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Assoziiertes Institut der Universität Zürich & Kooperationspartner der ETH Zürich
RECHT BERATUNG WEITERBILDUNG

Editors:
Andreas Kellerhals, Tobias Baumgartner, Fatlum Ademi

EU Enlargement and European Integration: Challenges and Perspectives

14th Network Europe Conference
Stockholm, 25–26 September 2023

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Preface

This publication comprises the contributions presented at the 14th Network Europe Conference held in Stockholm/Sweden, in September 2023. The conference addressed various challenges for the European integration process in light of current global crises, as well as aspects of the EU enlargement perspectives.

As late as the beginning of 2022, a major round of enlargement of the European Union seemed unlikely in the foreseeable future. However, Russia's unprecedented invasion of Ukraine in February 2022 has fundamentally changed the position of the European Union. Ukraine and Moldova were granted the status of candidates for EU membership, and Georgia was added to the list of potential EU candidates. Consequently, the purpose and future of the European Neighbourhood Policy will need to be clarified and redefined.

In view of this situation, the contributions in this publication address various imperative topics. Talks have emerged about accelerating the integration process for Western Balkan countries, while neighboring countries of the EU have been offered accession perspectives. In Armenia, the question of rapprochement with the EU has been raised following the exodus from Nagorno-Karabakh, as Russia failed to act as a protective power. Switzerland has engaged in crucial new negotiations to secure and strengthen its bilateral path with the EU. Furthermore, the external relations of the EU with Russia and China as opposing global players were examined. Finally, different future perspectives for the EU and alternative options in light of the upcoming challenges were presented.

We would like to thank the participants for their contributions as well as express our gratitude to the Co-Hosts of the conference from the University of Stockholm, Prof. Dr. Björn Lundqvist and Prof. Dr. Antonina Bakardjieva Engelbrekt.

Zurich, 23 July 2024

Prof. Dr. Andreas Kellerhals
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The Rule of Law: a major challenge for European integration and EU enlargement?[1]

Antonina Bakardjieva Engelbrekt

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[1] This chapter builds on my previous work 'The Eastward Enlargement as a Driving Force and Testbed for Rule of Law Policy in the EU', in A Bakardjieva Engelbrekt, A Moberg and J Nergelius (eds) *Rule of Law in the EU: 30 Years After the Fall of the Berlin Wall* (Oxford: Hart Publishing, 2021), 181-228 and 'The Rule of Law and Judicial Independence in the EU: Lessons from the Union's Eastward Enlargement and Ways Forward', in Reichel and Zamboni (eds) *Rule of Law*, *Scandinavian Studies in Law*, *vol.* 69 (Jure, 2023), 177-230.

I. Introduction

There is hardly a question of European Union law and policy that has received more extensive treatment and provoked more heated debates during the last decade, than the question of the waning commitment to the rule of law in individual EU Member States and the ensuing rule of law crisis in the Union.[2] The acute attention devoted to this crisis in both policy documents and academic literature is not surprising. It is prompted by a widely shared understanding of the centrality of the rule of law for the European project and growing concerns in the face of rapid backsliding and open neglect for rule of law standards in certain EU countries. Although 'rule of law crisis' has become the established term, in fact the crisis is broader than that because disregard for the rule of law inevitably undermines democratic institutions and the quality of democracy more generally. Furthermore, while the crisis is triggered by rule of law ruptures in individual Member States, it affects deeply the Union as a whole, since it puts into question EU's ability to uphold its fundamental values.[3]

To be sure, the notion of 'crisis' is so frequently used in the context of European integration that it seems to have suffered some devaluation and even trivialisation. The number and variation of crises that the Union is bemoaned to be facing and grappling with is ever expanding: financial crisis, migration crisis, Covid19 crisis, energy crisis, ecological crisis, security crisis, to name

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2 See the contributions in A Södersten and E Hercock (eds) *The Rule of Law in the EU: Crisis and Solutions* (SIEPS, 2023), available at: https://www.sieps.se/en/publications/2023/the-rule-of-law-in-the-eu-crisis-and-solutions/; Laurent Pech, 'The Future of the Rule of Law in the EU' https://verfassungsblog.de/the-future-of-the-rule-of-law-in-the-eu/.

3 See András Jakab, 'Three misconceptions about the EU rule of law crisis', *Verfassungsblog*, 17 October 2022, available at: https://verfassungsblog.de/misconceptions-rol/.

but a few. Thus, the concept of crisis may no longer project the sense of urgency vested in its original meaning. The 'normalisation' of the state of crisis is further enhanced by the broadly held conviction that the Union is typically not weakened, but rather strengthened by crises.[4]

Yet, there are many who argue convincingly that the rule of law crisis which has been unfolding during the last decade is of a different, one could say existential, character for the Union, and should be a cause for greater concern and trepidation.[5] For one, the majority of crises the Union has coped with, or is currently struggling with, is caused by external factors, such as global financial streams, migration flows or climate change. In contrast, the rule of law crisis is internal to the Union. More importantly even, it strikes at the heart of the Union's constitutional principles and institutional foundations. For what happens with a Union based on mutual trust and law-governed cooperation if legal commitments are not observed and if the Member States, i.e. the composite units in the carefully intertwined common construct, cannot guarantee the integrity and accountability of their core institutions?

In addition, the state of the rule of law in the Union has substantial external implications, notably in the context of an intensified EU enlargement process. This process involves countries with poor rule of law record and, after opening accession negotiations with Ukraine, extends even to candidate states that are currently at war.[6] Showing credible commitment to the rule of law has been one of the major hurdles set before the candidate states on their path to EU accession. Therefore, ensuring respect for the rule of law in the Union becomes decisive for the authority and legitimacy of EU enlargement policy. In sum, the rule of law emerges as a major challenge for both European integration and for the continuing enlargement of the Union.

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4 See Bakardjieva Engelbrekt et al, 'The EU and the Precarious Routes to Political, Economic and Social Resilience', in Bakardjieva Engelbrekt et al (eds) *Routes to a Resilient European Union* (Palgrave McMillan, 2022), 1.

5 See Anna Södersten, 'Rule of Law Crisis: EU in Limbo Between Federalism and Flexible Integration' in: Bakardjieva Engelbrekt et al (eds) *EU Between Federal Union and Flexible Integration, Interdisciplinary European Studies* (Palgrave McMillan, 2023), 51-73; Nicole Scicluna and Stefan Auer, 'Europe's constitutional unsettlement: testing the political limits of legal integration' (2023) 99(2) *International Affairs*, 769–785.

6 See decision of the European Council to open accession negotiations with Ukraine and Moldova, European Council, Conclusions, European Council meeting 14 and 15 December 2023, EUCO 20/23, Brussels, 15 December 2023. Accession negotiations started formally by an Intergovernmental Conference held on 25 June 2024 after the Council approved the Negotiating Framework on 21 June 2024.

The rule of law crisis that is at the center of this chapter can be linked to a general political trend of nationalist and populist forces either rising to power, or gaining increasing political influence across the European continent and beyond.[7] While this trend can be discerned in a number of EU Member States, it has been most prominently visible in the ascent of self-proclaimed 'illiberal democracies', starting with the coming to power of Victor Orbán's Fidesz party in Hungary in 2010, and in Poland during the period of consecutive governments led by the Law and Justice (Prawo i Sprawedliwość, PiS) party.[8] These political parties have used their time in government to strengthen their grip on political power by engaging in a quest to undermine constitutionally established checks and balances, and by systematically assaulting the independence of key institutions, such as the media, educational establishments and notably the judiciary. As a result, in 2020, Freedom House for the first time qualified Hungary as a 'transitional or hybrid regime', while Poland slipped back into the group of semi-consolidated democracies.[9] Since then, the situation in Hun-

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7 Jan-Werner Müller, 'Should the EU Protect Democracy and the Rule of Law inside Member States?' (2015) 21(2) *European Law Journal*, 141–160.

8 See Victor Orbán's speech at Băile Tuşnad (Tusnádfürdő), available at: https://budapestbeacon.com/full-text-of-viktor-orbans-speech-at-baile-tusnad-tusnadfurdo-of-26-july-2014/. L Pech and K Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) 19 *Cambridge Yearbook of European Legal Studies* 3. On Hungary, see Gábor Halmai and Bojan Bugaric, 'Autocracy and Resistance in Hungary since 2010', 19 June 2023, available at SSRN http://dx.doi.org/10.2139/ssrn.4484312; András Jakab, 'Institutional Alcoholism in Post-socialist Countries and the Cultural Elements of the Rule of Law: The Example of Hungary' in: A Bakardjieva Engelbrekt and X Groussot (eds) *The Future of Europe: Political and Legal Integration Beyond Brexit* (Oxford: Hart Publishing, 2019), 209. On Poland see, among others, Wojciech Sadurski, 'Constitutional Design: Lessons from Poland's Democratic Backsliding' (2020) 6 *Const Stud* 59; L Pech, P Wachowiec, D Mazur, 'Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action' (2021) 13 *Hague Journal on the Rule of Law* 1.

9 See the democracy index put together by Freedom House at https://freedomhouse.org/ and the scores for Hungary at https://freedomhouse.org/country/hungary/nations-transit/2020. In 2022, the country's democracy score fell from 3,71 to 3,68 after evidence of further deterioration of media freedom and no improvement on other counts. The score remained unchanged in 2023 and 2024. Among the EU Member States from CEE, in 2024 Freedom House qualified three other countries as 'semi-consolidated democracies': Bulgaria, Romania and Croatia. See also Kelemen's analysis of what he calls the EU's autocratic equilibrium in Dan Kelemen, 'The European Union's authoritarian equilibrium' (2020) 27 *Journal of European Public Policy* 481. Following a different index maintained by the Gothenburg V-Dem institute, Hungary is placed in a group of so called 'electoral autocracies' while Bulgaria, Poland and Romania fall into a group of 'electoral democracies', together with some of the old Member States such as Austria, Greece and Portugal. See https://v-dem.net/documents/43/v-dem_dr2024_lowres.pdf. According to the latter index, among

gary has not improved. In contrast, Poland experienced what has been described as a 'tectonic shift' with the elections of October 2023, leading to the loss of power by the PiS party and the start of a difficult process of restoring the rule of law and repairing the damage on the country's democratic institutions.[10] What has been particularly distinctive of Hungary under Orbán and the PiS-led governments in Poland, is that these regimes have not even pretended to follow European rule of law standards and have instead been taking a course of open confrontation with EU institutions.[11]

In the face of the potentially devastating effects of such rule of law backsliding[12] for the mutual trust on which European integration builds, and hence for the very survival of the European project, all EU institutions have felt bound to act to uphold the rule of law as a fundamental EU value. Indeed, the Commission, the European Parliament, the Council and the Court of Justice of the European Union (hereinafter, the Court, or CJEU) have each within their respective sphere of competence, weighed in on the question of rule of law compliance and, albeit with differing resolve, undertaken specific measures to bolster the rule of law in EU Member States more generally, and address developments in backsliding states like Hungary, and previously Poland, in particular. The avenues for action have been manifold and intersecting, prompting scholars to search for a suitable taxonomy that would enhance the understanding for the various tools and measures and their implications and relative importance. Classifications have been offered along different lines: according

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the EU Member States from CEE, only Czechia, Estonia and Latvia are classified as liberal democracies.

10 See Country Report Poland, Freedom House, 2024, available at: https://freedomhouse.org/country/poland/nations-transit/2024. On the difficulties of such restoration see A Sajó, 'On the difficulties of Rule of Law restoration' in: Södersten and Hercock (n 2), 60-65.

11 See judgement of the Polish Constitutional Tribunal Nr. K/21 of 7 October 2021, available in English translation at: https://trybunal.gov.pl/en/hearings/judgments/art/11662-ocena-zgodnosci-z-konstytucja-rp-wybranych-przepisow-traktatu-o-unii-europejskiej.

12 The term 'backsliding' is by now well established in the legal and political science literature, although it has been criticised on a number of counts. Rule of law backsliding has been defined as 'the process through which elected public authorities deliberately implement governmental blueprints which aim to systematically weaken, annihilate or capture internal checks on power with the view of dismantling the liberal democratic state and entrenching the long-term rule of the dominant party', Pech and Scheppele (n 8), 10. Some have pointed out that while the term implies a regression from a previous state of consolidated democracy, many countries in CEE were not truly consolidated democracies at the time of accession in the first place. See Licia Cianetti and Seán Hanley, 'The end of the backsliding paradigm' (2021) 32 *Journal of Democracy*, 66, at 67, with reference to Tim Carothers, 'The End of the Transition Paradigm' (2002) *Journal of Democracy* 5.

to the institutional actor undertaking the respective measure (Council, Parliament, Commission, Court, other bodies)[13], according to the functional sphere within which the respective tool is situated (political, legal, financial)[14], or according to the character of the governance approach employed (proceduralization, conceptualisation, judicialization).[15]

A natural point of reference in this search for the right strategy are the lessons learned from past experiences. In this respect, as I will argue in this contribution, particular attention deserve the insights gained during the "big-bang" Eastward Enlargement of the Union of 2004, 2007 and 2013 (hereinafter the Eastward Enlargement) and the way the obligation of ensuring respect for the rule of law in the Central and Eastern European (CEE) candidate states was handled in this process. The reasons for looking closer into the Eastward Enlargement are manifold. First, although incidences of rule of law deterioration can be observed in many countries within and outside Europe[16], it is quite obvious that the risk for democratic backsliding is more imminent in the new, still immature democracies from CEE that came out of the grip of authoritarian rule after the fall of the Berlin Wall in 1989. To be sure, there is a considerable variety in the political paths of the individual CEE Member States and not all of them are showing the same tendency of rule of law backsliding and open disrespect for international commitments as Hungary and Poland under the period of PiS-led governments. Yet, there seems to be broad agreement among initiated observers that the quality of democracy and the rule of law in the region has been deteriorating.[17]

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13 See C Closa, D Kochenov and J H Weiler, 'Reinforcing Rule of Law Oversight in the European Union'(2014) EUI Working papers, RSCAS 2014/25, at 20-23.

14 See Södersten (n 5).

15 Bakardjieva Engelbrekt, 'The Eastward Enlargement as a Driving Force and Testbed' (n 1).

16 In its annual report 'Freedom in the World 2020', Freedom House found 2019 to be the 14th consecutive year of decline in global freedom, and arrived at the sombre conclusion that democracy and pluralism were under assault. In 2019, the same organisation noted that 'the reversal has spanned a variety of countries, from long-standing democracies like the United States to consolidated authoritarian regimes like China and Russia. See Freedom House, Freedom in the World 2020, available at: https://freedomhouse.org/sites/default/files/2020-02/FIW_2020_REPORT_BOOKLET_Final.pdf.

17 See the introduction by Cianetti et al to the special issue of *East European Politics* on 'democratic backsliding' in CEE: L Cianetti, J Dawson and S Hanley, 'Rethinking "democratic backsliding" in Central and Eastern Europe – looking beyond Hungary and Poland' (2018) 34 *East European Politics* 243. Cf also contributions by Dawson and Dimitrova, in the same special issue.

Secondly, EU policy in the field of the rule of law, in particular seen as a requirement vis-à-vis Member States, stems to a large extent from the process of Eastward Enlargement that has unfolded in the 1990s and beginning of 2000s. At this juncture, democracy, the rule of law and fundamental rights protection were set out unequivocally in the EU Treaties as shared values and conditions for Union membership. More generally, the evolving framework for ensuring respect for the rule of law in the Union has been noticeably influenced by the critique of double standards and the urge to close the gap between external and internal standards in this domain.[18]

Thirdly, in the context of the Eastward Enlargement, EU institutions, notably the Commission, started to flesh out the broad concept of the rule of law through more detailed positive and negative requirements and obligations. Crucially, it began developing a toolbox for screening and assessing the state of the rule of law in individual candidate states, adjusting the various instruments in the toolbox as experience from their application accumulated. A closer insight into this process can thus, arguably, help improve the efficiency and effectiveness of current EU rule of law policy, both internally in respect to EU Member States and externally, in respect of the ongoing process of preparing new candidate states for their accession to the Union.

