also criminalised in the domestic legal system – can from this perspective be viewed as an irritant: a factor that threatens to disrupt governance practices ordinarily combining law and lawlessness in a contemporary version of a Fraenkelian 'dual state.'[8] The perceived need to disregard legal rules has led to the emergence of discourses claiming that good governance should combine 'ruling the country in accordance with law' and 'rule by virtue,' affording the authorities rhetorical tools to justify their intensified clampdown on nonconformist attitudes, rights advocacy, and political dissent.

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6 Xi, *Jinping* (习近平), '加强党对全面依法治国的领导' [Strengthening the Party's leadership of comprehensive rule of the country in accordance with law], Qiushi Magazine, 15 February 2019, available at: <http://www.qstheory.cn/dukan/qs/2019-02/15/c_1124114454.htm>.

7 Despite its generally lower standards of protection, the 1979 Criminal Procedure Law's Chapter 6 on 'coercive measures' contains legal requirements affecting criminal detention and arrest, for example 中华人民共和国刑事诉讼法 (1979年) [PRC Criminal Procedure Law 1979].

8 *Pils, Eva*, China's Dual State revival under Xi Jinping, forthcoming in Asian-Pacific Law and Policy Journal, 2023.

The advent, from 2013 onward, of Party General Secretary & President Xi Jinping's 'New Era,' heralds a change of direction. Under President Xi, actors of the party state and of civil society that could reasonably be regarded as proponents of the idea of rule of law at its most basic – the idea that public power must be curbed by law, including most importantly by fundamental rights to protect individuals against abuse – are marginalised and persecuted. If a campaign starting in July 2015 against lawyers working to defend their human rights of their clients can be taken as emblematic of 'New Era' repression of civil society,[9] the intensified 'anticorruption' drive, partly supported by the creation of a new Party-State 'supervision commission' with powers to circumvent the criminal procedure law in its investigation of 'discipline violations,' provides the central authorities with reinforced tools to control potential rivals within the party establishment – although certainly, the corruption ostensibly addressed by this new institution and related laws is real. In principle, the prospect of being subjected to 'discipline violation' investigations affects all officials, including judges, prosecutors, and other officials of the legal institutions, who are also subjected to intensified political education.[10] Both at the level of political discourse, propaganda, and legal regulations, and the level of institutional changes, the overall effect of the 'New Era' has been to weaken the principles of the rule of law and human rights that were given limited recognition during the reform and opening era.

This rule of law retrogression under Xi Jinping's first two terms in office matters not only because any domestic deterioration of the situation with regard to human rights is relevant to the international community by virtue of its responsibilities towards the victims of human rights violations, especially those that are systematic and large-scale. It matters also, because there is a degree of continuity between China's domestic and global governance discourse and practices, as a few examples can help to illustrate:

Firstly, the Chinese party states extensive practices of censorship and deletion of information and opinion considered to be detrimental to the interests of the state have a direct bearing on how the international community engages with human rights violations in China. For example, censorship and intimidation pertaining to the atrocities in the Uighur autonomous region of Xinjiang has rendered it much more difficult to get a complete and independent under-

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9 *Fu, Hualing*, The July 9th (709) Crackdown on Human Rights Lawyers: Legal Advocacy in an Authoritarian State, Journal of Contemporary China 27 (112), 2018, pp. 554–68, doi:10.1080/10670564.2018.1433491.

10 *Sapio, Flora*, The National Supervision Commission: A 'Subaltern History', Modern China 48, no. 4, July 2022, pp. 754–84, doi:10.1177/00977004211049489.

standing of practices on the ground, and this has in many ways strengthened the case of the Chinese government against accusations, since a large part of its defence against accusations in international fora consists in factual denial – in particular, the Chinese government has kept insisting that the camps thought to be holding hundreds of thousands of members of ethno-religious groups are facilities for voluntary training.

Secondly, repressive practices of the party state have extended to targets well beyond China's territorial borders. They include, for example, the 'long arm' pursuit of supposed criminal fugitives and/or dissidents in exile. In this example, the fact that the authorities make use of different mechanisms including formal extradition requests to 3rd countries, the deportation of Chinese nationals by said third countries, and what is referred to as 'persuasion to return' well illustrates the characteristic combination of law based and lawless methods of governance that we can also observe being deployed in domestic contexts.[11] In all of these contexts, the involuntary repatriation of fugitives to China raises significant human rights concerns due to the severe flaws of the criminal process, as recognised, inter-alia, by the Swedish Supreme Court rejecting an extradition in 2019.[12] Other measures with structurally similar albeit vastly less invasive effect include the exclusion by means of travel bans against European Union and United Kingdom -based journalists, academics, parliamentarians, et cetera, in the in the context of 'countersanctions' imposed by the Chinese government on persons perceived to be unwelcome critics.[13]

Under President Xi, moreover, the party state has produced statements and policies very clearly signalling a new perceived mission to reshape global governance. On the one hand, the authorities have relied heavily on inflated

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11 Safeguard Defenders, Involuntary Returns – Report Exposes Long-Arm Policing Overseas, 18 January 2022, available at: <https://safeguarddefenders.com/en/blog/involuntary-returns-report-exposes-long-arm-policing-overseas>; 一图读懂外逃人员都是怎么被追回来的-新华网, <http://www.xinhuanet.com/legal/2017-04/25/c_129572598.htm>.

12 Nu ska HD fatta beslut: Häktad kinesisk medborgare kan utlämnas till Kina, SVT Nyheter, 18 June 2019, available at: <https://www.svt.se/nyheter/inrikes/kinesisk-brottsmisstankt-riskeras-att-utlamnas-till-kina>; *Milne, Richard*, Swedish Court to consider extradition of Chinese official, Financial Times, 17 June 2019, available at: <https://www.ft.com/content/336681c0-8eb4-11e9-a1c1-51bf8f989972>. One of the authors, Pils, appeared before the Court as expert witness in this case.