The chapter proceeds as follows: In the next section, I go back to the beginnings of European integration and enquire into the status of the rule of law as a Community/Union value in the early days of the European project. I then trace the growing formalization and codification of the rule of law in the EU legal framework and the Treaties, taking place largely in anticipation of the

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[18] The link between rule of law policy in the EU and the Eastward Enlargement is widely acknowledged in the scholarly literature. See E Wennerström, *The Rule of Law and the European Union* (Iustus förlag, 2007); D Kochenov, *EU Enlargement and the Failure of Conditionality* (Kluwer, 2008); Gráinne de Búrca, 'Beyond the Charter: How Enlargement has enlarged the human rights policy of the European Union' (2003) 27(3) *Fordham International Law Journal*, 679; Wojciech Sadurski, 'EU Enlargement and democracy in New Member States', in W Sadurski, A Czarnota and M Kryiger (eds), *Spreading Democracy and the Rule of Law? The Impact of EU Enlargement on the Rule of Law, Democracy and Constitutionalism in Post-Communist Legal Orders* (Dordrecht, Springer, 2006), 27-49; Wojciech Sadurski, 'Charter and Enlargement' (2002) (8)(3) *European Law Journal*, 340-362; Wojciech Sadurski, 'Accession democracy dividend: The Impact of the EU Enlargement upon democracy in the New Member States of Central and Eastern Europe' (2004) 10 *European Law Journal*, 371--401; Christophe Hillion, 'The Copenhagen Criteria and their Progeny' in C Hillion (ed), *EU Enlargement: A Legal Approach* (Hart Publishing, 2004); C Hillion, 'Enlarging the European Union and Deepening its Fundamental Rights Protection' (2013) 11 *SIEPS European Policy Analysis*.

Union's Eastward Enlargement. In a subsequent section I look into the process of preparing the Candidate Countries (CCs) from Central and Eastern Europe (CCE) for accession to the Union, focusing on respect for the rule of law as part of the Copenhagen criteria for membership. Particular attention is given to the evolving Commission toolbox of instruments for screening the status of the rule of law in the CCs and guiding them towards building the necessary safeguards for the protection of the rule of law in their national legal and institutional systems. After this review, the chapter turns to the crisis of the rule of law in some of the CEE Member States of the Union post accession. The current multi-track mobilisation of Union institutions to respond to the rule of law backsliding is assessed, gauging the relative weight of different instruments in the internal rule of law policy of the Union. In a concluding section, the chapter identifies the challenges ahead, paying particular attention to the place of rule of law requirements in the ongoing Enlargement process. The overarching question is to what extent the lessons learned from the Eastward Enlargement of the Union can contribute to forging a more effective and sustainable internal and external EU rule of law policy.

II. The Rule of Law in the EU legal framework prior to the Eastward Enlargement

In recent academic debate, it is argued that there is a sufficiently firm common understanding of the meaning and scope of the principle of the rule of law in the EU. According to Pech, 'there is now a broad legal consensus in Europe on the core meaning of this principle, its minimum components, and how it relates to other key values such as democracy and respect for human rights'.[19] While this statement may be correct as a reflection of the current state of affairs, at the time when the Eastward Enlargement first came into sight as a political option for the EU, the situation was quite different. As most commentators agree, there was at that juncture a relatively thin express normative basis for the rule of law as a condition for EU membership, and scarce detail as to the exact content of the rule of law as an EU law principle.[20] Indeed, if we try to trace the evolution of the concept of the rule of law in Community/Union law,

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19 Laurent Pech and J Grogan, 'Unity and Diversity in National Understandings of the Rule of Law in the EU', *Reconnect*, WP 1 D, April 2020, available at https://reconnect-europe.eu/wp-content/uploads/2020/05/D7.1-1.pdf, 6 (hereinafter 'Unity and Diversity'); see also L Pech and Joelle Grogan, 'Meaning and Scope of the EU Rule of Law', *Reconnect*, WP 7 D2, April 2020, available at https://reconnect-europe.eu/wp-content/uploads/2020/05/D7.2-1.pdf (hereinafter 'Meaning and Scope').

20 See Kochenov (n 18); Wennerström (n 18); Hillion, 'Enlarging the European Union' (n 18) 10.

we must start by acknowledging that in the course of the four decades of legal history preceding the process of Eastward Enlargement the concept appears only rarely in legislative documents and in the jurisprudence of the European Court of Justice (ECJ).

1. Rule of Law in the Original Treaties

The original treaties of the European Communities contained no solemn declarations or formal commitment to the rule of law, democracy and fundamental rights.[21] There is no consensus in the literature as to the reasons for this conspicuous silence. Some seek the explanation in the fact that the United Kingdom (UK) was not among the founding Members of the European Communities. Since 'the rule of law' is a very central concept in UK law, it is seen as not surprising that the concept does not appear in the founding Treaties of the European Communities, while in contrast it occupies a prominent place in the Statute of the Council of Europe (CoE) and the ECHR.[22] At the same time, it is argued that by defining the function of the ECJ as being to guarantee 'that the law is observed', the legal system of the EU has from its inception been solidly based on the rule of law. Certainly, the very existence of the ECJ and the bold scope of its jurisdiction, including a mandate to review the legality of the acts of EU institutions, are in themselves a robust evidence of the importance of the rule of law in the legal and institutional system of the EU.[23] However, this can hardly be equated to the prominent commitment to the rule of law, as, for example, in the Statute of the CoE, nor to an explicit requirement of respect for the rule of law addressed to the Member States.

A more plausible explanation for the silence is in my view to be sought in the different approaches to European cooperation represented by the two major European organisations established in the aftermath of World War II. Whereas the CoE was conceived as an intergovernmental organisation with the main mission of upholding human rights in its Member States, the European Coal and Steel Community and, later on, the European Economic Community (and

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21 On the original provision of Art 31 ECSC Treaty and the controversies around the correct translation of the concept 'respect du droit' used therein, see Laurent Pech, 'The Rule of Law in the EU: The Evolution of the Treaty Framework and Rule of Law Toolbox' (2020) *Reconnect*, WP 7, available at https://reconnect-europe.eu/wp-content/uploads/2020/03/RECONNECT-WP7-2.pdf (hereinafter 'The Rule of Law in the EU') 7.

22 See Art 3 Statute of the Council of Europe. As to the corresponding German and French concepts, namely *Rechtsstaat* and *état du droit*, the emphasis on statehood in these concepts is considered a plausible explanation for their avoidance in the founding Treaties and in subsequent ECJ jurisprudence. See Pech, 'The Rule of Law in the EU' (n 21), 8–9.

23 See Pech, 'The Rule of Law in the EU' (n 21), 8 et seq; Wennerström (n 18).

Euratom) were set up as international organisations of a hybrid type, with a substantial degree of delegation of sovereignty to supranational institutions and centered around the idea of a Common Market. This approach, closely associated with the architect of European integration Jean Monnet, and aptly referred to as 'functionalist', relies on achieving political unity through the logic of market integration.[24] It envisages pragmatic steps towards intertwining the economies of the Member States, while avoiding a debate over 'the political'.[25] If this view is correct, the absence of a reference to the rule of law in the original Treaties should not be seen as an unfortunate omission but rather as a conscious choice that followed logically from the model of European cooperation pursued by the Communities.

Certainly, the absence of an explicit rule of law clause in the original treaties did not mean that the founding members were tolerant or indifferent towards the rule of law. Quite to the contrary, the minimalist approach was partly possible due to the lack of sharp incongruences in the original Member States' understanding of fundamental constitutional values.[26] The traumatic heritage of World War II, and the living example of the detriments caused by authoritarian rule in the European countries within the Soviet sphere, had the effect of limiting, if not eliminating, the basis for political movements questioning the values of democracy, the rule of law and human rights in Western Europe. Moreover, all founding Member States of the European Communities were Members of the CoE. One might say that the rule of law, understood as a fundamental limitation on the exercise of state power, had been taken for granted among existing Member States.[27] The fact that countries like Greece, Spain and Portugal, which went through periods of military juntas and authoritarian rule

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24 See EB Haas, *Beyond the Nation-State: Functionalism and International Organization* (Stanford, CA, Stanford University Press, 1964). See in this sense Gráinne De Búrca, 'Poland and Hungary's EU membership: On not confronting authoritarian governments' (2022) 20(1) *International Journal of Constitutional Law*, 13.

25 As succinctly put by Grabbe, "This is the heart of the 'Monnet method' of European integration: focus on practical economic integration and knit interests together so that people will stop paying so much attention to nationalist claims." See Heather Grabbe, 'Six Lessons of Enlargement Ten Years on: The EU's Transformative Power in Retrospect and Prospect (2014) 52 (Annual Review) *Journal of Common Market Studies* 46.

26 See Ivan Damjanovski, Christophe Hillion and Denis Preshova, 'Uniformity and Differentiation in the Fundamentals of EU Membership: The EU Rule of Law Acquis in the Pre- and Post-accession Contexts' (2020) *EU IDEA Research Papers* No 4, available at www.iai.it/sites/default/files/euidea_rp_4.pdf, 5.

27 Ibid.

in the decades following World War II, were not considered for membership until their clear return to democracy and the rule of law, also testifies to this tacit assumption.

2. The Rule of Law in the Court's Jurisprudence

Given the absence of an explicit reference to the rule of law in the original Treaties, it famously fell to the ECJ to painstakingly educe the rule of law as a general principle and undergirding value of the EU legal order. Some scholars see already the seminal judgments of *Costa v ENEL* and *Van Gend en Loos* as early recognition of a vision of the Communities as bound by law and constituting a separate legal order with a clear hierarchy of norms, where EU law prevails over conflicting rules of national law and citizens can derive individual rights directly from EU law and enjoy judicial protection of these rights.[28]

The Court also gradually developed other principles that constitute essential components of the rule of law, such as the principles of legality, legal certainty, separation of powers (or, in the EU context, of functions), prohibition of retroactivity, and judicial review of administrative acts.[29] Notably, in a line of creative jurisprudence, the ECJ recognised fundamental rights as constituting general principles, and thus an integral part, of EU law.[30] But it was in the seminal decision in '*Les Verts*' that the ECJ recognised most prominently the principle of the rule of law as a general principle of EU law.[31] The Court famously referred to the principle of legal community (*Rechtsgemeinschaft*), or a community under the rule of law.

No doubt, this jurisprudence contributed greatly to consolidating the self-perception and the international standing of the European Community as a Community of law, cherishing the principles of legality and the rule of law and guaranteeing respect for fundamental rights. Based on the analysis of individ-

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28 See Wennerström (n 18), 117 et seq; cf Case 6/64 *Costa v ENEL*, ECLI:EU:C:1964:66; Case 26/62 *Van Gend & Loos*, ECLI:EU:C:1963:1.

29 For a detailed account of the ECJ case law, see Wennerström (n 18), 117 et seq; see also Pech, 'The Rule of Law in the EU' (n 21).

30 See Case 29/69 *Stauder*, ECLI:EU:C:1969:57 and Case 11/70 *Internationale Handelsgesellschaft*, ECLI:EU:C:1970:114. For the methodology of identifying individual fundamental rights in the common constitutional traditions of the Member States or in the ECHR, to which all Member States were signatories, and elevating these rights to general principles of EU law, see de Búrca (n 18) and Koen Lenaerts, 'Interlocking Legal Orders in the European Union and Comparative Law' (2003) 52 *ICLQ* 873.

31 Case 294/83 *Parti écologiste 'Les Verts' v Parliament*, ECLI:EU:C:1988:94. See also Opinion 1/91 *EEA*, ECLI:EU:C:1991:490; cf Pech (n 21), 10.

ual Treaty provisions and of relevant ECJ case law, scholars have argued that the rule of law was at the end of the 1980s well developed in Community law, in both its formal and its substantive dimensions, as a declaratory and a procedural concept.[32] However, it is also admitted that the case law has predominantly been spurred by concerns about safeguarding the supremacy of EU law, rather than by substantive ambition about raising the level of respect for the rule of law and human rights in the Community. As aptly formulated by de Búrca, the jurisprudence has been 'reactive', and one might even say defensive, in character.[33] Moreover, the Court has been rather cautious about acknowledging general Community competences in the field of human rights.[34] As a consequence, Member States have been subject to EU or ECJ jurisdiction in matters of the rule of law and fundamental rights only 'in highly circumscribed contexts'.[35]

In sum, the approach of the Communities/Union to the constitutional question, including the rule of law and fundamental rights, has from the outset been one of minimalism and incrementalism. The tension has systematically stemmed from Member States' claiming higher levels of protection of constitutional principles and fundamental rights in their national constitutional legal order, and voicing concerns that the same high levels could not be guaranteed by the EC/EU. As we shall see in the following, exactly the reverse concern has become the driving force behind the next stage in the development of the rule of law in the Union, a development propelled largely by the prospect of Eastward Enlargement of the Union.

III. Reinforcement of the EU Rule of Law Framework in Anticipation of the Eastward Enlargement

Against the background sketched out above, it is fair to say that the principle of the rule of law made its true entry into the Treaties and EU constitutional law only after the collapse of communism in CEE, and when the prospect of a closer relationship with the CEE countries came within reach.

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32 On the different dimensions of the rule of law, see Wennerström (n 18), 154–57.

33 de Búrca (n 18).

34 See Opinion 2/94, ECLI:EU:C:1996:14, para 27.

35 de Búrca (n 18). For an even more fundamental critique on the rule of law in the EU see Dimitry Kochenov, 'The missing Rule of Law', in C Closa and D Kochenov (eds) *Reinforcing Rule of Law Oversight in the EU* (Cambrdige University Press, 2016), 290.

1. The Entry of the Rule of Law into the Treaties

The first mention of the rule of law in the Treaties was in the Treaty of Maastricht of 1992, where the principle was expressly acknowledged as an EU principle. Member States officially confirmed 'their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law'.[36] However, this was done only in the Preamble, in relatively vague or, to use Pech's words, 'symbolic', terms, and with no specific definition or obligations attached.[37] It is notable that in the Preamble, the clause on the rule of law came immediately after a clause recalling 'the historic importance of the ending of the division of the European continent'. Thus, the link between elevating the status of the rule of law in the Union and the end of the Cold War was openly acknowledged.

Surely, at the time of drafting of the Maastricht Treaty, the exact fate of the relationship between the former socialist states from CEE and the EU was still not conclusively decided. In a Commission Communication from August 1990, the Commission outlined the immediate way forward as being one of Association Agreements with the countries of CEE.[38] Still, the prospect of opening the EU to new members from CEE was already on the table, something confirmed by the fact that a special article on the procedure for accepting new members was included in the Treaty on European Union (TEU) (Article O Maastricht Treaty, now Article 49 TEU). More importantly, the context in which the Maastricht Treaty was drafted was starkly shaped by the dramatic events in CEE. It was exactly within this historical timespan that democracy, the rule of law and fundamental rights received world-wide attention and recognition as never before.[39]

Against this backdrop, it is surprising that while the Maastricht Treaty included a provision on accepting new Members, clearly in anticipation of such applications from the CEE countries, it did not set out any specific criteria for membership and did not mention the rule of law as such a criterion. This only

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36 See Maastricht Treaty, Preamble, third indent.

37 Pech (n 21), 12.

38 Communication from the Commission to the Council and the Parliament on Association agreements with the countries from Central and Eastern Europe: a general outline, COM(90) 398 final, Brussels, 27 August 1990.

39 See Conclusions of the Dublin European Council of 20 April 1990. See also the Paris Charter signed in 1990 by the Heads of State or Government of the CSCE (Commission on Security and Cooperation in Europe) states, further committing themselves to democracy, the rule of law, and respect for human rights and fundamental freedoms.

comes to confirm that the rule of law has been a concept in the making, the content and importance of which were evolving in parallel with the process of Eastward Enlargement.

2. The Crucial Role of the Copenhagen Criteria

Only a year after the entry into force of the Maastricht Treaty, at the Copenhagen European Council of June 1993, the EU declared that 'the associated countries in Central and Eastern Europe that so desire shall become members of the European Union'. The Council also famously defined the economic and political conditions required for the associated countries to join the Union. These conditions, or criteria are divided into three groups:

(a) political conditions, requiring that 'the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities';
(b) economic conditions, requiring 'the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union';
(c) *acquis* criterion, that is, the ability to take on the obligations of membership, including adherence to the aims of political, economic and monetary union.[40]

Importantly, the Madrid European Council in 1995 complemented the third criterion by stressing the necessity not only of formally transposing the *acquis*, but also of implementing it effectively through appropriate administrative and judicial structures. Some analysts treat this addition as a separate, fourth criterion requiring (d) institutional and administrative capacity to implement the *acquis*,[41] which is in my view a useful distinction.

Students of EU Enlargement have been adamant to point out that the Copenhagen criteria should not be regarded as a novelty but rather as a consolidation and codification of the experience and practice of previous enlargements.[42] At the same time, it is also acknowledged that among the criteria there were many new elements in both substantive and institutional terms. For one, the political conditions for membership were formulated in greater detail, extending to areas where the Union itself had at the time limited com-

40 Copenhagen European Council, Presidency conclusions.

41 See Wennerström (n 18), at 64.

42 See Hillion, 'The Copenhagen Criteria and their Progeny' (n 18) with reference to the Declaration on Democracy, Annex C, Copenhagen European Council, Final text, 20 April 1978, *EC Bulletin* 3-1978; cf Kochenov (n 18), 24. See also Pech and Grogan, 'Meaning and Scope' (n 19), at 7.

petence (see below). Secondly, they were set out in more straightforward, even 'command' terms.[43] Thirdly, whereas in previous accessions, candidate states were expected to fulfil the EU admission conditions without much interference from the Union, in the conclusions from the Copenhagen European Council the EU declared its intention to engage actively in preparing the CCs for membership, steering and monitoring the process.[44]

3. Increased Formalisation of the Principle of the Rule of Law in the Treaties

The prominent place awarded to the rule of law in the Copenhagen criteria had notable political repercussions for the Union. Very soon, the principle found expression in the texture of the EU Treaties. The Amsterdam Treaty, which was signed in 1997, when the official negotiations on the CEE countries' membership of the EU had already taken off, stipulated this time more clearly in the Treaty text that the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the *rule of law*, principles that are common to the Member States (Article F(1), now Article 2 TEU, considerably amended, my italics).

The most obvious provision preparing for the future Eastward Enlargement was the amended Article O (now Article 49 TEU), which through reference to Article F(1) finally cemented the political conditions for membership as known from the Copenhagen criteria, namely democracy, the rule of law and fundamental rights (minus minority rights), elevating them into Treaty requirements. At this juncture, it was also considered important to introduce an insurance against possible future democratic and rule of law backlash in a Member State through the setting up of a sanctioning mechanism in case of a serious and persistent breach of the values and principles laid down in Article F(1) TEU (see Article F.1, now Article 7 TEU).

As acknowledged by the Commission in subsequent accession documents, through the Treaty of Amsterdam 'the political criteria defined at Copenhagen were essentially enshrined as constitutional principles in the Treaty on European Union'.[45] Scholars speak of codification of the Copenhagen criteria.[46]

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43 See Hillion, 'The Copenhagen Criteria and their Progeny' (n 18), at 10–11.

44 Hillion, 'Enlarging the European Union' (n 18) 3; Ronald Janse, 'Is the European Commission a Credible Guardian of the Values? A Revisionist Account of the Copenhagen Political Criteria during the Big Bang Enlargement' (2019) (17)(1) I.CON 43, at 47.

45 See eg Regular Report Bulgaria (2002), at 18, note 3.

46 de Búrca (n 18), at 696; cf Hillion, 'Enlarging the European Union' (n 18), at 3.

4. Consolidating Fundamental Rights Protection in the Union

Similar and even more revolutionary development can be traced in the closely related domain of human rights and fundamental freedoms. The Eastward Enlargement of the EU can also in this area be seen as providing a powerful impetus for the advancement of a genuine human rights agenda for the Union. The evolution followed a parallel trajectory to the one regarding the rule of law, anchoring the commitment to fundamental rights in the Treaties as a general principle of EU law through Article F Maastricht Treaty (now Article 6 TEU), codifying in this way the doctrine developed by the ECJ, on the one hand, and setting it out as a condition for membership through the Amsterdam Treaty, on the other. These changes were clearly intended to 'signal to the candidate countries that membership comes out of the question before it is certain that they have legislation which protects and guarantees citizens' rights'.[47]

Decisively, the Union's commitment to human rights and fundamental freedoms received solemn recognition and reinforcement through the European Union Charter of Fundamental Rights (hereinafter, CFR or the Charter) signed in 2000. This move was undertaken clearly as a safeguard and insurance against unwanted backlash in the CEE candidate countries post accession. Less conspicuously, it was prompted by the criticism that had started to mount against EU institutions for applying double standards in the ongoing Enlargement process, setting stricter requirements in respect of the CCs than the Union could demand from its own Member States.[48] The Charter can thus be conceived as a step towards strengthening the integrity and trustworthiness of the Union's fundamental rights policy, closing the gap between external and internal standards.[49]

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47 See speech by Sweden's Minister of Justice Laila Freivalds, 'Rule of Law in an Enlarged European Union' (1998) *Europarättslig tidskrift* 15; in a similar sense, Sadurski, 'Accession Democracy Dividend' (n 18).

48 For the academic critique, see Joseph Weiler and Philip Alston, 'An "Ever Closer Union" in need of a human rights policy' (1998) 9 *EJIL* 658; Andrew Williams, 'Enlargement of the Union and human rights conditionality: A Policy of Distinction?' (2000) 25 *EL Rev* 601; cf de Búrca (n 18).

49 See Sadurski, 'Charter and Enlargement' (n 18). In de Búrca's words, 'The EU … has been hoisted on its own petard.' See de Búrca (n 18) 680. Still, the Charter did not fully succeed in placing internal and external standards on the same level as its scope and impact are limited in several respects. See de Búrca (n 18) 702.

IV. Screening the Candidate Countries for Rule of Law Compliance

As seen in section III above, the Eastward Enlargement worked as a powerful force, raising the status and visibility of the rule of law in the constitutional framework of the EU. The question to be discussed in this section is how the Union approached the rule of law in its pre-accession policy; a discussion which inevitably is centered around the notion of 'conditionality'.

1. General Approach: The Rise of Rule of Law Conditionality

In the legal and political science literature on EU Enlargement, the concept 'conditionality' has acquired almost canonical status.[50] Interpreted narrowly, conditionality implies that the CEE countries are allowed to become Members only after certain political and legal conditions are fulfilled. Conceived more broadly, conditionality represents the key component of EU institutions' approach to accession, seeking to engender change in the laws and institutions of the CCs by applying continuous pressure on them through a system of specific targets and tangible rewards, with the aim of bringing the countries closer to EU standards and requirements. The concept captures well the asymmetric relationship between the parties involved – the EU (the Commission) setting the conditions for entry 'into the club' and the CCs striving to meet those conditions.[51]

The term 'conditionality' first entered the enlargement discourse with the conclusions of the Copenhagen European Council of 1993 and the stipulation of the Copenhagen criteria. The years before that, i.e. the initial phase in the relations between the CEE countries and the EU, had the character of a traditional diplomatic exchange. The emphasis had been on 'meetings of an advisory nature' and the tone – one of 'co-operation and assistance'.[52] Once the conditions for membership were set out in unambiguous and non-negotiable terms, the approach changed palpably, and the relationship became increasingly skewed and formalised.

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50 On accession conditionality, see Frank Schimmelfennig and Ullrich Sedelmeier, 'Governance by Conditionality: EU rule transfer to the candidate countries of Central and Eastern Europe'(2004) 11 *Journal of European Public Policy* 661; F Schimmelfennig and U Sedelmeier (eds), *The Europeanization of Central and Eastern Europe* (Ithaca, NY, Cornell University Press, 2005) 210–28.

51 On asymmetry in EU accession policy, see Kjell Engelbrekt, 'Multiple Asymmetries: The European Union's Neo-Byzantine approach to Eastern Enlargement' (2002) 39 *International Politics* 37.

52 Williams (n 48).

Still, the true rise of conditionality is associated not with the Copenhagen criteria, but rather with the Commission Communication 'Agenda 2000' from 1997. In this document, the Commission presented a comprehensive vision for a reinforced pre-accession strategy.[53] The main tenet of the strategy was advancing conditionality by setting specific priorities and intermediate targets adapted to each CC's particular problems and challenges, and enhancing the scrutiny of these countries' progress towards meeting the Copenhagen criteria.[54] Consequently, positive evaluation by the Commission became decisive for the start, and thereafter the progress, of accession negotiations. Most analysts therefore consider Agenda 2000 to be the point when rule of law conditionality 'acquired teeth' and real 'bite'.[55]

2. The Toolbox of Conditionality: Regular Country reports and Accession Partnerships

The enhanced strategy comprised a myriad of documents and policy instruments, two of which stand out as particularly important: individual country assessments and Accession Partnerships.[56]

The Commission kept producing regular and individualised assessments of the level of compliance of the CCs with the criteria for membership throughout the pre-accession process. The first round of such assessments comprised the so-called Country Opinions attached to Agenda 2000, giving an initial appraisal of the situation in the applicant countries, also in respect of the political conditions for accession. These initial opinions were then followed up by annual country reports (so called Regular Reports (RRs)) measuring the applicant countries' progress toward meeting the conditions for membership. The RRs were drawn up and published simultaneously for all CCs, introducing in this way a strong comparative and competitive element in the procedure and amplifying the level of scrutiny and pressure on the applicants.

The second instrument in the 'toolbox' of conditionality was the so-called Accession Partnership (AP). Such partnerships, between the Council, on the one hand, and each of the CCs, on the other, were signed following a proposal from

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53 See European Commission, 'Part II: The Challenge of Enlargement' and 'Enhanced Pre-accession Strategy', in Agenda 2000 Volume I – Communication: For a stronger and wider Union, COM(97) 2000 final, Brussels, 15 July 1997.

54 See previously the Conclusions of the Madrid European Council, Bulletin of the European Communities, No 12/1995. See also Williams (n 48), at 608.

55 Williams (n 48), at 608; see also Sadurski, 'Accession Democracy Dividend' (n 18), at 375.

56 For the different types of documents that made the Copenhagen principle workable, see Kochenov (n 18) 76.

the Commission, and were thereafter regularly revised and updated. The instrument allowed the Commission to break down the otherwise daunting task of preparing the CCs for membership into more specific short-term and intermediate objectives, and to adapt its assessments and recommendations to the situation and performance of each applicant.

The most important dimension of the instrument was, however, that it offered a framework for enforcing 'strict conditionality' in allocating technical and financial assistance to the CCs.[57] Throughout the pre-accession process, the CEE countries were benefitting from considerable financial and structural aid, notably through the PHARE programme, but also through twinning programmes and access to Community programmes such as SAPARD.[58] With the introduction of APs this much-needed assistance was made conditional upon compliance with the objectives and commitments specified in the APs. Failure to respect these conditions and commitments could lead to a decision by the Council to suspend financial assistance.[59] Thus, the instrument gave EU institutions, and the Commission in particular, powerful leverage in micro-steering reforms in the CCs and enforcing accession conditionality. According to Kochenov, the APs laid the ground 'for a fully-fledged conditionality of sticks and carrots'.[60]

A less-observed aspect of the AP instrument is that it was conceived, as the name indicates, as a partnership, that is, as a framework of common engagement, with priorities and precise objectives set up in collaboration between the EU and the CCs. While conditionality is usually analysed as building on one-sidedness and asymmetry, the active engagement of EU institutions in preparing the CCs contributed to gradually transforming Enlargement into a common project in which both the CCs and the Union institutions, notably the Commission, had a stake.[61]

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57 See Agenda 2000 (n 53) at 53.

58 The assistance was in Commission statements compared to the Marshall Plan. For a critical view on this proposition, see M Ivanova, 'Why there was no "Marshall Plan" for Eastern Europe and why this still matters' (2007) 15(3) *Journal of Contemporary European Studies* 345.

59 See Art 4, Council Regulation (EC) No 622/98 on assistance to the applicant States in the framework of the pre-accession strategy, and on the establishment of Accession Partnerships.

60 Kochenov (n 18), at 74. The Commission admits that such linking of individual countries' progress with the degree of financial assistance is quite unprecedented; however, it defends this approach by citing the enormous task involved in preparing the CCs for membership. See Agenda 2000 (n 53), at 89.

61 The perception of Enlargement as a joint project is visible in other Commission documents as well. See eg European Commission, 'Making a Success of Enlargement', Strategy Paper

3. Methodology of Assessment

In Agenda 2000, the Commission described the methodology applied for the individual country assessments as going beyond formal indicators and seeking to establish how democracy and the rule of law 'actually work in practice'.[62] At the same time, when looking at the sources of information on which the Commission relied, it appears that the assessment has been 'largely paper based'.[63] Central place among the sources was awarded to a questionnaire that was sent out to each of the applicant countries. According to commentators who have looked closely into the process, the questionnaire was composed of numerous but often rather scattered and arbitrary questions, which were then left to the self-assessment of the candidate states' governments.[64] Other sources that are named explicitly are assessments by the Union Member States, European Parliament reports and resolutions, and more broadly 'the work of various international organisations, non-governmental organisations and other bodies'.[65]

The questionnaire method was complemented by bilateral meetings held with each of the applicant countries. The information gathered through those meetings is apparently processed in an informal manner, without employing any quantitative or qualitative methods established in social sciences.[66]

4. The Rule of Law as a Moving Target

The preceding admittedly cursory review of EU's pre-accession strategy and the methodology for assessment provides an insight in the modalities of the Commission's rule of law screening and assessment exercise. However, the most important variable in this assessment is the very benchmarks against which the performance of the CCs was measured. Following the Copenhagen European Council, it was clear that commitment to the rule of law was one of the political conditions for membership of the Union. Yet, the precise meaning and contents of this condition remained vague. According to one of the early

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and a Report, COM(2001) 700 final, Brussels, 13 November 2001, 5. See also Sonja Grimm, 'Democracy promotion in EU enlargement negotiations: more interaction, less hierarchy' (2019) 26 *Democratization* 851, who argues that the process of accession is more interactive and less one-sided than usually believed.

62 See Agenda 2000 (n 53) vo. 1, 42.

63 See Williams (n 48), at 609. See also Wennerström (n 18), at 179 et seq.

64 See Janse (n 44) 54–55.

65 Agenda 2000 (n 53) at 39; cf Williams (n 48), at 609.

66 For criticism on this point, see the analysis by Kalypso Nicolaïdis and Rachel Kleinfeld, 'Rethinking Europe's "Rule of Law" and Enlargement Agenda: The Fundamental Dilemma' (2012) NYU *School of Law, Jean Monnet Working Paper* 08/12.

critics of EU enlargement policy and rule of law conditionality, the concepts of the rule of law and democracy were undetermined in the EU legal framework and thus open to interpretation and contestation. They were 'almost impossible to measure' – something making their use as conditions for membership precarious.[67]

Given this indeterminacy, the role of EU institutions, and notably the Commission, for defining the standards, establishing compliance thresholds and assessing individual CCs' performance looms large. The Commission was well aware of the exceptional character of its mission. In Agenda 2000, it described its task not merely as difficult, but as unprecedented. The two main challenges as the Commission saw it were (i) that the broadly defined political criteria went far beyond the *acquis communautaire* and (ii) that the *acquis* had expanded since previous enlargements, including, among others, the area of justice and home affairs (JHA).[68] Both concerns were highly relevant for the rule of law component of political conditionality.

Concerning the first point in particular, at the beginning of the accession process there was little in terms of binding EU *acquis* in the area of the rule of law, as well as concerning administrative and judicial structures. Importantly, given competence limitations stemming from the principle of conferral, the Union did not consider itself to be in a position to set out general requirements as to the regulation of these domains in the EU Member States.[69] Correspondingly, there were no tools for systematic monitoring and assessment of these fundamental features of Member States' constitutional orders. Hence, the Eastward Enlargement process inevitably had to be one of learning by doing, and the resulting methodology – vacillating and eclectic.