13 China Mission, Foreign Ministry Spokesperson Announces Sanctions on Relevant EU Entities and Personnel, 22 March 2021, available at: <http://www.chinamission.be/eng/fyrjh/t1863128.htm>; Chinese Embassy, Foreign Ministry Spokesperson Announces Sanctions on Relevant UK Individuals and Entities,26 March 2021, available at: <www.chinese-embassy.org.uk/eng/zywl/t1864369.htm>.

notions of state sovereignty to argue that virtually any criticism of their human rights violations and alleged international crimes constitutes interference with Chinese state sovereignty, even though such an argument has no basis in international law. On the other hand, and of even more concern in the longer term, the authorities have also increasingly adopted the language of great power relation and propagated global (*tianxia*) governance ideas explicitly presented as an alternative to liberal democracy, while also seeking to use existing global institutions such as the UN human rights Council and newly created networks and institutions such as the Shanghai Cooperation Organisation, the Belt and Road Initiative with the various institutions it has engendered, including the Asian infrastructure investment bank (AIIB),[14] the South-South Human Rights Forum,[15] and the '16 1 (now 14 1)' Chinese and European network/framework to exert influence on how other member states of international organisations position themselves within these organisations – of course, this does not necessarily mean that all these initiatives by the Chinese authorities have been consistently successful.[16]

In summary, we can observe that the Chinese party state's global governance ambitions have led it increasingly to replicate the shift towards autocratic closure at the level of its global interactions with other countries' governments and nonstate actors. In this context, it is particularly important to realise that the same factors that have weakened if not entirely killed off the efforts to construct mechanisms and institutions of governance that might in the longer term have allowed the system to move towards the rule of law have also affected China's relations with the EU and its member states. It is all the more important, therefore, to engage in a close and (self-) critical examination of the assumptions, principles, and mechanisms that have shaped EU China interaction on human rights issues.

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14 *Parepa, Laura-Anca*, The Belt and Road Initiative as Continuity in Chinese Foreign Policy. Journal of Contemporary East Asia Studies 9, no. 2, 2 July 2020, pp. 175–201, doi:10.1080/24761028.2020.1848370.

15 South-South Human Rights Forum: Officials, Experts from Developing Countries & International Organizations Gather to Discuss Cooperation on Human Rights - CGTN, available at: <https://news.cgtn.com/news/2021-12-09/VHJhbnNjcmlwdDYxMDI5/index.html>.

16 Cf. Balkan Insight, How China Lost Central Europe, 15 August 2022, available at: <https://balkaninsight.com/2022/08/15/how-china-lost-central-europe/>.

III. A look in the mirror: the discreditation of the EU's *change through commerce* approach

The belief, rooted in modernisation theory, that economic liberalisation leads to political liberalisation and that economic integration prompts peaceful relations, i.e., the much-touted *change through commerce* model, has long been prevalent in the EU-China relations. Historically, since the beginning of the Opening and Reform Era and increasingly in the current century, trade has been the backbone of relations between the European Union and its member states with China. Today, China is the EU's second largest trading partner,[17] and thanks to the attractiveness of the European single market and European enterprises' investment in China, the EU is an important economic actor for China[18].

The *change through commerce* model is implicit in Article 21 of the Treaty of the European Union, which states that the EU shall "encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade", while at the same time "consolidate and support democracy, the rule of law, human rights and the principles of international law."[19] The Lisbon Treaty and the Commission's communication 'Trade for All' mention the EU's promotion of norms and values through commerce policy[20].

At least following the June 4th massacre of 1989, European countries had to engage with China's human rights violations. The extensively reported violent crackdown on peaceful protest constituted a turning point.[21] International

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17 *Yan*, *Shaohua*, The European Parliament in EU Trade Relations with China: A Norm and Policy Advocate?, in: Parliamentary Cooperation and Diplomacy in EU External Relations, edited by Raube, Kolia/ Müftüler-Baç, Meltem/ Wouters, Jan, pp. 432–448, Edward Elgar Publishing, 2019.

18 *Ghiretti*, *Francesca*, Is China Still Trying to Win the EU over?, MERICS Briefs Europe China 360°, MERICS, 2022.

19 European Union, Consolidated version of the Treaty on European Union, 26 October 2012, OJ C 326/13.

20 *Yan*, *Shaohua*, The European Parliament in EU Trade Relations with China: A Norm and Policy Advocate?, In Parliamentary Cooperation and Diplomacy in EU External Relations, edited by Raube, Kolia/ Müftüler-Baç, Meltem/ Wouters, Jan, pp. 432–448, Edward Elgar Publishing, 2019.

21 In May 1989, the former Soviet leader Mikhail Gorbachev's state visit to Beijing drew the world's media attention there at a crucial moment for the protesters gathered on Tiananmen square, available at:< https://edition.cnn.com/2022/08/31/china/china-reaction-mikhail-gorbachev-intl-hnk/index.html>.

outrage and widespread condemnations put the Chinese government into the spotlight[22] and concurrently also put pressure on the governments of liberal democracies. Western countries adopted multilateral sanctions that hurt China economically, politically and in terms of its international image, but cracks quickly emerged in the following months.[23] While the pressure on China was maintained at the Commission on Human Rights (CHR) for the following years after the Tiananmen massacre, this came to an end when France broke from the ongoing EU policy and stopped co-sponsoring resolutions critical of China's human rights record. Germany, Italy, Spain and Greece subsequently followed France's stance.[24]

Economic vulnerabilities, including dependencies on trade, but also on foreign direct investment,[25] have unsurprisingly played a role in shaping all EU member states' willingness to raise human rights issues. Among the EU member states, Germany is today by far the largest EU exporter to China, and especially following the 2008 financial crisis, Germany increasingly prioritized strong trade and investment with Beijing to the detriment of raising human rights concerns, with some observers ascribing to Chancellor Merkel, in particular, a 'reluctance to openly antagonize Beijing for fear of triggering a downturn in bilateral diplomatic relations or economic retaliation against German compa-

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22 *Kristof, Nicholas D.*, Crackdown in Beijing; Troops attack and crush Beijing protest; Thousands fight back, scores are killed, The New York Times,4 June 1989, available at: <https://www.nytimes.com/1989/06/04/world/crackdown-beijing-troops-attack-crush-beijing-protest-thousands-fight-back.html>.

23 *Foot, Rosemary*, Rights Beyond Borders: The Global Community and the Struggle over Human Rights in China, Oxford University Press, 2000, doi:10.1093/0198297769.001.0001.

24 *Baker, Philip*, Human Rights, Europe and the People's Republic of China, The China Quarterly 169, March 2002, pp. 45–63, doi:10.1017/S0009443902000050.