Probably the most fundamental challenge to the accession process was that the legal and administrative systems in the CCs were in a process of major rehaul as part of their post-communist transformation. This process ran parallel to EU accession, which made keeping track of relevant legislation and practice difficult. The Commission thus found itself in the precarious position of having considerable leverage in shaping rule of law institutions and legislative frameworks in the CCs, while having no firm ground for offering advice and guidance.

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67 See Kochenov (n 18), at 2.

68 Agenda 2000 (n 53), at 39.

69 See de Bùrca (n 18); Kochnenov (n 18), at 80–81.

The EU institutions approached the challenges in a pragmatic manner. The Commission proceeded to put more flesh on the bones of political conditionality through general policy documents, such as Agenda 2000, composite and strategy papers, as well as country-specific documents such as APs and RRs. The screening and assessment documents were typically structured following the Copenhagen criteria, namely considering the rule of law (i) as constituting a political condition for membership, (ii) as being decisive for the administrative and judicial capacity of the candidate states, but also gradually as (iii) binding *acquis* as the Union advanced its competence within the area of Justice and Home Affairs (JHA). Given the fact that these areas of scrutiny were in constant flux, a dividing line between them was not always easy to draw.[70]

a) The Rule of Law as Part of the Political Conditions for Membership

Concerning the political criterion for membership, Agenda 2000 drew up three thematic fields to be examined under this point:

(a) democracy and the rule of law;
(b) human rights; and
(c) respect for minorities.

Within the rule of law field, on the basis of the RRs, scholars elicit five main areas that were part of the Commission's scrutiny: (i) supremacy of law, (ii) the separation of powers, (iii) judicial independence, (iv) fundamental rights and (v) the fight against corruption. It has been argued that these areas broadly correspond to the rule of law concept as it had evolved in the internal legal order of the Community/Union, probably with the exception of the fight against corruption, which was still a novel domain for the EU.[71] Yet it is also acknowledged that the Commission never ventured to offer an analytical definition of the rule of law. If anything, a definition could be derived from the individual elements and indicators included in the RRs, but there was no attempt to explain how these elements fit together into a coherent concept.[72]

In the individual country Opinions attached to Agenda 2000 and the subsequent RRs, the rule of law was mostly analysed through the main institutions representing the different branches of power, principally the executive and the judiciary in the respective state. The Opinions contained descriptive details about the organisation of public administration, the laws governing public service and the organisation of the judiciary in the CCs. Particular attention was

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70 See Wennerström (n 18), at 179.

71 ibid, at 213.

72 ibid 180. On the EU's reluctance to conceptualise the rule of law, see Nicolaïdis and Kleinfeld (n 66) 16. See also Kochenov (n 18), at 110.

paid to the relevant institutional structures, such as constitutional courts, ombudsmen, supreme courts, the hierarchy of the court system, the position of the public prosecution, etc.

b) The Rule of Law as Part of Administrative and Judicial Capacity

The second basis for the Commission's scrutiny of the rule of law in the CCs was the fourth Copenhagen criterion, putting emphasis on the capacity of administrative and judicial structures to apply the *acquis*. Scrutinising the rule of law under this criterion highlighted its importance not only as a political, but also as a highly pragmatic condition of vital importance for the functioning of all other Union policies, and notably for giving full effect to the Internal Market *acquis*.[73]

Throughout the Enlargement process, the 'capacity' criterion has been used as a basis for demanding substantial reforms of the public administration and the judiciary in the CCs, with a view to making them independent, professional, accountable, and up to the task of applying the *acquis* and participating in processes of administrative and judicial cooperation.[74] Since the institutional structure of public administration and the judiciary, as well as enforcement, was at the time of Enlargement largely governed by the principle of national procedural and institutional autonomy, requirements under this point constituted another way of expanding the external mandate of the Commission vis-à-vis the CCs beyond the scope of its internal mandate in respect of the Member States.[75]

c) From Political Condition to Binding Rule of Law Acquis

Finally, with the advancement of European integration, specific EU rules and standards relating to certain aspects of the rule of law (for instance concerning the judiciary, or the fight against corruption) were gradually enshrined in the Treaties, in the CFR or in legislative acts, thus becoming part of the increasing corpus of binding EU *acquis*. For instance, with the Amsterdam Treaty, the Union policy in the area of JHA moved from the third to the first pillar as de-

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73 See European Commission, White Paper, COM(95)163 final, section 2.30.

74 See eg Antoaneta Dimitrova, 'Europeanisation and Civil Service Reform in Central and Eastern Europe' in F Schimmelfenning and U Sedelmeier (eds), *The Europeanisation of Central and Eastern Europe* (Ithaca, NY, Cornell University Press, 2005), 84.

75 See Matej Avbelj 'National procedural autonomy: concept, practice and theoretical queries' in A Lazowski and S Blockmans (eds), *Research Handbook in EU Institutional Law* (Cheltenham, Edward Elgar, 2016), 421.

fined by the Maastricht Treaty, opening for new legislative instruments and requirements, and formally creating the Union's area of freedom, security and justice (AFSJ). Development in this policy area intensified with the Tampere and Haag programmes of 1999 and 2004.[76] This internal development translated almost immediately into changes in EU Enlargement policy, transforming certain issues from political conditions for membership into binding *acquis* forming novel chapters of the negotiations framework.

d) External Sources for Rule of Law Assessment

Over and beyond the three internal bases for the Commission's rule of law assessment of the CCs, and partly due to the rather limited and vague content of the requirements derived on this ground, the Commission has been working with various external sources of authority. The most natural such sources have emanated from the CoE's work in the field of the rule of law and fundamental rights. Although the CoE is only occasionally mentioned in EU pre-accession documents, at the time the Union embarked on its Eastward Enlargement, the CoE had just finalised, or was in the process of finalising, its own enlargement to the East, involving massive screening of applicant states and assessment of their eligibility for membership based on adherence to democracy, the rule of law and respect for fundamental rights.[77] The CoE could claim expertise and authority in the field, and could in many respects be considered the antechamber to the EU.[78] Importantly, the CoE had been quick to establish the Venice Commission on Democracy Through Law and a plethora of informal expert networks that provided valuable normative input regarding rule of law and fundamental rights standards, also in the course of EU Enlargement.[79]

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76 See Helen Hartnell, 'EUstitia: Institutionalizing Justice in the European Union' (2002-2003) 23 *Northwestern. Journal of International Law and Business*, 65.

77 On the screening procedure of the Parliamentary Assembly of the Council of Europe see T Kleinsorge (ed), *Council of Europe* (Alphen aan den Rijn, Kluwer Law International, 2015) 85 et seq.

78 See the Council of Europe's self-description at www.coe.int/en/web/yerevan/the-coe/about-coe/overview. See also the contribution by Daniel Tarschys, 'The Council of Europe as an Antechamber of the EU', in: Bakardjieva Engelbrekt et al, *Rule of Law in the EU* (n 1), 143.

79 On the role of the Venice Commission, see the contribution by Iain Cameron in: Bakardjieva Engelbrekt et al, *Rule of Law in the EU* (n 1), 147.

Given the considerable synergies between the CoE and the EU in respect of their policies vis-à-vis the CEE, steps towards formalizing and structuring the cooperation between the two organisations were gradually undertaken.[80]

Summing up, the evolution of EU's pre-accession rule of law policy suggests that the policy took shape somewhat hesitantly and intuitively, but gradually gained momentum and was equipped with increasingly powerful tools for inducing follow-up and compliance on the part of the CCs. The strong attraction of EU membership in combination with non-trivial financial and technical assistance coupled with short-term and medium-term targets, has given conditionality a powerful leverage in steering law- and institution-building in the CEE countries. At the same time, the content of the rule of law standard that the Union projected has remained poorly defined, relying on external sources for filling the gaps.

V. What Lessons from Rule of Law Conditionality in the course of Eastward Enlargement?

The pre-accession strategy outlined in the preceding two sections and its application in the area of the rule of law in the CCs have been subject to close scrutiny in legal and political science scholarship, prompting both praise and criticism. Here only the most widely agreed weak spots can be reviewed in an attempt of drawing lessons that can be helpful for current and future EU rule of law policy.

A recurrent line of criticism levelled at EU institutions in their rule of law policy vis-à-vis the CCs has concerned the uncertain standards on which the requirements were built and the ensuing question about the legitimacy of EU Enlargement policy in this domain. Political scientists working in the area of Europeanisation conceived as transfer of norms from the EU to the candidate states, measure legitimacy by the quality of EU rules, the quality of the rule transfer and the quality of the rule-making process.[81] Arguably, Enlargement rule of law policy, as a form of Europeanisation, exhibited problems on all three counts.

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[80] See Joint Declaration Council of Europe and the European Commission, 2001. Cf D Piana, *Judicial Accountabilities in New Europe: From Rule of Law to Quality of Justice* (Farnham, Ashgate, 2010), at 62.

[81] Jeffrey Checkel, 'Sanctions, Social Learning and Institutions' (1999) 11 *Arena Working Papers*.

1. Quality of EU rules

The lack of clarity over EU rule of law standards is an important factor negatively influencing the quality of the rules. As already discussed above, at the time when the pre-accession process was launched, the rule of law had not been elaborated in much detail in the Treaties, nor in secondary legislation.[82] Uncertainty was further added by the dynamics of constitutional developments in the EU, moving some of the relevant issues of the rule of law from the domain of political conditionality to the more specific chapters of binding *acquis*. Despite the many policy documents, EU institutions showed a reluctance to conceptualise the rule of law. The Commission never offered 'a general and authoritative conceptual document on the EU rule of law', opting for a 'description-based' rather than 'analytically-based' approach.[83] Even scholars who are generally positive of the Commission's work in the area, agree that the individual country evaluations had a relatively 'diverse and superficial nature'.[84]

This uncertainty is by many perceived as undercutting the overall success of EU rule of law policy in the CEE countries. For one thing, it has inevitably given rise to information costs, since the CCs could not know what exactly was expected of them and what measures were required to satisfy the standard.[85] To put it in the provocative words of Kochenov, 'the candidate states were told to comply, but not told with what'.[86] As a result, the standards have been difficult to explain to local stakeholders and have formed an unstable ground for inducing compliance.

An even more important aspect, from the perspective of legitimacy, is the extent to which the rules were also binding internally for the EU Member States.[87] In areas where the EU has strong competences and European institutions have accumulated considerable practice, for instance in the area of competition law, the requirements spelled out in the accession process have enjoyed high authority and legitimacy.[88] In the field of the rule of law, the

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82 See Kochenov (n 18), 109; Hillion, 'Enlarging the European Union' (n 18), 4.

83 See Nicolaïdis and Kleinfeld (n 66) 16. In a similar sense, Kochenov (n 18), 110.

84 Pech and Grogan, 'Meaning and Scope' (n 19) 11.

85 See Sadurski, 'EU Enlargement and Democracy in New Member States' (n 18), 31.

86 Kochenov (n 18), 315.

87 Or as succinctly formulated by Sadurski, the legitimacy and effectiveness of the standards are influenced by 'the seriousness and determination with which the EU has held its own member states to those standards', Sadurski, 'Accession Democracy Dividend' (n 18), 378.

88 See A Bakardjieva Engelbrekt, 'Grey Zones, Legitimacy Deficits and Boomerang Effects: On the Implications of Extending the Acquis to the Countries of CEE' in N Wahl and P Cramér (eds), *Swedish Yearbook of European Law* (Hart Publishing, 2006), 1.

Union lacked corresponding authority and legitimacy. The Commission itself admitted that in many respects, the screening of the CCs for rule of law and democracy compliance went far beyond any *acquis communautaire*, and hence beyond the requirements that could be directed internally to the Member States.[89]

A particularly conspicuous example of the gap between external and internal standards was the early requirement of respect for minority rights under the Copenhagen political criteria. At the time when the criteria were spelled out, none of the EU Member States were subject to a similar requirement.[90] But also in the area of the rule of law, the perception of double standards has plagued the Enlargement process on a number of issues. For instance, on the important issue of judicial governance, CCs were required to undertake changes in the organisation of their judicial systems while such requirements would have been impossible at the time, if applied to EU Member States.[91] Hillion critically contends that the criteria applied to the CCs in the Enlargement process offered a distorted reflection of the EU's constitutional identity (*miroir déformant*).[92]

The criticism of the vague and inconsistent standards on which rule of law conditionality built is widely shared in Enlargement scholarship, but it has not remained uncontested. On the basis of a comprehensive review of Commission pre-accession documents, Janse has argued that despite the many flaws in its work, the Commission has been consistent in articulating 'a clear vision on the core meaning of the political accession criteria'.[93] The documents produced by the Commission refer in his view to a set of elements that are adequately selected and indeed essential for securing democracy and the rule of law. Therefore, Janse contends that the Commission's work deserves more positive overall evaluation, with the important implication that it can also be entrusted with the task of monitoring rule of law compliance in the Member States beyond

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89 Agenda 2000 (n 53) vol 1, 42.

90 C Hillion, 'Enlargement of the European Union – The Discrepancy between Membership Obligations and Accession Conditions as Regards the Protection of Minorities' (2004) 27 *Fordham International Law Journal* 715–40, 716. Sadurski, 'EU Enlargement and Democracy' (n 18), 31.

91 On double standards in the domain of human rights, see Williams (n 48), calling EU human rights policy in the process of Enlargement 'a policy of distinction'. In a similar sense, P Maier, 'Popular Democracy and EU Enlargement' (2003) 17 *East European Politics and Societies* 58, 68.

92 Hillion, 'Enlarging the European Union (n 18) 1; see also Nicolaïdis and Kleinfeld (n 66) 52.

93 See Janse (n 44) 46. The analysis builds on a review of general policy documents such as Agenda 2000, as well as country-specific documents such as RRs.

Enlargement. Janse's view is largely shared by Pech and Grogan, who, while admitting the many deficiencies in the Commission's approach, consider that the EU is not 'exporting' a vague or incoherent ideal' but instead seeks compliance with a set of specific sub-components of the rule of law.[94]

The work of Janse, and of Pech and Grogan, adds an important nuance to the debate on rule of law conditionality and the role of EU institutions. Given the unprecedented task the Commission was faced with, and the condensed timeframe it had to develop and apply its pre-accession strategy, it would indeed be unrealistic to measure the success of the approach against too rigid standards. It is also true that once we put together the different jigsaw pieces from all Commission pre-accession documents, a more coherent conception of democracy and the rule of law would emerge than what might appear at first sight. Yet, the lack of coherence in the Commission's vision of democracy and the rule of law has been only one line of criticism in the academic literature. The more serious point has concerned the perceived discrepancy between internal and external standards. Whether the rule of law conception advanced by the Commission is internally consistent has only limited bearing on the 'double-standards' critique.

2. Quality of rule transfer

Turning to the quality of rule transfer, the focus shifts to the process of eliciting common standards and the consistency and equality in the process of imposing such standards on candidate countries.

a) 'Normative harmonisation'

One way used by the Commission to compensate for the lack of binding *acquis* in the field of rule of law policy, was to project an image of an alleged common European standard that the CCs were urged to adopt or approximate. This is clearly demonstrated by developments in the area of judicial independence, where the Commission gradually advanced one particular institutional model for judicial governance, namely through a Judicial Council, as the "golden standard" for securing judicial independence. Smilov has convincingly criticised such common standards as 'myths', with the Commission emulating unity where there is none.[95]

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94 Pech and Grogan, 'Meaning and Scope' (n 19) 11.