25 *Burnay, Matthieu*, EU-China Comprehensive Agreement on Investment: State of Play and Way Forward, 2021, available at: <https://www.youtube.com/watch?v=dMkVS515Dow>; *Burnay, Matthieu*, Bridging the gap between investments and human rights protection: Prospects and challenges for the China–EU CAI, in Li, Yuwen/Qi Tong/Bian Cheng (eds), China, the EU and International Investment Law, 2019, Routledge, London, pp. 54-67; *Burnay, Matthieu/Raube, Kolja*, Obstacles, Opportunities, and Red Lines in the European Union: Past and Future of the CAI in Times of (Geo)-Politicisation, The Journal of World Investment & Trade 23, no. 4, 5 August 2022, pp. 675-99, doi:10.1163/22119000-12340265.

nies.'[26] More widely, China's economic rise reconfigured the basic factors that had once given rise to *change through commerce* discourses. As a collaboratively produced think tank report observed in 2015, outlining some of the core issues of contention that had remained a constant,

> 'Although officially a core concern of the EU's dealings with China, human rights issues have proven to be an area in which member states have independent approaches, but are increasingly isolated and vulnerable to China's retaliation. In dealing with highly contentious issues such as meetings with the Dalai Lama or arms sales to Taiwan, member states rarely find support among their European counterparts, despite other states having similar practices at different times, and are generally left to bear the brunt of China's reaction. Countries such as France, which butted heads with China in 2008 when the French president met with the Dalai Lama and threatened a boycott of the Olympic Games in Beijing, have drastically altered their approach, opting to protect economic interests and to take a more indirect approach to human rights issues. Other states such as Portugal, Spain or Ireland, meanwhile, largely avoid the topic all together, fully recognizing their degree of vulnerability and lack of leverage.'[27]

As the rise to power of President Xi Jinping heralded intensifying systematic problems and new major abuses such as the atrocities in Xinjiang,[28] as part of a process of autocratic closure unprecedented since the end of the Mao era the 'change through trade' approach appeared increasingly untenable, if

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26 *Brattberg*, *Erik*, Merkel's Mixed Legacy on China, Carnegie, 2021, available at: <https://carnegieendowment.org/2021/09/30/merkel-s-mixed-legacy-on-china-pub-85471/>.The assessment of individual EUMS's choices on human rights in China has remained somewhat mixed. In Kenneth Roth's (Human Rights Watch) assessment, 'despite the occasional misstep, the German government under Chancellor Angela Merkel had shown that it was possible to confront Beijing's severe repression.', Human Rights Watch, The China Challenge for Olaf Scholz, 20 May 2022, available at: <https://www.hrw.org/news/2022/05/20/china-challenge-olaf-scholz>.

27 *Huotari*, *Mikko/Otero-Iglesias*, *Miguel/ Seaman*, *John/ Ekman*, *Alice* (eds), Mapping Europe-China Relations: A Bottom-Up Approach, A report by the European Think-tank Network on China (ETNC), 2015, 92 pages, available at: <https://www.ifri.org/sites/default/files/atoms/files/etnc_web_final_1-1.pdf>.

28 *Pils*, *Eva/Weber*, *Ralph*, Chinas alternative Weltordnung: Neue Entwicklungen und alte Fragestellungen zum politischen Wesen der Menschenrechte [China's Alternative World Order: New Developments and Old Questions on the Political Nature of Human Rights], Zeitschrift für Europarecht 2021, pp. 182-95; *Fulda*, *Andreas*, Germany's China Policy of 'Change Through Trade' Has Failed, Royal United Services Institute (RUSI), 1 June 2020; *Groitl*, *Gerlinde*, Das Märchen Vom Wandel Durch Handel [China and the Fairy Tale all of Change Through Trade], 15 June 15 2021.

not preposterous. Yet despite a worsening human rights record and a clear trend towards autocratic closure in China, the EU and its member states were slow to recognise the limitations of the change through trade approach and to revise the terms of its engagement with China.

Even as the *change through commerce* approach has been largely discredited, disunion amongst EU member states' approach to China, including its human rights problems, became increasingly visible in the context of international fora and mechanisms such as the Human Rights Council of the United Nations. Statements at the Human Rights Council have long been an important tool of the EU human rights policy towards China,[29] but the EU has increasingly failed to achieve unified stances on major human rights issues in China. For example, in 2017, Greece blocked an EU statement at the Human Rights Council, marking the first time the EU failed to make such a statement,[30] instead referencing the EU human rights dialogue (discussed below) as a more efficient and constructive way of delivering results. Some attributed Greece's decision to Chinese investments, with the Chinese shipping company Cosco holding a 51% stake in the Piraeus port.[31] In the same vein, Hungary, which is also a large recipient of Chinese investment, has repeatedly blocked EU statements criticizing China's rights record.[32]

Since then, disunion of the EU member states at the Human Rights Council has been increasingly visible, exposing the fact that there is no effective, consistent EU level policy on how to confront even the most egregious of China's human rights violations. EU member states have been instrumental in organising joint statements on China's policies in Xinjiang, for example, supported

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29 Delegation of the European Union to the UN and other international organisations in Geneva, available at: <https://www.eeas.europa.eu/eeas/press-material_en?f[0]=pm_tag:Human Rights Council&f[1]=pm_tag:Human Rights Council&s=62>; for an example, see HRC45 - Item 4 - Human Rights situations that require the Council's attention - EU Statement, available at: <https://www.eeas.europa.eu/eeas/hrc45-item-4-human-rights-situations-require-councils-attention-eu-statement_en>.

30 *Denyer, Simon*, Europe divided, China gratified as Greece blocks E.U. statement over human rights, The Washington Post, 19 June 2017, available at: <https://www.washingtonpost.com/news/worldviews/wp/2017/06/19/europe-divided-china-gratified-as-greece-blocks-e-u-statement-over-human-rights/>.

31 *Smith, Helena*, Greece blocks EU's criticism at UN of China's human rights record, The Guardian, 18 June 2017, available at: <https://www.theguardian.com/world/2017/jun/18/greece-eu-criticism-un-china-human-rights-record>.