95 D Smilov, 'Enlargement and EU Constitutionalism in the Balkan Periphery' in W Sadurski, J Ziller and K Zurek (eds), *Après Enlargement: Legal and Political Responses in Central and Eastern Europe* (Florence, Robert Schuman Centre, 2006) 161; D Smilov, 'EU Enlarge-

His analysis is reinforced through a study by Bobek and Kosar who are highly critical of the procedure for eliciting the JC model as the European standard of judicial governance. They point in particular to the lack of transparency as to patterns of participation and representation in the consultative networks and bodies engaged in setting the JC standard that was subsequently imposed with considerable rigour upon the CCs. In their view, the standards elaborated within these networks reflect to a great extent the preferences of the judicial profession, and even more narrowly, of the higher tiers of the judiciary, often court presidents, who typically represent the profession in the networks. A bias in favour of the JC model arguably also resulted from the strong activism of Italy and Spain, as main proponents of the model, within both judicial networks and twinning projects with CEE countries. Furthermore, once the model was adopted by some of the CEE countries, a self-generating logic was set in motion, whereby the model could be advanced as predominant in Europe. The influence was further institutionalised with the setting up of a European network of judicial councils.[96]

Certainly, the Commission was also advancing the JC model with the conviction of the model's superiority, especially for guarding the CEE judiciary from the legacies of the socialist past. The approach thus, at least partly, represents what Smilov dubs 'normative harmonization'. Under the notion of a common standard, the Commission promotes a desired normative model or solution.[97] However, and importantly for the quality of rule transfer, by insisting on one particular model of judicial governance without support in binding *acquis* or in a common European tradition, the Commission is narrowing the range of alternative institutional models for the CCs. The more serious danger of an approach building on 'myths' lies, according to Smilov, in the fact that such myths are inevitably unstable and provide shaky ground for building long-term relationships of trust. Once the lack of binding rules is discovered, the myth as a basis for mutual obligations collapses, and there is a risk of backlash and even regression into Euro-scepticism and nationalism.[98] This prediction is to a cer-

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ment and the Constitutional Principle of Judicial Independence' in Sadurski, Czarnota and Kryiger (eds) (n 18) 313. For more detail on how this standard was applied, see Bakardjieva Engelbrekt, 'The Eastward Enlargement as a Testbed' (n 1).

96 M Bobek and D Kosar, 'Global solutions, local damages: A critical study in Judicial Councils in Central and Eastern Europe' (2014) 15 *German Law Journal* 1257–92, 1263, at 1270 et seq.

97 Smilov, 'Enlargement and EU Constitutionalism' (n 95), 176 et seq.

98 ibid. In a similar sense, Sadurski, 'EU Enlargement and Democracy'(n 18), 33 with reference to formulas such as 'EU model' and 'part of common constitutional traditions'.

tain extent confirmed in the current open 'double standards' rhetoric of illiberal governments and their intellectual supporters.[99]

b) Consistency and equal treatment

Concerning the quality of rule transfer, a main line of criticism, partly connected with the one above, is the lack of consistency in the Commission's evaluations: between individual CCs, across policies and over time. Here only the first point will be addressed.[100] One of the distinctive features of the Eastward Enlargement has been the high number of states with similar historical legacies that applied for membership at approximately the same time. As a consequence, applications had to be reviewed, and accession negotiations carried out, simultaneously. This parallel treatment brought a great deal of political prestige in the project and has in the literature been aptly dubbed a 'regatta' approach.[101] The EU institutions were well aware of this politically sensitive aspect of the Eastward Enlargement. In the individual Opinions attached to Agenda 2000, the Commission was adamant that while the analysis of each application was made on its merits, all applications were judged according to the same criteria.[102]

Yet despite this assurance of equal treatment, evidence from systematic review of individual country opinions and RRs suggests otherwise. While the areas of rule of law assessment were broadly the same, the specific components addressed under each area differed considerably between countries. Scholars note with amazement the inclusion of certain elements and requirements in some country reports and their absence in others – without, moreover, providing any justifications for the different treatment.[103] Divergence is noted also in the rigour with which the Commission carries out its scrutiny of CCs' compliance with prescriptions and recommendations. Whereas some applicants were held strictly to account on all points of rule of law conditionality, others could gloss over individual criteria with little or no assurances of conditions being actually met. Furthermore, measures that in some country reports were assessed as steps in the right direction, were in other country reports criticised or not mentioned at all.

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99 On this rhetoric, see Pech and Grogan, 'Unity and Diversity' (n 19), 68 et seq

100 As to inconsistencies across policy documents, see Wennerström (n 18), 213; Kochenov (n 18), 30–31.

101 On the 'regatta approach', see Engelbrekt (n 51).

102 A common text was used in this sense in all country Opinions. See eg Commission Opinion on Bulgaria's Application for Membership of the EU, COM(97)2008 final, 2.

103 See Nicolaïdis and Kleinfeld (n 66). In a similar sense, Janse (n 44), 54–55.

The unequal treatment is well illustrated by the Commission's approach to the question of judicial governance. While the Commission has promoted the model of JC as the best guarantee of judicial independence in respect of most CCs, it has not been entirely consistent in its approach. Thus, it has been widely observed that the introduction of a JC was spelled out as an almost non-waivable condition for EU membership vis-à-vis Slovakia.[104] Judicial independence was identified as a serious problem in this country at an early stage. As pre-accession conditionality tightened up, the Commission became increasingly assertive in advancing the JC model as a guarantee of judicial independence until a JC was ultimately introduced in 2001.[105] Similar pressure for setting up a JC was exerted towards Latvia, Estonia and Romania. In the case of Bulgaria, where a JC had been set up prior to the start of accession negotiations, the pressure was rather towards bringing the design of the JC, and its composition and functions, closer to the Euro-model previously mentioned.[106]

Yet the attitude was markedly different in respect of the Czech Republic. This country opted to preserve its institutional framework for judicial governance with important functions for the Ministry of Justice and did not institute a JC. Surprisingly, this choice did not prompt objections on the part of the Commission. In the RRs it is only noted that while formally judges and prosecutors could be recalled by the Minister of Justice, this had not happened in practice.[107]

This divergence in approach has been problematic,[108] first, because it raises serious doubts as to the objectivity in the Commission's assessment and the credibility of the Commission's self-declared ambition to treat all applicant

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104 See European Commission, Regular Report Slovakia, COM(1999) 511 final, 14.

105 In the RR of 2000, the Commission notes with dissatisfaction that a reform expected to shift the competence for judicial appointments to the JC has not yet been adopted. Regular Report Slovakia SEC(2001) 1754, 17. In the RR of 2000, the Commission expresses its approval of the legislative amendments setting up a JC, with broad administrative functions and competences regarding judicial appointments. At the same time, the pressure for further reforms in this direction is stepped up. See European Commission, Regular Report Slovakia (2000), 16.

106 Particular problems have related to treating the investigation service as part of the judiciary, and thus being represented in the Supreme Judicial Council. The parliamentary quota is also seen as a concern. See Piana (n 80), 135; cf Diana Bozhilova, 'Measuring Successes and Failures of Europeanization in the Eastern Enlargement: Judicial Reform in Bulgaria' (2007) 9 *European Journal of Law Reform* 285, 292.

107 See European Commission, RR Czech Republic (1999), 13.

108 For a critique of this differential approach, see Bobek and Kosar (n 96); Piana (n 80), Damjanovski et al (n 26).

countries equally. Certainly, one could argue that a JC may be a desirable solution in one institutional and political context and not in another. However, in the case of the Czech Republic and Slovakia, there was much that spoke for identical treatment, given the common legal and institutional legacies of the two countries. Moreover, the Commission did not provide any justifications for the different approach. Thus, the impression is formed that the countries had different leverage in the accession negotiations, and probably different self-confidence in their overall record as CCs, something giving the respective governments a different degree of audacity to defend national preferences and positions.[109]

Second, the ease with which the Commission was able to drop certain requirements in respect of some countries does not strengthen the credibility and authority of these requirements, and goes against the very claim of a common European standard. Third, just as in the case of double standards, lack of consistency may lead to disillusionment among enlargement supporters and strengthen the positions of anti-European and nationalist forces in the CCs. Bozhilova considers the most dramatic flaw of this approach to be that it gives national 'veto players' leeway to contest the desired reforms by accusing the EU 'of subjectivity and favouritism, and an *a la carte* approach to accession'.[110]

c) Focus on Formal Laws and Institutions

When explaining its methodology, the Commission, as already mentioned above, has been at pains to show that it was basing its assessment not on formal compliance but on the actual operation of laws and institutions. Yet in an extensive analysis of rule of law conditionality in the process of Eastward Enlargement, Nicolaïdes and Kleinfeld have criticised the Commission's approach as being precisely formalistic. In their view, the Commission was paying disproportionate attention to formal legal and institutional indicators, while turning a blind eye to 'law in action' and deeper layers of legal and political culture.[111]

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109 For similar dynamic in other policy areas, see Bakardjieva Engelbrekt (n 88), 30.

110 Bozhilova (n 106), 290; see also Smilov, 'EU Enlargement and Judicial Independence' (n 95).

111 Nicolaïdis and Kleinfeld (n 66), 16; of a different opinion, Janse (n 44). On the importance of rule of law culture see Monica Claes, 'Safeguarding a Rule of Law Culture in the Member States: Engaging National Actors' (2023) 29(2) *Columbia Journal of European Law*, 214, also with reference to the interesting study by Jerg Gutmann and Stefan Voigt, 'Judicial independence in the EU: a puzzle' (2020) 49 *Eur J Law Econ*, 83-100, showing the paradox of lower level of rule of law in countries with higher volume of formal rule of law legislation and institutions.

The focus on formal laws and discrete institutions is to a certain extent inevitable. It was partly predetermined by the compressed time-schedule of the Eastward Enlargement and the enormous strain on scarce resources it exerted on both sides of the Union threshold. Another reason for this emphasis on institutional structures is what I have in a previous contribution called 'the joint interest of the "rational accession seeker" and the "rational accession-provider"'.[112] Whereas politicians and public officials of the CCs seek rapid accession and want to demonstrate visible progress, politicians and officials of EU institutions (notably the Commission) require palpable results that are easy to identify, measure and monitor. This dynamic unfolds partly as a result of the fact that the Commission, as mentioned before, gradually develops its own interest and stake in the success of Enlargement. Seen in this light, the preference for discrete interventions in the form of enacting specific legislation and setting up institutions corresponding neatly to EU policy compartments and requirements is well understood. For the CCs, on the other hand, formal laws and institutions are attractive because they can point to their existence in progress reports and when criticised for insufficient administrative capacity.

One area where this strong legal-institutional focus has been systematically identified is Enlargement-induced reform of judicial governance.[113] As shown above, the model promoted by the Commission has revolved around the JC. In addition, the Commission advanced a requirement of setting up of a centralised body for judicial training. Over and beyond these two bodies, it was not unusual for CCs to point to ad hoc institutional solutions, in an apparent attempt to demonstrate progress. For instance, various special anti-corruption bodies, inspectorates and commissions were being invoked as evidence of the priority given to the fight against corruption. In addition, formal legislation, such as Acts on the Judiciary, but also policy documents such as Strategy on the Reform of the Judiciary, or National Anti-Corruption Strategy, typically received the Commission's approval.[114]

An unfortunate consequence of such an approach is what Nicolaïdes and Kleinfeld call 'legal-institutional mimetism'. There is a proliferation of laws and institutions that are supposed to implement EU legislation, or legislation re-

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112 A Bakardjieva Engelbrekt, 'An End to Fragmentation? The Unfair Commercial Practices Directive from the Perspective of the New Member States of CEE' in S Weatherill and U Bernitz (eds), *The Regulation of Unfair Commercial Practices under EC Directive 2005/29* (Hart Publishing, 2007) 47, 81 et seq.

113 See Bobek and Kosar (n 96); Piana (n 80); Damjanovski et al (n 26), 5. For other areas of pre-accession policy, see Bakardjieva Engelbrekt (n 88).

114 See Regular Report Bulgaria, 2003, 19–20.

quired by the EU, but which do not bring actual change in underlying social relations and practices. Moreover, such laws are often changed and institutions frequently refurbished. Paradoxically, a situation is created where pre-accession policy as applied by the Commission contributes to eroding legal certainty, the latter being a key goal of rule of law reform.[115]

3. Quality of rule-making in the recipient states

The legitimacy of Enlargement cum Europeanisation can also be measured by its impact on the quality of the rule-making process in the applicant countries. In this regard, many critical analyses note the impoverishing effects 'external governance' has occasionally exerted on the legislative process, and ultimately on democracy and democratic institutions in the CCs. Such effects have been observed on several levels.

For one, the unquestionable priority of EU accession on the political agenda in the CEE countries in combination with the detailed steering of rule of law reform through specific short-term and intermediate targets and strict monitoring, has implied excessive pressure on the legislative process in these countries. Comparative research on Enlargement's effects in CCs provides evidence of a legislative process plagued by fast-track procedures, lack of information and insight, and poor, if any, consultation with affected stakeholders and civil society, where the role of parliament is reduced to rubber-stamping.[116]

A related effect of the pre-accession strategy is the priority given to government and state actors, who are chief interlocutors in accession negotiations and typically have the mandate of communicating EU requirements to domestic stakeholders and institutions. Intergovernmental negotiations are as a rule based on 'informal contacts between negotiators on both sides, not easily subject to formal control'.[117] This limited insight exacerbates the power of government and public agencies at the expense of democratically elected parliaments, as well as of civil society participation. Thus, another paradox of accession conditionality is revealed: by giving priority to efficiency over legitimacy, the EU undermines its own efforts to promote democratic development in the CCs.[118]

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115 Nicolaïdis and Kleinfeld (n 66) ,19.

116 Heather Grabbe, 'How does Europeanisation affect CEE governance? Conditionality, diffusion and diversity' (2001) 8 *Journal of European Public Policy* 1013, 1016.

117 Sadurski, 'EU Enlargement and Democracy in New Member States' (n 18), 383.

118 Grabbe (n 116). For arguments in the same vein, see Maier (n 91), 63; Nicolaïdes and Kleinfeld (n 66), 26.

Finally, as observed by Nicolaïdes and Kleinfeld, a more subtle distorting effect for democratic law making comes with long-term prioritisation of implementing EU *acquis* and requirements over systemic domestic demands. Such law making steered by external governance may to some extent deprive the polities in the candidate states from the feeling of ownership over important democratic and rule of law transformation in their societies. Sajó warns, somewhat prophetically, that democratic reforms carried out with 'an apparent lack of constitutional commitment and passion among the citizenry might become a problem in the event that a tyrannical or corrupt elite should ever attempt to govern'.[119]

VI. Turning Conditionality and Rule of Law Oversight Inwards to Curb Rule of Law Backsliding in EU Member States

The first sections of this chapter described how the Eastward Enlargement prompted a major upheaval in EU rule of law policy, mostly in the form of raising the standards for membership and precluding the possibility for entry into the Union of polities with low respect for the constitutional principles of democracy, the rule of law and fundamental rights. Although this development was taking place through amendments in EU Treaties and legislation, the effects were mostly outward-bound, intended for the post-communist candidate states from CEE. However, after the fifth EU Enlargement was successfully completed, problems of rule of law backsliding in recently acceded states can no longer be treated as external to the Union. In this section, I look at how the lessons learned from the Eastward Enlargement, could inform and strengthen the Union's inward-bound rule of law policy.