32 *Emmott, Robin/Koutantou, Angeliki*, Greece blocks EU statement on China human rights at U.N., Reuters, 18 June 2017, available at: <https://www.reuters.com/article/us-eu-un-rights-idUSKBN1990FP>.

by EU member states and like-minded allies.[33] (It should be noted in this context that signatories supporting China are distributed more widely across the globe than those criticising it, a fact exploited by the Chinese government drawing on critiques of human rights as neoliberal 'imposition,'[34] although perhaps unsurprisingly, the supporting states also tend to have weaker domestic human rights records themselves.[35]) Following a jointly issued letter including several EU member states as co-signatories in 2019[36], EU member states

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33 *Putz, Catherine*, 2020 Edition: Which Countries Are For or Against China's Xinjiang Policies?, The Diplomat, 9 October 2020, available at: <https://thediplomat.com/2020/10/2020-edition-which-countries-are-for-or-against-chinas-xinjiang-policies/>.

34 *Xin, Liu*, More than 90 countries express support to China amid rampant anti-China campaign at UN human rights body, The Global Times, 22 June 2021, available at: <https://www.globaltimes.cn/page/202106/1226834.shtml>; *Pils, Eva*, Autocratic challenges to international human rights law: a Chinese case study, forthcoming in Current Legal Problems; *Seppänen, Samuli*, Crits and the Chinese Party-State, Critical Legal Thinking (blog), 21 October 2021, available at: <https://criticallegalthinking.com/2021/10/21/crits-and-the-chinese-party-state/>.

35 Participation in the Human Rights Council is not premised on states to show a certain level of human rights enjoyment to be elected member nor to criticize other countries' record. Cf UN-GA Resolution 60/251, which states that: "(…) membership in the Council shall be open to all States Members of the United Nations; when electing members of the Council, Member States shall take into account the contribution of candidates to the promotion and protection of human rights and their voluntary pledges and commitments made thereto (…)" and that "(…) members elected to the Council shall uphold the highest standards in the promotion and protection of human rights (…)", available at: <https://www.un.org/ga/search/view_doc.asp?symbol=A/RES/60/251&Lang=E>. See also *Inboden, Rana Siu*, China and Authoritarian Collaboration, Journal of Contemporary China 31, no. 136, 2022, pp. 505–517, doi:10.1080/10670564.2021.1985828; see also *Pils, Eva*, Autocratic challenges, on reform proposals.

36 Copy of the joint statement signed in Geneva on 8 July 2019 available at: <https://www.hrw.org/sites/default/files/supporting_resources/190708_joint_statement_xinjiang.pdf>.

such as Germany,[37] France,[38] and the Netherlands[39] delivered joint statements criticising China's human rights violations in the name of coalitions of mostly liberal and democratic countries. But other EU member states have remained absent from these statements.[40]

A thinktank investigating support or otherwise for three joint statements regarding human rights concerns in Xinjiang and Hong Kong in the year 2020 found that 15 EU member states had consistently supported all three statements (Austria, Belgium, Denmark, Estonia, Finland, France, Germany, Ireland, Latvia, Lithuania, Luxembourg, the Netherlands, Slovenia, Sweden, and the UK), three had supported two out of three (Italy, Slovakia, and Spain), three had supported one (Croatia, Poland, Portugal), and five (Cyprus, the Czech Republic, Greece, Hungary, Romania) had supported none of the statements.[41] While this is only a snapshot, it is nevertheless telling, as it illustrates considerable lack of support for criticisms of human rights violations that are well documented and indefensible.

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37 Auswärtiges Amt, Statement by Ambassador Christoph Heusgen on Behalf of 39 Countries in the Third Committee General Debate, 6 October 2020, Permanent Mission of the Federal Republic of Germany to the United Nations, available at: <https://new-york-un.diplo.de/un-en/news-corner/201006-heusgen-china/2402648>.

38 Global Human Rights Defence, The 48th United Nations Human Rights Council Session Polarizes Member States Regarding China's Involvement in Tibet, 23 November 2021, available at: <https://ghrd.org/the-48th-united-nations-human-rights-council-session-polarizes-member-states-regarding-chinas-involvement-in-tibet/?utm_source=rss&utm_medium=rss&utm_campaign=the-48th-united-nations-human-rights-council-session-polarizes-member-states-regarding-chinas-involvement-in-tibet>.

39 Government of the Netherlands, Joint statement on behalf of 47 countries in the UN Human Rights Council on the human rights situation in China, Diplomatic statement, 14 June 2022, available at: <https://www.government.nl/documents/diplomatic-statements/2022/06/14/joint-statement-47-countries-un-human-rights-council-situation-china>.

40 *Poggetti Lucrezia*, EU-China Mappings: Interactions between the EU and China on key issues, MERICS, 20 January 2021, available at: <https://merics.org/en/short-analysis/eu-china-mappings-interactions-between-eu-and-china-key-issues>.

41 MERICS, EU-China Mappings: Interactions between the EU and China on Key Issues, MERICS, January 2021, available at: <https://merics.org/en/short-analysis/eu-china-mappings-interactions-between-eu-and-china-key-issues>.

Disunion and lack of support are also visible in other contexts. For example, during the 2022 Beijing Olympics, no official position was adopted by the EU on whether the event should be boycotted, given China's serious human rights violations in Xinjiang and elsewhere, with some member states boycotting and others not.[42]

The above observations might lead one to conclude that the EU's and its member states' ability to confront China on human rights violations were in the process of inevitable decline, tracking China's rise as an autocratic world power. Yet, such an analysis would be simplistic; it would overlook the fact that China's increased influence has led to a range of complex responses.

IV. A widening range of transnational human rights concerns affecting increasingly complex relations with China

Three examples of interaction between the European Union and its member states and China on human rights issues, discussed in the following, may serve to illustrate the evolution of interaction from a model of dialogue and collaboration towards a model of confrontation and (attempted) risk mitigation. These examples show that increasingly, government decision-makers within the EU and its member states have had to confront criticism from within – from democratic processes at regional and domestic levels that are increasingly attentive to the need to confront China's human modes violations.

There is firstly the evolution of the mechanism of 'human rights dialogues' with China, both at the level of the EU and of some of its member states, which evolved after the 1989 Tiananmen massacre, when it became politically impossible to remain silent on China's human rights violations.[43] Most EU members characterised bilateral dialogue as more conducive to the enhancement of commercial opportunities than a more confrontational stance such as pub-

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42 *Genoud, Christelle*, The Beijing Olympics in Retrospect: An Anti-Human Rights Politics Machine, The Jamestown Foundation China Brief 22, Volume 22, Issue 6, 2022.

43 *Cohen, Roberta*, People's Republic of China: The Human Rights Exception, Human Rights Quarterly 9, no. 4, 1987, doi:10.2307/761910, Human rights played a marginal role not only in the relationship between China and the EU, but also with the rest of the world, see *Kent, Ann*, China and the International Human Rights Regime: A Case Study of Multilateral Monitoring, 1989-1994, Human Rights Quarterly 17, no. 1, 1995, pp. 1–47, doi:10.1353/hrq.1995.0008. Another example is the human rights dialogue between China and the US, which started only once that Washington de-linked human rights issues from the granting of the Most Favoured Nation trading status.[43] For a list of countries that started a human rights dialogue with China in the 1990s, see: <https://savetibet.org/bilateral-human-rights-dialogues-with-china/>.

licly "blaming and shaming".[44] The EU's own human rights dialogue with China, begun in 1995, is to be understood in this context; it was at the time debated as an alternative to co-sponsoring a resolution critical of China at the UN CHR.

As scholars have observed, the EU (and its member states) and China had different motivations for implementing human rights dialogues. For China, the main goal was to avoid attention at multilateral fora, or what it often denounces as megaphone diplomacy, move the discussion on human rights at the bilateral level and compartmentalize the issue in order to avoid human rights being raised during economic discussions. For the EU, the rationale for implementing the dialogue has been anchored in the objective of some EU member states to normalize relations with China after the shattering of relations prompted by the 1989 Tiananmen massacre,[45] which had put trade relations on hold for several years. Eagerness to access the Chinese market could be seen as a major motivation for the initiation of the dialogues, even though this step was also supported by the *change through commerce* paradigm, more particularly the idea that China's economic integration into the international rules-based order would lead to political liberalisation and human rights improvements.

Critics have argued that for the EU, the dialogue served as a replacement for a genuine human rights policy on China. According to Baker, it has been, at least at some point in time, "hard not to regard the dialogue as a replacement for a real human rights policy on China".[46] Other critics dwelt on the lack of tangible results. In 2022, a joint NGO letter ahead of the EU-China Summit cautioned the EU against "allocating precious time during the upcoming summit to discussions over holding yet another round of the bilateral human rights dialogue" as "the exercise itself is, at best, incapable of triggering any meaningful human rights progress in the country, and, at worst, a counterproductive pub-

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44 Another example is the human rights dialogue between China and the US, which started only once that Washington de-linked human rights issues from the granting of the Most Favoured Nation trading status.

45 *Foot, Rosemary*, Rights Beyond Borders: The Global Community and the Struggle over Human Rights in China, Oxford University Press, 2000, doi:10.1093/0198297769.001.0001.

46 *Baker, Philip*, Human Rights, Europe and the People's Republic of China, The China Quarterly 169, March 2002, pp. 45–63, doi:10.1017/S0009443902000050. Baker also describes how China could instrumentalise the dialogues, e.g. by threatening to suspend them.

lic relations coup for the Chinese government".[47] NGOs also argued that bilateral dialogues must be accompanied by international pressure in multilateral fora in order to be effective.[48] Kinzelbach argued that the EU's willingness to de-link the human rights dialogue from reputational pressure at the multilateral level, in particular from the threat of a UN resolution, signalled weakness and indecisiveness, concluding that the dialogue could even be counter-productive.[49] Taylor attributed the lack of tangible results to the lack of self-reflectivity of EU diplomats informing ineffective approach to engaging with China.[50] The authors have also called on governments to resist instrumentalization of official human rights diplomacy through human rights dialogue as a tool of 'silent diplomacy' and to reassess the appropriateness of dialogues.[51]

In summary, human rights dialogues conducted between China, the EU and its member states have not only produced very limited results. They also have generated unproductive dynamics where China threatens its partners to cancel the dialogue in case they participate in multilateral criticism of China's human rights record, for example at the Human Rights Council.[52] Indeed, the Chinese government has openly characterised the human rights dialogues as

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47 See: <https://www.hrw.org/news/2022/03/18/joint-ngo-letter-ahead-eu-china-summit>; in addition, the letter urges "the EU leaders to publicly announce a suspension of the human rights dialogue with Chinese authorities until it can be a meaningful exchange capable of producing positive impact on the human rights situation in the country." Similar concerns were raised in 2017 when a group of human rights NGOs called on the EU to cancel its human rights dialogue with China, see: <https://www.hrw.org/news/2017/06/19/eu-suspend-china-human-rights-dialogue>.

48 International Campaign for Tibet, Bilateral human rights dialogues with China, see: <https://savetibet.org/bilateral-human-rights-dialogues-with-china/>.

49 *Kinzelbach, Katrin*, The EU's Human Rights Dialogue with China: Quiet Diplomacy and Its Limits, Routledge, 2015.

50 Taylor has also criticised EU diplomats for being dismissive of Chinese perspectives, see *Taylor, Max Roger*, Inside the EU–China Human Rights Dialogue: Assessing the Practical Delivery of the EU's Normative Power in a Hostile Environment, Journal of European Integration 44, no. 33, 2020, pp. 365–80, doi:10.1080/07036337.2020.1854245.

51 *Genoud, Christelle/Pils, Eva*, Human Rights and EU-China Relations: From Dialogue and Cooperation to Confrontation: (Final Report), EU-China Legal and Judicial Cooperation (EUPLANT), 2022.