Already in the course of preparing the CCs for membership into the Union, policy makers as well as legal and political science scholars pointed at the imminent risks post accession. Many feared that the reforms introduced in the course of Enlargement and under the pressure of conditionality were only weakly institutionalised in the CCs, and could easily suffer a backlash once conditionality would be lifted. At the same time, it was pointed out that the Union is constrained in its ability to curb such developments in at least two significant ways. First, the procedure for sanctioning Member States under Article 7 TEU is notoriously heavy-handed and has proven to be grossly inad-

119 A Sajó, 'Constitution without the constitutional moment: A view from the new member states' (2005) 3 *International Journal of Constitutional Law* 243, 249.

equate to check illiberal developments in the Member States.[120] Second, and more problematic, the EU's competences in the policy areas at the core of rule of law backsliding have been perceived as limited and uncertain. rule of law conditionality in the process of accession included requirements that went beyond the scope of the EU *acquis*, and arguably even beyond the limits of the principle of conferral in EU constitutional law.[121] Post accession, such stretching of competences becomes more problematic.[122] Hence, misgivings were expressed that should the new Member States lapse into political practices going against the rule of law, there would be little or no possibilities for the EU to counteract such a development effectively. With the illiberal turn in Hungary under Orbán, in Poland during the period of PiS-led governments, and with the deteriorating quality of democracy in a number of other CEE Member States, such misgivings have indeed materialised.[123]

To overcome the ensuing rule of law crisis, all EU institutions are currently engaged in an attempt to find a blueprint for a coherent multi-layered and multi-institutional EU rule of law policy, a philosopher's stone of sorts.[124] In this process one can partly observe how monitoring mechanisms, policies and standards developed in the course of Eastward Enlargement travel back to the Union and produce what could be defined as 'boomerang' effects.[125] Such effects can be said to work along several, partly intersecting, tracks, relying on different modes of governance.[126] First, instruments for country-specific rule of law monitoring and assessment developed in the course of Enlargement are refined and extended horizontally to apply internally to all Member States, leading to increased proceduralisation of EU rule of law policy in line with

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120 For an analysis, see the contribution by Moberg in ch 15 of Bakardjieva Engelbrekt et al, 'Rule of Law in the EU' (n 1), 341.

121 Hillion (n 90), 716.

122 See Hillion, 'Enlarging the European Union' (n 18), 8.

123 On the illiberal turn in Hungary, see the contributions by Halmai in Bakardjieva et al, 'Rule of Law in the EU' (n 1), Jakab (n 8), Halmai and Bugaric (n 8). Concerning the deteriorating quality of democracy in the region, see L Cianetti, J Dawson and S Hanley, 'Rethinking "democratic backsliding" in Central and Eastern Europe – looking beyond Hungary and Poland' (2018) 34(3) *East European Politics*, 243.

124 See European Commission, 'Strengthening the rule of law within the Union. A blueprint for action', COM(2019) 343 final.

125 For the metaphor of 'boomerang effects' see my contribution A Bakardjieva Engelbrekt (n 88).

126 There is yet another instrument, namely the selective and time-limited post-accession conditionality associated with the CVM applied to Bulgaria and Romania. Since this mechanism is conceived as an exception, it will not be discussed here.

theories of experimentalist governance.[127] Second, rule of law conceptualisations and systematisations precipitated in the course of Enlargement acquire increased sophistication and feed into new legislative instruments of EU-internal rule of law policy. Third, the one-sided conditionality method, used in the context of Enlargement is transformed from a political tool into a legislative instrument of general application, allowing for strengthened enforcement and moving closer to the classical 'Community' governance method.[128] Fourth, and probably most decisively, a process of enhanced judicialisation of EU rule of law policy is unfolding, whereby CJEU jurisprudence works as a bridge between pre-accession and post-accession standards and as a glue between different components of EU-internal and external rule of law policy. The question is whether these novel governance instruments are adequately informed by the achievements and flaws of rule of law policy in the course of the "big-bang" Enlargement. Have the lessons identified above been integrated when the new rule of law framework is conceived and implemented? And what are the challenges ahead?

1. Proceduralisation and Experimentalist governance in EU Rule of Law Policy

Along the first track, EU institutions seek to compensate for the limited competence and inadequate mechanisms for enforcing the rule of law in the Member States by developing instruments for monitoring, data gathering and periodic country-specific rule of law assessments, expecting this benchmarking exercise to promote best practices and expose deficiencies. Early such mechanisms of what comes close to the model of experimentalist governance include the EU Justice Scoreboard, by which the efficiency, quality and independence of Member States justice systems are reviewed as part of the European Semester.[129] In 2019, a full-blown Rule of Law Mechanism (RLM) was launched

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127 See Ch Sabel and J Zeitlin, 'Learning from Difference: The New Architecture of Experimentalist Governance in the EU' (2008) 14(3) *European Law Journal*, 271–327. For an early analysis of Enlargement policy in terms of New Modes of Governance, see E Tumlets, 'The Management of New Forms of Governance by Former Accession Countries of the European Union: Institutional Twinning in Estonia and Hungary' (2005) 11 *European Law Journal* 657.

128 On different modes of governance in the EU and the classical 'Community' method, see J Scott and D Trubek, 'Mind the Gap: Law and New Approaches to Governance in the European Union' (2002) *European Law Journal*, 1-18.

129 Hillion, 'Enlarging the European Union' (n 18), 10. See European Commission, 'The EU Justice Scoreboard A tool to promote effective justice and growth', COM(2013) 160 final, Brussels, 27 March 2013.

by the Commission.[130] The Commission describes the instrument as a process for an annual dialogue on the rule of law between the Commission, the Council and the European Parliament together with Member States as well as national parliaments, civil society and other stakeholders. The basis of this dialogue is the Rule of Law Review Cycle with the annual Rule of Law Report, consisting of a general report and 27 country chapters with Member State-specific assessments. The first Annual Rule of Law Report was published in September 2020.[131] The reports for 2021, 2022 and 2023 have likewise been released, establishing the mechanism as a permanent element of the Union's rule of law governance framework.[132]

These instruments are apparently emulating those developed in the course of Enlargement and lead to increased proceduralisation of EU rule of law policy. When explaining the method for preparing the Annual Reports, in particular, the Commission describes a process very close to the one employed in its pre-accession strategy.[133] The methodology builds on questionnaires sent out to the Member States and on involvement of professional networks, civil society, other international organisations and expert bodies, etc. However, there are also major differences. Importantly, the instrument is now directed internally at all EU Member States, thus seeking to avoid criticism of double standards and unequal treatment. The Commission is apparently acutely aware of the importance of equal treatment and consistency in the country reports. It is adamant to point out that it has ensured "a coherent and equivalent approach by applying the same methodology and examining the same topics in all Member States, while remaining proportionate to the situation and developments."[134] On the basis of the report the Commission is, since 2022, issuing individual country recommendations, which makes the strife towards equivalent assessment even more important.

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130 See European Commission, 'Rule of Law Mechanism. Further strengthening the Rule of Law within the Union', COM(2019) 163 final, Brussels, 3 June 2019.

131 European Commission, 2020 Rule of Law Report, COM(2020) 580 final, Brussels, 30 September 2020.

132 European Commission, 2021 Rule of Law Report, COM(2021) 700 final, Brussels, 20 July 2021; European Commission, 2022 Rule of Law Report, COM(2022) 500 final, Luxembourg, 13 July 2022; European Commission, 2023 Rule of Law Report, COM(2023) 800 final, Brussels, 5.7.2023; European Commission, 2024 Rule of Law Report, COM(2024) 800 final, Brussels, 24.7.2024.

133 Piana (n 80), 4–5.

134 See Rule of Law Report, COM(2020) 580 final, 4.

Regarding methodology, the Commission also adds that it is using qualitative methodology and explains in more detail the sources and data on which the reports build. In particular, in contrast to the pre-accession approach, the Commission is now more transparent about the external sources and actors involved, and openly announces strengthened cooperation with CoE bodies.[135] The reports seem to rely on broad interaction with non-governmental organizations on the ground seeking in this way to empower such actors and to contribute to the deeper embedding of rule of law values in Member States' polities. Importantly, the RLM aims not only, and even not predominantly, at elaborating and clarifying legal standards or imposing sanctions, but at promoting rule of law culture.[136] Thus, it appears that some lessons are drawn from pre-accession monitoring.

Yet despite their stated ambition, the Annual Reports still repeat one major flaw of the pre-accession strategy. The Reports tend to remain overly focused on formal laws and institutions in the Member States. The national chapters do not discuss major cases of corruption in the Member States and carefully avoid confronting the political causes for rule of law failures.[137] In this, the RLM seems to sustain EU's traditional legalistic approach, shying away from uneasy questions about abuse of political power.

A more fundamental critique is delivered by Laurent Pech, who finds the RLM not helpful and even counterproductive by the sheer number of reports and recommendations and by mixing "minor issues with systemic threats/violations". In his view, this has the effect of "normalising the abnormal and diverting limited resources."[138] Likewise, Scheppele considers the RLM, together with other instruments that build chiefly on measuring, reporting and recommendations, to constitute a way for the Commission of "appearing to be doing something" when it in fact does nothing, diverting valuable resources to largely futile exercises, while failing to initiate infringement proceedings and perform its main function as Guardian of the Treaties.[139] Indeed, given the open disregard by the political regimes in some backsliding countries, notably

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135 Damjanovski et al (n 26), 16–17.

136 This is declared prominently in the latest Rule of Law Report, COM(2024)800 final, Brussels, 24.7.2024, 2.

137 For a critical appraisal of the first Annual Rule of Law Report of 2020, see A Mungiu-Pippidi, 'Unresolved Questions on the EU Rule of Law Report' (2020) *Carnegie Europe*, available at https://carnegieeurope.eu/2020/10/20/unresolved-questions-on-eu-rule-of-law-report-pub-82999, pointing also at methodological flaws.

138 Pech (n 2).

139 Kim Scheppele, 'The Treaties without a Guardian: The European Commission and the Rule of Law' (2023) 29(2) *Columbia Journal of European Law*, 93, at 150.

Hungary, for their EU law obligations, and of legal constraints more generally, the soft approach taken in the RLM can hardly be expected to induce substantial change. Nevertheless, the ambition of working on the ground in the Member States with a view of supporting rule of law organisations and civil society and ultimately of nurturing rule of law culture should not be written off too easily. Although such work may not be in a position to immediately turn the tables and reverse years of rule of law destruction, it is arguably indispensable for achieving long-term embeddedness of rule of law mentality among public servants, politicians and the population at large.[140]

2. Post-accession inward-bound conditionality

Despite its resemblance with Enlargement rule of law instruments, the RLM lacks the most important element of the pre-accession rule of law strategy, namely, conditionality. While it can undoubtedly work as an early warning system and a welcome preventive instrument, it is less apt as an instrument for sanctioning and deterrence. Higher expectations in this respect are therefore vested in the other novel mechanism advanced by the Commission and adopted by Council and Parliament in 2020, namely, Regulation 2020/2092 on a general regime of conditionality for the protection of the Union budget (the Conditionality Regulation).[141] The Regulation famously introduces rule of law conditionality in the EU budgetary framework and the possibility to impose sanctions in the form of intercepted access to EU funds in the case of established breaches of the rule of law in a Member State that 'affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way'.[142]

This mechanism is certainly reminiscent of the coupling of pre-accession financial and structural assistance with strict conditionality assessment, introduced with Agenda 2000 and the APs as part of EU's pre-accession policy, even though the Conditionality Regulation has a more narrow scope of application.[143] But here as well, there are differences from pre-accession con-

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140 Claes (n 111).

141 Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget.

142 The Regulation provides a detailed description of incidences that are considered indicative of breaches of the principles of rule of law. It also contains a list of breaches that can trigger the sanctioning procedure. Ibid, Art 4.

143 Damjanovski et al observe that the conditionality mechanism would 'allow the EU to supervise and influence the operation of state structures, in a way that resembles the pre-accession methodology'. Damjanovski et al (n 26), 16–17.

ditionality. For one, there is no asymmetry in the relationship, given that the modalities of the mechanism are defined jointly by, and apply equally to all, EU Member States. Furthermore, the intervention on the part of EU institutions is expected to occur in reaction to specified incidences of rule of law infringement. This makes interventions targeted and concrete, in contrast to the often broad and abstract requirements formulated in the course of Enlargement, directed at institutional design and steered by ambitions of normative harmonisation.

The drafting history of the Conditionality Regulation shows another difference of post-accession rule of law conditionality compared to the pre-accession one. The recalcitrant countries are now full-fledged members of the Union. On the positive side, this implies that the decision-making process is not characterized by the one-sidedness that was an intrinsic feature of pre-accession conditionality. On the negative side, backsliding countries have all the levers at their disposal for obstructing the introduction of formal rule of law obligations and their effective monitoring. Predictably, the Regulation has been controversial and vehemently opposed by Hungary and Poland (at the time led by a PiS-dominated government). To still advance the new legal regime the EU legislator, following European Council intervention, resorted to quite an unprecedented measure of postponing the legal effect of the act for the time it was challenged by Hungary and Poland before the CJEU. This deviation from the normal course of procedure was probably an inevitable measure of last resort, seeking to break the deadlock and avoid the imminent veto of the draft Regulation by the two countries. However, it sets a disquieting precedent of corroding the rule of law in the Union for the sake of strengthening the rule of law.[144]

The first experiences from applying the Conditionality Regulation have so far been a mixed bag.[145] The Commission activated the Regulation against Hungary in Spring 2022 straight after the Regulation was "cleared" by the CJEU,

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144 For criticism of the unusual intervention of the European Council in the course of legislative decision-making, see Kim Scheppele, Laurent Pech and Sébastien Platon, 'Compromising the Rule of Law while compromising on the Rule of Law' (2020) *Verfassungsblog*, 13 December 2020. See actions for annulment lodged by Hungary and Poland and judgments of the CJEU (full court) in the cases C-156/21 *Hungary v Parliament and Council*, ECLI:EU:C:2022:97 and C-157/21 *Poland v Parliament and Council*, ECLI:EU:C:2022:98.

145 See, critically, Isabel Staudinger, 'The rise and fall of Rule of Law conditionality', in: Matteo Bonelli, Monica Claes, Bruno De Witte and Karolina Podstawa, *Usual and Unusual Suspects: New Actors, Roles and Mechanisms to Protect EU Values*, European Papers (2022).

suspending an estimated €6,3 billion funds under different instruments.[146] In addition, surprisingly, less observed conditionality mechanisms in other EU monetary instruments, namely the Recovery and Resilience Regulation and the Common Provisions Regulation, have been used jointly by the Commission and the Council, leading to the interception of funds of more substantial amounts than under the Conditionality Regulation.[147] The Recovery and Resilience Regulation connects EU funding of national Recovery and Resilience plans with country-specific recommendations, including conditions related, in the case of Hungary and Poland, to rule of law and judicial independence. The Common Provisions Regulation contains so called horizontal principles requiring among others compliance with the CFR, including Article 47 of the Charter.[148] Interestingly, the allocation of funds to Member States under the Common Provision Regulation is organized around so-called Partnership Agreements between the Commission and each individual state. This model has visible parallels with the model of APs during the Eastward Enlargement, probably seeking a similar effect of engaging the two parties – the Commission and Member States – into a cooperative relationship, and softening the hierarchical top-down appearance of conditionality.

The active employment by the Commission and Council of different conditionality instruments in respect to both Hungary and Poland has been praised by commentators as finally showing resolve and imposing measures with a real bite.[149] On the negative side, the highly political nature of the instruments, relying ultimately on Council decisions, poses a number of challenges for their effective and equitable application. First, the governments in backsliding states have considerable experience in mimicking reform and engaging in distracting tactics. Disavowing such false compliance claims takes time and resources, and requires perseverance from Union institutions. Second, and more problematically, in times where sensitive political decisions at EU level have to be taken by unanimity and demand solidarity, rogue governments can resort

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146 So far, €6,3 billion have been suspended in respect to Hungary. See Kim Scheppele and John Morijn, 'What price Rule of Law?' in: Södersten and Hercock (n 2), 29-35.

147 Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility (Recovery and Resilience Regulation) [2021] OJ L 57/17; Regulation (EU) 2021/1060 of the European Parliament and of the Council of 24 June 2021 laying down common provisions (Common Provisions Regulation) [2021] OJ L 231/159. According to Scheppele and Morijn, as of March 2023 more than €20 billion in EU funds allocated to Hungary have been frozen, above and beyond what the funds suspended under the Conditionality Regulation, and at least €110 billion have been withheld from Poland without the Conditionality Regulation ever being invoked See Ibid.