52 Swissinfo, Swiss-Chinese human rights talks postponed, 20 December 2019, available at: <https://www.swissinfo.ch/eng/politics/diplomacy-_swiss-chinese-human-rights-talks-postponed--/45450158>.

a strategy to avoid public shaming in international fora.[53] Despite the lack of results and the unproductive dynamics created by the dialogues, the EU and other like-minded governments have maintained them, potentially because they served the convenient purpose of being able to claim that the government in question was actively confronting China on its human rights abuses, while 'compartmentalising' human rights concerns away from other aspects of relations with China, including in particular trade and investment. For example, politicians unwilling to address human rights issues when conducting high-level visits with Chinese counterparts can argue to their people and parliament that the human rights dialogue is the place where to raise such issues. For example, during his state visit in 2019 aiming to reinforce economic and financial ties between the two countries, as well as sign a memorandum of understanding on the Chinese Belt and Road Initiative (BRI), the President of Switzerland, Ueli Maurer did not raise the issue of human rights with the Chinese leadership. Instead, the Swiss press release on the visit accentuated the existence of the human rights dialogue.[54] Critiques of the human rights dialogue have grown louder, as the credibility of the dialogue as a tool to promote human rights has decreased.[55]

Secondly, there is the development of a stronger political nexus between Sino-European interaction on trade and human rights, driven by a political dynamic characteristic of separation-of-powers governance models. The case of the China-EU Comprehensive Agreement on Investment (CAI) is a telling case in point. Key actors in the European Union including the European Commission and the governments of France and Germany were initially very eager to promote the conclusion of CAI, with German Chancellor Merkel expending significant political capital, and arguably staking her own reputation, on pushing

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53 See for example the case of Switzerland, which mentions in its 2021-2024 China Strategy that: "The most recent human rights dialogue was held in Beijing in June 2018. Subsequent rounds of dialogue have been cancelled by China, in response to Switzerland joining in multilateral criticism of the situation in Xinjiang or citing the COVID-19 pandemic.", Swiss Federal Council, China Strategy 2021-2024, 19 March 2019, p. 19, available at: <https://www.eda.admin.ch/content/dam/eda/en/documents/publications/SchweizerischeAussenpolitik/Strategie_China_210319_EN.pdf>.

54 Federal Council, President Ueli Maurer meets President Xi Jinping, 29 April 2019, see: <https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-74817.html>.

55 Human Rights Watch, Joint NGO Letter Ahead of EU-China Summit, 18 March 2022, available at: <https://www.hrw.org/news/2022/03/18/joint-ngo-letter-ahead-eu-china-summit>.

through an agreement in late 2020,[56] when evidence of China's state crimes in Xinjiang, especially, was already incontrovertible and raised extremely disturbing concerns about potential European complicity with forced labour in Xinjiang. In a rush to conclude an 'agreement in principle,' the EU, under a German Council of the EU presidency (July –December 2020),[57] initially settled for a pledge from Beijing to consider acceding to the International Labour Organization (ILO) treaties on forced labour,[58] even though whether this pledge would be honoured was no less in doubt than the question how it might bring on-the-ground improvements to victims of labour rights violations, including in Xinjiang. Kenneth Roth of Human Rights Watch at the time rightly characterised this as 'a ploy to ignore the enormous problem of forced labour in Xinjiang,' noting that the EU had not even extracted a pledge from China to ratify the treaties, let alone comply with them.[59] Noting the fact that the German carmaker Volkswagen, whose very name remains tainted by its Nazi Germany past, had rejected allegations of the use of forced labour in Xinjiang in its own factory there, Garton Ash commented that the West was 'headed for an ethical car crash.'[60]

The ensuing political dynamic, however, rapidly made the apparent 'solution' to push the CAI through to conclusion non-viable, since the 'agreement in principle' still required ratification by the European Parliament. As a site of legislative and policy debates and an institution whose legitimacy derives from an election process different from the treaty-based legitimation of the EU's other organs, the European Parliament had long featured concerned and critical discussions about the use and its member states' interaction with China, partly driven by the European Parliament's active delegation on China.[61] It was partly

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56 South China Morning Post, Merkel Targets China on Trade and Rights but Hails Climate Pledges, 30 September 2020, available at: <https://www.scmp.com/news/china/diplomacy/article/3103717/merkel-targets-china-human-rights-and-trade-tempers-praise>.

57 The Presidency of the Council of the EU, see: <https://www.consilium.europa.eu/en/council-eu/presidency-council-eu/>.

58 POLITICO, Merkel Pushes EU-China Investment Deal over the Finish Line despite Criticism, 29 December 2020, available at: <https://www.politico.eu/article/eu-china-investment-deal-angela-merkel-pushes-finish-line-despite-criticism/>.

59 *Roth, Kenneth*, The China Challenge for Olaf Scholz, Human Rights Watch, 2022, <https://www.hrw.org/news/2022/05/20/china-challenge-olaf-scholz>.

60 *Ash, Timothy Garton*, VW's Dilemma in Xinjiang Shows How the West Is Headed for an Ethical Car Crash, The Guardian, 28 July 2021, sec. Opinion, available at: <https://www.theguardian.com/commentisfree/2021/jul/28/vw-dilemma-xinjiang-west-ethical-car-crash>.

61 Website of the European Parliament's Delegation for Relations with the People's Republic of China (D-CN), see: <https://www.europarl.europa.eu/delegations/en/d-cn/home>.

under pressures from this political process that the EU imposed restrictive measures on four Chinese officials considered responsible for human rights abuses in Xinjiang.[62]

After, in March 2021, several members of the European Parliament (MEPs), including its China Delegation chair, were affected by what China called 'countersanctions' inter alia banning them from China,[63] the European Parliament refused to endorse the CAI 'agreement in principle,' at least while sanctions against members remained in place.[64] MEPs at the time indicated that not only that sanctions, but also the underpinning human rights concerns including atrocities in Xinjiang as well as the deeply troubling trajectory of the Hong Kong Special Administrative Region, affected by rapid erosion of rule of law principles under a new 'National Security Law,' would be taken into account.[65]

The CAI debacle, putting a halt to an at least symbolically highly important mechanism that might have seemed to validate the 'change through trade' approach so long dominating mainstream understandings of EU China relations, now instead encapsulated the fact that the 'change through' trade model had failed. It may also serve to point to strategies to address the failure of this model, however. For example, not only EU member states, but also the EU have been working on value chain legislation that might begin to address one of the major risks of complicity with human rights violations that are initiated in China but have transnational dimensions.

A third example of the evolution of EU-China relations can serve to illustrate another way in which China's human rights violations can 'go global' and directly engage the responsibility to protect human rights of the EU and its member states. As the involuntary return of Chinese nationals considered as fugitives from Chinese (criminal) justice became part of a campaign under Xi Jinping, a range of target persons accused, inter alia, of 'corruption' (under-

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62 Council of the EU, EU Imposes Further Sanctions over Serious Violations of Human Rights around the World, see: <https://www.consilium.europa.eu/en/press/press-releases/2021/03/22/eu-imposes-further-sanctions-over-serious-violations-of-human-rights-around-the-world/>.

63 Foreign Ministry Spokesperson Announces Sanctions on Relevant EU Entities and Personnel, 22 March 2021, see: <http://www.chinamission.be/eng/fyrjh/t1863128.htm>; Foreign Ministry Spokesperson Announces Sanctions on Relevant UK Individuals and Entities, 26 March 2021, see: <https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2535_665405/202103/t20210326_9170815.html>.

64 MEPs Refuse Any Agreement with China Whilst Sanctions Are in Place, 20 May 2021, see: <https://www.europarl.europa.eu/news/en/press-room/20210517IPR04123/meps-refuse-any-agreement-with-china-whilst-sanctions-are-in-place>.

65 Ibid.

stood in a wider sense and comprising offences against Chinese Communist party discipline)[66] and of endangering the state by virtue of their identity as ethnoreligious (e.g. Uyghur) exiles[67] were exposed to diverse tactics to effect their repatriation. These included, as Chinese authorities openly discussed in the state media, formal extradition requests (ad hoc or on the basis of extradition agreements concluded with a few EU member states), attempts to motivate the 'host' state to deport the individual in question, a context in which the deporting state can become implicated in egregious violation of the principle of *non-refoulement*, inter alia, as in a German case of deporting a Uighur Chinese citizen who promptly disappeared,[68] and attempts to deploy a tactic euphemistically termed 'persuasion to return' (*quanfan*).[69]

The extradition process has become closely interlinked with the Interpol mechanism, and according to Human Rights Watch, 'the Chinese government, against Interpol's regulations, has tried to control and persecute dissidents and activists abroad by issuing politically motivated red notices through Interpol'.[70] In this context, a requested EU member state's decision to extradite any person to China raises obvious human rights concerns, which may be heightened by the circumstances of the individual case. Primarily, concerns arise about the risk to life e.g., by imposition of the death penalty, about violations of the extradited persons right to a fair trial, and about the closely related right not to be tortured. While in earlier years, when the 'change through

66 Financial Times, How Xi Jinping's Anti-Corruption Crusade Went Global, 22 February 2022.

67 This has included attempts to return fugitives to the PRC including through the use of Interpol "Red Notices" to target political dissident Dolkun Isa (Interpol resolution AG-2016-RES-06, editor 2018) and attempts to curtail their ability to operate abroad; *Needham, Kirsty*, China Will Use 'Other Options' to Return Fugitives as Extradition Treaty Falters, The Sidney Morning Herald, 30 March 2017, available at: <https://www.smh.com.au/world/china-will-use-other-options-to-return-fugitives-as-extradition-treaty-falters-20170330-gv9ztr.html>; Article 82; Interpol Deletes Red Notice against Persecuted Uyghur Dissident Dolkun Isa, Fair Trials, 23 February 2018, available at: <https://www.fairtrials.org/news/interpol-deletes-red-notice-against-persecuted-uyghur-dissident-dolkun-isa>.

68 Germany expels Uighur asylum seeker to China "in error", DW, 6 August 2018, <https://www.dw.com/en/germany-expels-uighur-asylum-seeker-to-china-in-error/a-44970788>.

69 Other controversial cases include Switzerland readmission agreement with China: Safeguard Defenders, Lies and Spies - Switzerland's Secret Deal with Chinese Police, Safeguard Defenders Investigations, 9 December 2020, available at: <https://safeguarddefenders.com/en/blog/lies-and-spies-switzerland-s-secret-deal-chinese-police>.

70 Human Rights Watch, Interpol: Address China's 'Red Notice' Abuses, 25 September 2017, available at: <https://www.hrw.org/news/2017/09/25/interpol-address-chinas-red-notice-abuses>.

trade' maxim still reigned supreme in policy circles, EU member states seemed increasingly willing to sign extradition agreements with China and accommodate individual extradition requests, Chinese extradition requests have failed in some instances in recent years. For instance, in 2019, the Swedish Supreme Court decided that Sweden must not extradite a supposed fugitive, Qiao Jianjun, as extradition would violate his right not to be tortured and right to a fair trial (as well as, potentially, his right not to be executed) and must therefore be denied on human rights grounds. In so deciding, the Court drew on domestic as well as international law human rights guarantees, including Article 2 ('right to life'), Article 3 ('prohibition of torture') and Article 6 ('right to a fair trial') of the European Convention on Human Rights.[71] In October 2022, the European Court of Human rights in the case of *Liu v Poland* confirmed that extradition to China in that case would violate Article 3 ECHR and that Liu's detention in Poland had violated Article 5 (1) ECHR.[72]

In other cases, domestic law envisages a decision not by the judiciary, but rather by the executive. But even in such cases, decisions to extradite can at least in theory be and have indeed been challenged. So far as this has happened, judicial protections of relevant rights have been as crucial manifestations of a principle of separation of powers, as the emergence of an increasingly well informed and critical political discourse in other contexts, such as that of the CAI. In both contexts, European government / prosecution office decisions apparently accommodating Chinese requests were thwarted by other powers within the democratic system.

However, in addition to formal legal proceedings, the Chinese party-state has characteristically also used informal methods of governance commonly practised in China to achieve 'global law enforcement' objectives abroad. 'Persuasion to return' (*quanfan*) generally involves the deployment of emissaries of the Party-State's law enforcement apparatus sent to the host country to contact the target person and give them reasons, potentially including threats to themselves or to family and friends in China, that motivate them to return 'voluntarily' in the company of the emissaries.[73] For example, in 2017, French

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71 Reuters, Sweden Rejects China's Request to Extradite Former Official, 9 July 2019, sec. Media and Telecoms, available at: <https://www.reuters.com/article/us-sweden-extradition-china-idUSKCN1U40RI>. One of the co-authors, Pils, acted as an expert witness in the proceedings before the Swedish Supreme Court.

72 ECHR, Liu v. Poland, No. 37610/18, Judgment from 6 October 2022.

73 Xinhua News, 一图读懂外逃人员都是怎么被追回来的-新华网, 25 April 2017, <http://www.xinhuanet.com/legal/2017-04/25/c_129572598.htm>; Involuntary Returns – Report Exposes Long-Arm Policing Overseas, Safeguard Defenders, <https://safeguarddefenders.com/en/blog/involuntary-returns-report-exposes-long-arm-policing-overseas>.

authorities learned through a press release that the fugitive Zheng Nin – who was targeted by an Interpol Red Notice – had been 'persuaded' to return to China by Chinese police, acting on French territory.[74] These practices, which according to one NGO report are widely used, have elements of lawlessness which can be especially difficult to respond to, and which undermine reliance on the rule of law in target countries,[75] even as EU member states have begun to address human rights concerns arising in the formal legal processes of extradition and deportation to China.