148 See Article 9 Common Provisions Regulation.

149 Scheppele (n 139).

to the threat of the veto to push for concessions and for release of funds despite wanting compliance with rule of law commitments. This is clearly seen in the case of Hungary where Orbán has not hesitated to use blackmailing techniques, pressuring the Council and the Commission to lift decisions on suspension of funds, arguably prematurely, in exchange for Hungary's positive vote on important EU measures, such as life-saving support for Ukraine.[150] Also in the case of Poland, it has become evident that the instruments give too much leeway to the Council to compromise the enforcement of the conditions under different financial Regulations depending on political vagaries, jeopardizing the legitimacy of the instruments and negatively influencing their effectiveness. Particularly criticized has been the decision of the Council to approve payments from the Recovery and Resilience Facility to Poland, accepting that the country has met its so called 'milestones' obligations concerning rule of law and judicial independence, despite lacking compliance with the CJEU's judgment on the controversial Disciplinary chambers for the judiciary.[151] The Council's implementing decision has been, famously but unsuccessfully, challenged in a remarkable lawsuit filed by several European judicial associations.[152]

More fundamentally, the Eastward Enlargement has shown that when amendments in laws and institutions are introduced under the sole pressure of conditionality, they only rarely produce meaningful and sustainable reform.[153] On the contrary, there is considerable probability that the changes would remain

150 See Pech (n 2).

151 See Council Implementing Decision of 17 June 2022 on the approval of the assessment of the recovery and resilience plan for Poland, 15835/23, Brussels, 5 December 2023; cf. in particular milestones F2G and F3G concerning "reform to remedy the situation of judges affected by the decisions of the Disciplinary Chamber of the Supreme Court in disciplinary cases and judicial immunity cases", Annex to Council Implementing Decision, 15835/23 ADD 1, Brussels, 24 November 2023. The relevant judgement of the CJEU is Case C-791/19 *Commission v Poland* (Disciplinary regime for judges).

152 See Joined Cases T-530/22 & T-533/22 *AEAJ, EAJ, MRR v Council*; the action was dismissed as inadmissible since neither the applicant associations, nor Polish judges as a whole, were considered directly concerned by the contested legal act, namely Council Implementing Decision of 17 June 2022 on the approval of the assessment of the recovery and resilience plan for the Republic of Poland ('the initial decision'), as amended by the Council Implementing Decision of 8 December 2023 ('the contested decision'). See Order of the General Court (Grand Chamber) of 4 June 2024.

153 See Nicolaïdes and Kleinfeld (n 66).

rather "thin" and transitory, unless they are appropriated and internalized by actors on the ground who have genuine incentives and realistic chance to change the status quo.[154]

3. Enhanced Rule of Law Conceptualisation and Systematisation

Probably the most significant rule of law dividend of the Eastward Enlargement is that it has triggered a reflection over the fundamental values of the Union and set in motion a process of conceptualisiation and systematisation of these values so that they fit into a coherent and sustainable constitutional framework. This 'spill-over' effect has been widely acknowledged in the area of judicial governance[155] and, more generally, in the domain of the rule of law.[156] Looking at the concept of the rule of law, it is hard to deny that it has matured and is now much more developed and settled in EU law and policy. In the array of documents produced by EU institutions – Commission, Council and Parliament[157] – in the course of the "big-bang" Enlargement and post accession, gradually a consensual and increasingly sophisticated vision of the rule of law is transpiring. This vision also appears in the Commission's approach to particular incidents of rule of law violations in the Member States.[158] Remarkably, the recent Conditionality Regulation now contains a legislative definition of the rule of law.[159] By including this definition in the Regulation, the Union's approach to the rule of law has reached a new level. The jigsaw puzzle of rule of law bits and pieces that has been assembled in the course of Enlargement has ultimately resulted in a fairly coherent rule of law concept that now claims normative status, including vis-à-vis Union Member States.

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154 See A Sajó (n 10); in a similar sense Claes (n 111).

155 Piana (n 80), at 4–5, seeing the process of rule of law promotion as a self-reflection.

156 Hillion, 'Enlarging the European Union' (n 18), although with a critical edge.

157 On this development, see the contributions by Perego and by Stefani and Martinéz Iglesías in Bakardjieva Engelbrekt et al, 'Rule of Law in the EU' (n 1), at 292 and 313, respectively.

158 Pech and Grogan, 'Meaning and Scope' (n 19); Damjanovski et al (n 26).

159 See Regulation 2020/2092, Art 2(a): "'the rule of law' refers to the Union value enshrined in Article 2 TEU. It includes the principles of legality implying a transparent, accountable, democratic and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights; separation of powers; and non-discrimination and equality before the law. The rule of law shall be understood having regard to the other Union values and principles enshrined in Article 2 TEU."

In addition, individual components of the legislative framework for the rule of law are increasingly fleshed out by binding EU legislation. A clear example is the adoption of the European Media Freedom Act,[160] setting out common rules to protect media pluralism and independence in the EU. Obviously, this development leads to a whole different quality of the EU rules in the domain of the rule of law, and consequently, of a different level of legitimacy that the concept and its components can claim in the Union legal and political framework.

Still, it is important to be mindful of the different normative status of individual rule of law concepts and standards and keep a distinction between commonly agreed binding legal obligations, on the one hand, and standards as normative ideals, on the other. In this context, it is interesting to observe that in the Recommendations part of its Rule of Law Report since 2020, the Commission recurrently refers to 'European standards' on a number of issues, such as resources for justice systems, access to official documents, secondment of judges, Councils for the Judiciary, independence and autonomy of the prosecution, public service media and funding for civil society.[161] While such common standards have indeed been discussed and elaborated within various fora, not least in the process of the "big-bang" Enlargement, in the area of rule of law and judicial independence it may often be more convincing to make recourse to standards in a negative, rather than in a positive sense. This would imply identifying patterns of institutional conduct that are unacceptable rather than projecting uniform positive standards and falling into the trap of 'normative harmonization'.[162] Such "negative" approach would balance more successfully acceptance for institutional diversity in organising public administration and judicial governance, with rigorous requirements for safeguarding the rule of law and judicial independence as a principle.[163]

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160 Regulation (EU) 2024/1083 establishing a common framework for media services in the internal market and amending Directive 2010/13/EU (European Media Freedom Act), OJ L, 2024/1083.

161 See the over 100 mentions of "European standards" in the document Annex to the European Commission, 2024 Rule of Law Report, COM(2024) 800 final, Brussels, 24.7.2024.

162 See Smilov, 'Enlargement and EU constitutionalism' (n 95).

163 In a similar sense see Armin von Bogdandy, 'Principles of a systemic deficiencies doctrine: how to protect checks and balances in the Member States' (2020) *CMLRev*, 705, who speaks of a 'doctrine of red lines', that "would rather have to follow the logic of 'negative dialectics', which refrains from specifying what the ideal situation should look like, and instead focuses on what cannot be tolerated." For an example of such a balanced position see Damjanovski et al (n 26) 13, with reference to Commission Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law COM(2017) 835 final, para 182. On the CJEU contribution in this direction see below.

4. Judicialisation as a Bridge Between Pre-accession and Post-accession EU Rule of Law Policy

Finally, and potentially most decisively, Member States' obligations to respect the rule of law, and in particular the principles of judicial independence and impartiality, have become subject to judicial oversight, following broader interpretation by the CJEU of its own mandate to exercise such oversight. A central role in this evolution is played by Article 19 TEU and Article 47 EUCFR. In what can be defined as the single most revolutionary development in the Court's jurisprudence since the seminal judgements of *Costa v ENEL* and *Van Gend en Loos*[164], the Court in *Associação Sindical dos Juízes Portugueses* advanced an interpretation of Article 19 TEU as giving expression to the fundamental EU value of the rule of law.[165] According to the Court, the second paragraph of Article 19(1) TEU vests the responsibility for providing effective judicial protection not only in the EU Court itself, but also in national courts and tribunals, and this not exclusively when these courts apply EU law *stricto sensu* but also more broadly when they can potentially exercise responsibilities 'in fields covered by EU law'.[166] The Court stresses the central role of national judiciaries in ensuring the effective application of EU law at the national level and for sustaining the mutual trust on which the EU legal order essentially builds. In the understanding of the Court, this is only possible if national judiciaries follow principles of the rule of law and judicial independence, and if they are 'not immune from EU oversight' for compliance with such principles.[167] Furthermore, once it has established its jurisdiction by way of a broader reading of Article 19 TEU, the Court proceeds to interpret this provision in conjunction with Article 47 EUCFR, thus opening the way for setting specific requirements vis-à-vis Member State courts as to their independence and impartiality, beyond the narrow scope of application of the Charter as defined in Article 51 CFR.[168]

The judgment in *Associação Sindical dos Juízes Portugueses* has cleared the way for a stream of proceedings before the CJEU in which various assaults on judicial independence in backsliding Member States, have been brought before the Court. Most of the cases have concerned controversial reforms of the judi-

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164 Case 6/64 *Costa v ENEL*, ECLI:EU:C:1964:66; Case C-26/62 *Van Gend & Loos*, ECLI:EU:C:1963:1.

165 See Case C-64/16 *Associação Sindical dos Juízes Portugueses*, ECLI:EU:C:2018:117

166 See ibid, para 29.

167 Damjanovski et al (n 26), 14.

168 See Case C-64/16, *Associação Sindical dos Juízes Portugueses* ECLI:EU:C:2018:117, para 32. Cf Damjanovski et al (n 26), 12.

ciary in Poland, but incidents in other Member States, such as Hungary, Romania and Malta have likewise been put to judicial scrutiny. The cases have travelled along different procedural tracks.

First, the Commission readily recognized the judgement in *Associação* as an invitation to be more assertive in enforcing EU fundamental principles and values in the Member States.[169] In what can be described as a vertical centralized track directed from the EU level to the Member States level, starting from 2018, the Commission instituted a series of infringement proceedings under Article 258 TFEU against Poland, seeking to revert controversial reforms of the country's judiciary, thus putting an end to years of uncertainty and inaction.[170] Emboldened by the positive outcome of these proceedings, the Commission has continued with direct infringement actions grounded on other EU fundamental values.[171]

Along a different, vertical decentralized track, going in the opposite direction, from the Member States to the EU level, the Court was reached by numerous preliminary references stemming from national courts, first in Poland, concerning the situation of national judges negatively affected by the same controversial reforms of the judiciary, but gradually also from courts in other Member States.[172] Through such Article 267 TFEU proceedings national actors

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169 Matteo Bonelli and Monica Claes, 'Judicial serendipity: how Portuguese judges came to the rescue of the Polish judiciary' (2018) 14(3) *European Constitutional Law Review*, 622-643.

170 The reforms concerned lowering the retirement age of Supreme Court judges, affecting 27 out of the 72 then acting Supreme Court judges and allowing the packing of the Supreme Court with party-loyal individuals followed by a similar reform concerning judges in the ordinary courts. See Case C-619/18 *Commission v Poland*, ECLI:EU:C:2019:531 on lowering of the retirement age of Supreme Court judges; Case C-192/18 *Commission v Poland*, ECLI:EU:C:2019:924 on lowering of the retirement age of judges of the ordinary Polish courts; C-192/18 *Commission v Poland* (Independence of ordinary courts) Case C-791/19 *Commission v Poland* (Disciplinary regime for judges); C-204/19 *Commission v Poland* ('muzzle law'). See Pech, Wachowiec and Mazur (n 8).

171 See Case C-769/22, *Commission v Hungary*, not yet decided. Additional opening toward general justiciability of the Union values in Article 2 TEU is seen in the judgments by the full Court in cases C-156/21 *Hungary v Parliament and Council*, ECLI:EU:C:2022:97, paras 126-127 and C-157/21 *Poland v Parliament and Council*, ECLI:EU:C:2022:98, paras 144-145; see Scheppele (n 139).

172 See Joined cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 *Asociaţia "Forumul Judecătorilor din România" and Others*, EU:C:2021:393 for Romania; C-564/19 *IS*, ECLI:EU:C:2021:949 for Hungary.

are seeking binding interpretation of EU law to achieve annulment of controversial national legislation, ultimately employing these proceedings in self-defense.[173]

In still another line of cases aptly called "horizontal Solange", national courts in other Member States more unexpectedly started questioning to what extent the fundamental EU principle of mutual trust could still be valid, given the instances of grave disrespect for the rule of law in backsliding Member States.[174] Finally, the above mentioned direct action of judicial associations attacking Council implementing decision under the Recovery and Resilience Facility as being too lax on assessing compliance with rule of law milestones, forms yet another, network-based track of involving the Court in the struggle for rule of law and judicial independence.

The complex jurisprudence that has evolved on these multiple tracks has catapulted the Court to the centre-stage of EU rule of law policy; some even suggest turning the Court into the real Guardian of the Treaties.[175] To be sure, each of the parallel procedural tracks has its own legal and political logic and its own advantages and challenges.[176] One major advancement visible across all types of proceedings is that the methodology outlined in *Associação* has allowed the CJEU to develop a coherent concept of judicial independence, with its internal and external aspects and with reference to the case law of the ECtHR.[177] In this novel jurisprudence, the CJEU walks a fine line between respecting the institutional autonomy of Member States and at the same time formulating constraints on the way this autonomy is exercised, notably in the field of judicial governance. Thus, in Joined Cases *AK and Others v Sąd Najwyższy*, the Court on the one hand reaffirms that where there are no EU rules governing the matter, 'it is for the domestic legal system of every Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which

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173 Joined cases C-585/18, C-624/18 and C-625/18 A.K. *et al v KRS* (independence of the disciplinary chamber of the Supreme Court); Case C-824/18, A.B., C.D., E.F., G.H., I.J. *v National Judicial Council* (procedure for appointment of judges at Supreme Court); Case C-487/19 W.Z. (Grand Chamber) (status of rulings by persons whose judicial appointment is considered irregular).

174 Cf. the seminal Case C-216/18 PPU (*LM*), ECLI:EU:C:2018:586.

175 Scheppele (n 139).

176 For a comprehensive analysis see Laurent Pech and Dimitry Kochenov, *Respect for the Rule of Law in the Case Law of the European Court of Justice: A Casebook Overview of Key Judgments since the Portuguese Judges Case* (2022) SIEPS, 2021:3.

177 See Joined Cases C-585/18, C-624/18 and C-625/18, *AK and Others v Sąd Najwyższy*, ECLI:EU:C:2019:982, paras 121–123.

individuals derive from EU law'.[178] However, the Court insists, with reference to the right to effective judicial protection in Article 47 EUCFR, that 'the Member States are … responsible for ensuring that those rights are effectively protected in every case'.[179]

In contrast to the Commission's approach in its pre-accession policy, the CJEU is careful not to allege the existence of a common standard or a uniform normative vision as to the institutional design of Member States' judiciaries. At the same time, the Court is more boldly relying on broad constitutional principles such as judicial independence, applying them in specific cases of encroachment on these principles in the Member States. This point of balance appears well found. While the Commission in its pre-accession strategy works mostly prospectively, *ex ante*, and addresses questions of judicial governance in general terms, the CJEU decides *ex post* on concrete incidences of questionable law and practice in the Member States. The Court can set these incidences in their context and assess them against overarching principles of the rule of law and judicial independence. This presents one more example of setting 'negative standards', identifying institutional patterns that cannot be accepted, giving concretion and legitimacy to the Court's rulings.

Commentators have observed that these judicial interpretations have quickly entered both the internal EU rule of law policy as well as the ongoing EU Enlargement policy (see below). The definitions of judicial independence developed by the Court in its jurisprudence have gradually received confirmation by the Union legislator, for instance through references in the Conditionality Regulation, as well as by the Commission in its soft law instruments.[180] Thus, in a dynamic process of cross-fertilisation, the standards and interpretations developed by the CJEU feed back into the work of EU institutions. In the course of handling of particular cases and situations, the Court refines and fleshes out the general principles of the rule of law and judicial independence, and thereby contributes to sharpening the monitoring and benchmarking tools of

178 ibid., para 115.

179 ibid., para 115. For similar reasoning in the context of the Polish legislation on lowering of the retirement age of Supreme Court judges, see Case C-619/18, *Commission v Poland*, ECLI:EU:C:2019:531, para 110; see also Case C-192/18, *Commission v Poland*, ECLI:EU:C:2019:924 on lowering of the retirement age of judges of the ordinary Polish courts, para 118.