There are many further examples of actual or potential transnational human rights violations affecting European countries. As already seen in the fugitive repatriations and the forced labour value chain examples, such cases not only raise concerns about the effects of the actions of the Chinese party state beyond its own borders. They also raise concerns about potential complicity of actors in Europe's liberal democracies, including but not limited to state actors.

Beyond the contexts of law enforcement, commerce and investment, concerns about authoritarian influencing potentially leading to transnational human rights violations and triggering responsibilities to protect human rights on the part of the EU and its member states have arisen in areas such as academic exchange and collaboration with China, civil society interactions, and the media, including the operation of traditional media organisations controlled by the Chinese party state in European countries,[76] as well as transnational surveillance by the Chinese party state via social media tools and other technology, affecting targeted persons in European countries, including applicants for EU membership such as Serbia.[77] While it is not possible to address these diverse concerns in detail, some structural similarities can be observed. Firstly, in the wake of globalisation, relations between China and the EU and its member states have diversified and become more complex. To date, they involve

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74 Reuters, China Says Its Police Brought Graft Suspect Back from France, 13 March 2017, sec. Emerging Markets, available at: <https://www.reuters.com/article/us-china-corruption-france-idUSKBN16K0WQ>.

75 Involuntary Returns – Report Exposes Long-Arm Policing Overseas, Safeguard Defenders, available at: <https://safeguarddefenders.com/en/blog/involuntary-returns-report-exposes-long-arm-policing-overseas>.

76 Sky News, CGTN: Ofcom Withdraws UK Broadcasting Licence for Chinese State-Owned News Channel, available at: <https://news.sky.com/story/cgtn-ofcom-withdraws-uk-broadcasting-licence-for-chinese-state-owned-news-channel-12208589>.

77 *Gotev, Georgi*, MEPs Sound the Alarm over Chinese Mass Surveillance Project in Belgrade, 3 June 2021, available at: <https://www.euractiv.com/section/china/interview/meps-sound-the-alarm-over-chinese-mass-surveillance-project-in-belgrade/>.

many kinds of state and nonstate actors and stakeholders and interactions in the fields not only of diplomacy and business, but also of civil society. Human rights issues originating in China have increasingly produced a direct impact overseas, including in Europe, in a situation where more and more Chinese nationals travel to and/or resigned European countries, and vice versa (at least until the global Covid 19 pandemic).

Secondly, there are complex considerations of agency that must be taken into account when assessing responsibilities resulting from the Chinese party-state's human rights violations, including the risks of complicity (*sensu lato*) with transnational human rights violations. It is important to recognise that in many instances, incentives and pressures are used to influence actors within liberal democracies who may be reluctant to promote the aims of the party state, or perhaps not even aware of the fact that they are being instrumentalised, for example, when universities are incentivised to engage in collaboration programmes that invite self-censorship on 'politically sensitive' topics concerning China further down the line, or when news media organisations are motivated to tone down their reporting on certain issues with a view to retaining access for their reporters. Thirdly, although an intensified discourse about how Europe should confront China's human rights violations must be welcomed, we can observe a troubling tendency to 'securitise' the discussion of our complex relationships with China: The tendency, in other words, to treat the human rights issues discussed in this article as issues of national security. Such a framing should be rejected, because it invites a binary friend-enemy thinking that risks stigmatising Chinese nationals abroad, while failing to recognise the complexity of pressures brought to bear on 'them' and 'us' – or more precisely, of pressures brought to bear on all of us affected, albeit to different degrees, by the Chinese party-state's global governance ambitions.

V. Conclusion

In this article, we have argued that the evolution of European engagement with China on human rights has been affected by the dynamics of globalisation and shifts in the distribution of geopolitical power. Some 30 years ago, the European approach was to assume that human rights in EU-China relations primarily meant rising to the challenge of improving China's domestic human rights record, and the predominant, mainstream view, reflected in many of the EU's and EU member states' discourses and practices, was that this could best be achieved through a 'change through commerce' model associated with a progressive modernisation theory. Today, by contrast, some of the Chinese

party-state's human rights violations have acquired transnational dimensions, and its rise to the world's foremost autocracy has coincided with wider global challenges to human rights and the law.

As a result, we must observe not only that the 'cooperative' model promoted by the belief in *change through commerce* has largely failed to promote human rights, the rule of law, and related principles in China, entailing the need for the EU and its member state to confront the Chinese government on its human rights violations and apparent international crimes, a goal for which tools of "silent diplomacy" such as human rights dialogues have proved evidently inadequate..

In addition, the EU and its member states have also been confronted with the rising problem of becoming complicit in some of China's human rights violations as a result of the very ties (through business, civil society, and other exchanges) which were once expected to result in China's liberalisation. Responses to the risks of complicity have begun to be developed, for instance by legally requiring greater transparency in transnational relations, but such responses must themselves be scrutinised: they must not give way to wholesale securitisation, especially in an era of democratic decline that has also affected EU member states and threatens to undermine fundamental principles of the EU from within.

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With the White Paper on the Future of Europe, the European Commission had launched a debate on fundamental reforms of the Union structures in 2017. A total of five reform scenarios ranged from a reduction and focusing of the Union's competences to increased integration in the sense of a United States of Europe. However, the White Paper did not have any consequences; none of the reform scenarios presented was implemented. However, current global challenges in the areas of health, climate change and energy resources as well as the shift in the global balance of power and related security issues demonstrate the increasing importance of a strong and united Europe. The idea of an "ever closer union", as laid down in the preamble of the 1992 EU Treaty, could experience a renaissance. Against this background, the 13th Network Europe Conference addressed the importance of the integration project in times of global crises and the challenges in various policy areas, as well as the EU's relations with its eastern and southern neighbors and its role vis-à-vis global actors such as China and Russia. This publication contains the conference contributions.

With contributions from:

Michael Ambühl
Jelena Ceranic Perisic
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Christelle Genoud
Christos V. Gortsos
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