180 See references in Recital 3, Regulation (EU, Euratom) 2020/2092; cf. references to the Court's case law on judicial independence in the Commission Rule of Law Report (2024), footnotes 66, 69.

European institutions, strengthening the coherence between different rule of law instruments and the congruence between internal and external rule of law standards.[181]

The bold entry of the EU Court as an institutional actor in the domain of rule of law policy has been welcomed with enthusiasm by most commentators.[182] At the same time, it would be naïve not to see the challenges ahead. It is well known that the incumbent institutions and political actors in the backsliding countries have met the Court's judgements with a mixture of scepticism, deliberate neglect and open resistance. During the time of the PiS-led government, the Polish Constitutional Tribunal notoriously held that the interpretations advanced by the EU Court concerning Articles 2 and 19 (1) subparagraph 2 should be considered *ultra vires* and in violation of the Polish Constitution, which the Tribunal proclaimed as having higher authority than the EU Treaties, in open violation of the principle of supremacy.[183] This judgment was issued upon the explicit request of the then Polish Prime Minister Mateusz Morawiecki, from the PiS party, and confirmed the Prime Minister's position that Polish courts should disregard CJEU interpretations and judgments regarding the Polish judicial system. The Commission acted promptly upon this open challenge to the authority of EU law, whereby the CJEU imposed a daily periodic penalty on Poland for non-compliance with its judgements. The conflict was certainly dissolved with the political change in Poland. However, such incidents corrode the mutual trust on which judicial dialogue in the EU essentially builds.

The other challenge is associated with the line of case law following the *Republika* judgement[184], where the CJEU steps in to defend national judges against wrongful appointments and removals in violation of the principles of judicial independence, instructing national courts to set aside and even consider verdicts of such unlawful courts non-existent. This turn in the jurisprudence is equally revolutionary and unsettling. In the follow up development, the EU Court is apparently trying to find a delicate point of balance between showing

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181 See, for instance, para 2, European Commission, Reasoned proposal in accordance with Article 7(1) TEU regarding the Rule of Law in Poland, COM(2017) 835 final, Brussels, 20 December 2017. See in this sense and for a detailed analysis, Damjanovski et al (n 26), showing how the CJEU's case law is now explicitly integrated in the Commission's Enlargement strategy and documents.

182 See Pech and Kochenov (n 176); Scheppele (n 139).

183 Judgement of the Polish Constitutional Tribunal Nr. K/21 of 7 October 2021 (n 5).

184 Case C-896/19 *Repubblika and Il-Prim Ministru*, ECLI:EU:C:2021:311.

solidarity with national judges affected by unlawful removals and holding back the tidal wave of references for preliminary ruling invoked by national judges as a means of self-defense.[185]

In view of these challenges, it is probably too optimistic to expect that a triumph of Union values will obtain by way of increased judicialization. The Court's jurisprudence should rather be seen as providing a much-needed frame of reference, giving continuous support to the other Union institutions in their quest to defend the EU values in the Member States through both dialogue and coercion.[186]

5. The relationship between inward-bound and outward-bound EU Rule of Law policy

To complete the circle, the interplay between an inward- and an outward-bound EU rule of law policy needs to be considered. Obviously, current EU enlargement policy has been evolving in apprehension of past enlargements but also of the reality of post-accession rule of law backsliding and the dynamics of EU internal rule of law policy. Thus, in the ongoing process of EU enlargement directed to the Western Balkans, and nowadays also to Ukraine and Moldova, respect for the political conditions for membership, and in particular for the rule of law, is moved to the forefront and is now defined as a decisive condition. In its 2020 the Commission introduced a so called 'fundamentals first approach', implying that "negotiations on the fundamentals will be opened first and closed last".[187] In a recent Communication on Enlargement, the Commission underscores its continued commitment to a 'fundamentals first' approach, declaring that "[i]t has refined its enlargement policy, by putting the fundamentals, such as democracy, rule of law and the protection of fundamental rights, even more at the core of the accession process."[188] Furthermore, ever since the accession of Croatia, judiciary and fundamental rights form a separate chapter (Chapter 23) of the acquis, in addition to the chapter devoted

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185 Ráfal Mánko and Przemysław Tacik, '*Sententia non existens*: A new remedy under EU law?: Waldemar Żurek (W.Ż.)' (2022) 59 *Common Market Law Review*, 1169–1194; Case C-487/19, W. Ż., EU:C:2021:798.

186 See in this sense, Koen Lenaerts, 'On Checks and Balances: Rule of Law within the EU' (2023) 29(2) *Columbia Journal of European Law*, 25-63.

187 European Commission, Communication, Enhancing the accession process - A credible EU perspective for the Western Balkans, COM(2020) 57 final, Brussels, 5.2.2020, 2-3.

188 European Commission, Communication on pre-enlargement reforms and policy reviews, COM(2024) 146 final, Brussels, 20.3.2024.

to cooperation in criminal and civil matters (Chapter 24). Requirements under this chapter are thus recognized as integral part of the EU *acquis* and not 'only' as eligibility conditions.[189]

The major difference in comparison to the "big-bang" Eastward Enlargement is, however, the very existence of an internal EU rule of law policy, with much clearer criteria and mechanisms for monitoring and enforcement. The link with internal EU rule of law policy has been reinforced by including the most advanced enlargement countries in some of the rule of law mechanisms sustained by the Commission, notably the annual Rule of Law Reports. The 2024 Report includes for the first time country chapters on four enlargement countries (Albania, Montenegro, North Macedonia, Serbia). According to the Commission:

> Their inclusion will support these countries' reform efforts to achieve irreversible progress on democracy and the rule of law ahead of accession, and to guarantee that high standards will continue after accession.[190]

Another important difference is the above discussed CJEU jurisprudence on the rule of law and judicial independence elaborated chiefly in response to backsliding in some of the new Member States from CEE. The standards elicited by the Court have obviously been particularly helpful in the context of the ongoing Enlargement, not least when formulating accession requirements vis-à-vis the applicant countries from the Western Balkans.[191] Additional tight coupling between pre-accession and post-accession EU rule of law policy is achieved by the principle of non-regression elaborated by the Court in *Republikka* and in subsequent judgements.[192]

Finally, Russia's war of aggression on Ukraine has only underlined the fundamental importance of the rule of law both in the course of accession, but also in internal EU rule of law policy. In a succinct analysis, Polish lawyer and a respected long-term rule of law advocate Ewa Łętowska argues convincingly that the illegal war on Ukraine shows the same disrespect for the rule of law and for international commitments as the PiS-led Polish government has shown in its open refusal to accept the primacy of EU law and the rulings of both the

189 Hillion, 'Enlarging the European Union' (n 18).

190 European Commission, Rule of Law Report (2024) 800 final.

191 See Damjanovski et al (n 26).

192 Case C-896/19 *Repubblika v Il-Prim Ministru*, ECLI:EU:C:2021:311. For analysis see Mathieu Leloup, Dimitry Kochenov and Aleksejs Dimitrovs, 'Non-Regression: Opening the Door to Solving the "Copenhagen Dilemma"?', *ReConnect*, Working Paper No. 15, June 2021.

CJEU and the European Court of Human Rights.[193] Standing with Ukraine thus requires not neglecting, but rather stepping up EU's efforts to defend fundamental values and rule of law in the Union Member States, as well as in candidate states.

VII. Concluding Reflections

The purpose with this chapter has been to capture the intricate dynamic between the Eastward Enlargement of the EU and the evolving internal and external rule of law policy of the Union. As the first section of the chapter has demonstrated, the prospect of Eastward Enlargement that opened up immediately after the fall of the Berlin Wall has worked as a driving force for the advancement of the rule of law as a fundamental value and principle of EU law. The resulting development, through consecutive amendments of the Treaties and the enactment of the EUCFR, can be considered a remarkable step in the evolution of the Union's constitutional framework.

More ambiguous is the appraisal of EU's involvement in rule of law reform in the CEE candidate countries in the process of preparing these countries for membership of the Union. The chapter describes the conditionality approach adopted by EU institutions, building on strict monitoring and reporting procedures and coupling financial assistance with evidence of progress in bringing the laws and institutions of the applicant states closer to EU standards. The chapter highlights the precarious position of the Commission in a domain where previously there had been very few legislatively set requirements in respect of EU Member States.

On the positive side, the EU's involvement has spurred the CCs to take rapid steps in the required direction of reinforcing the institutional framework of the rule of law, emboldening constitutional courts and introducing institutional guarantees of judicial independence. Although the process has been decidedly imperfect, it would be myopic not to see significant improvements in many areas of law and governance in the CEE countries. On many counts – transparency, accountability, citizen participation and access to justice – the societies of the new CEE Member States of the EU have made considerable progress, especially bearing in mind their unenviable starting positions at the outset of the accession process. One should likewise not underestimate the arguably more important change taking place in the shadow of accession, which is not necessarily visible in Commission reports. The engagement of

[193] Ewa Łętowska, 'The Rule of Law in a Time of Emotions' (2022) *Verfassungsblog*, 04 March 2022, available at: https://verfassungsblog.de/rule-of-law-in-a-time-of-emotions/.

NGOs, expert and professional associations, CoE institutions, such as the Venice Commission, all have played their part in creating a local constituency of interlocutors in the CCs, who are ultimately those who can achieve long-lasting and sustainable change in the mindset and 'habits of the heart'.

On the negative side, the vague and indeterminate content of the rule of law concept and its sometimes inconsistent interpretation and application vis-à-vis individual CCs may have contributed to wearing away the already weak respect for the rule of law in the region. The outcome has often been more visible in setting up formal institutions, such as JCs and anti-corruption units, but less palpable at the level of true reform and the changing of informal practices. The implications and limits of governance by conditionality are arguably partly visible in the 'unfinished business' of judicial reform and the current rule of law crisis in some of the new EU Member States.

While this development has rightly caused wide-spread concern and sober predictions, even questioning the future of European integration, one can also observe an unusual mobilisation of EU institutions, supported by Member States and civil society, in the direction of defining, explicating and asserting the EU's authority in the rule of law domain. This mobilisation proceeds along multiple and intersecting tracks relying on different modes of governance. Interestingly, in this process we can see how procedures and standards developed in the course of Enlargement serve as prototypes for new and bolder EU internal rule of law policy tools, but also how hard-learned lessons from EU pre-accession policy help avoid some of the missteps in this policy.

Finally, Enlargement has laid bare a more fundamental problem for EU rule of law policy, namely, that at the core of the rule of law are questions of power that EU institutions are reluctant to address. As pointed out by Nicolaïdes and Kleinfeld, the rule of law is most often flawed because political leaders, governments or powerful economic actors do not want it to exist. Impediments to rule of law reform are thus typically to be sought not primarily at the level of formal laws or faulty institutional design, but at the level of political power and political culture.[194] This analysis resonates with Smilov's overarching criticism of the formalistic legalism that has come to dominate the European integration project, including Enlargement, and the reluctance to embrace European constitutionalism as an imperative of political morality.[195] While avoiding the political by focusing on legal-technical issues has been at the very heart of Mon-

194 See Nicolaïdis and Kleinfeld (n 66), at 28, with reference to T Carothers, 'The Rule of Law Revival' in T Carothers (ed), *Promoting the Rule of Law Abroad: In Search of Knowledge* (Carnegie Endowment, 2006) 4.

195 Smilov, 'Enlargement and EU Constitutionalism' (n 95), 176.

net's method of European integration, Grabbe reminds us of a fundamental downside to this approach – 'if the unsolved political question re-emerges, it can disrupt all the careful technical [and one might add legal] work'.[196] This is a realization that is of relevance, not least for the ongoing Enlargement process.

It leaves EU rule of law policy in an uneasy place. On the one hand, it requires audacity from EU institutions to confront political questions even when the latter are uncomfortable for those in power, and intervention may seem a delicate matter for Member State governments. Leaving such questions outside the scope of rule of law assessment and EU internal rule of law scrutiny would be irresponsible and even 'foolhardy'.[197] On the other hand, it requires careful tailoring of EU interventions and humility, because sustainable change can only come from within.[198] To be sure, finding the right balance in this equation is no small feat. At the same time, as pointed out by the Court, the mutual trust on which the Union essentially builds cannot function as a fundament for the common European project unless each Member State of the Union can depend on other Members' respect for commonly agreed commitments and shared values.[199] This requires an active, equitable and coherent rule of law policy, both internally for the Union, as well as in the process of EU Enlargement.

196 Grabbe (n 25), 46.

197 Nicolaïdis and Kleinfeld (n 66), 36.

198 As pointed out by Bugaric, 'ultimately democratic political parties and social movements with credible political ideas and programs offer the best hope for the survival of constitutional democracy', see B Bugaric, 'Central Europe's Descent into Autocracy' (2018) *CES Open Forum Series Harvard* 33.

199 See Opinion 2/13 of the Court of 18 December 2014, ECLI:EU:C:2014:2454, paras 167 and 168: "168 This legal structure is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected."

The UK's Post Brexit Relationship with the European Union: A Case of Orbiting Europeanisation rather than De-Europeanisation?

Lee McGowan

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I. Introduction

Political Science literature has often identified 'critical junctures' in policy change. The UK's departure from the European Union in January 2020 clearly epitomises one such truly pivotal moment in the country's post 1945 history. The basics of this decision are well known. A former UK Conservative and Liberal Democrat government (2010-15) led by David Cameron, and one under pressure from a growing Euroscepticism within the British media and the strong electoral performance of the United Kingdom Independence Party (UKIP), pledged in January 2013 to hold a future referendum on the UK's membership of the European Union. This referendum commitment was caveated and dependent on the Conservative Party winning the 2015 general election. Cameron's surprise triumph at these elections led enthusiastic his Eurosceptic backbenchers to call on Cameron to honour his pledge on the referendum.

Any narrative of the events on the road to Brexit needs to appreciate that Cameron's decision to hold a referendum, was effectively a political gamble, and one that was predicated on the assumption that the UK public would vote for continued membership of the European Union. Cameron expected a fairly straightforward win and one that would both lance the Eurosceptic boil and confine UKIP to the history books. He was confident in his own abilities and

the fact that neither the UK government nor the vast majority of the Westminster parliament (and the devolved assemblies in Northern Ireland, Scotland and Wales) actually favoured leaving the European Union.

In retrospect, Cameron's decision to hold this referendum should be viewed as a major policy miscalculation on four fronts (McGowan and Phinnemore, 2023). Crucially he overestimated his abilities to re-negotiate the terms of the UK's membership with his counterparts in the European Council ahead of the referendum vote. He also failed to truly appreciate the growing malaise of Euroscepticism that had taken hold of the Conservative party from the late 1990s, a theme he himself has stoked in his bid to become party leader in 2005. The referendum provided the means for some 130 Conservative parliamentarians to make the case for 'leave', a much higher figure than Cameron's estimated 70 MPs (The Full Exposure, 2023). Thirdly, he misread the mood in his own cabinet and lost key allies such as Michael Gove and Boris Johnson to the 'leave' cause. Ultimately, Cameron underestimated the groundswell of public support for change and the referendum for many became a platform for a majority to voice their frustrations, whether EU related or not, directly to government.

Brexit should also be understood as a populist anti-system vote and one that was constructed around a nationalist narrative that centred on restoring sovereignty and preserving a concept of the UK that rejected interference from Brussels and prevented further immigration into the country. The pro Brexit campaign presented an alternative vision for the UK, one built upon promises of economic growth, national renewal and re-found pride. Such highly emotive messaging found its audience and proved much more attractive than the 'Remain' campaign's focus on the economic benefits of EU membership.

The vote for Brexit on 23rd June 2016 sent shockwaves across the entire EU, prompting initial fears of a British contagion sweeping across the EU. Such concerns rapidly receded as governments, political parties and the public observed the complexities of delivering on the referendum result. The vote for Brexit unleashed a period of genuine political turmoil in the UK that saw five Prime Ministers (all from the same party) in a period of just 6 years. With hindsight no-one could have anticipated the sequence of events to follow nor have written an accurate script from the point of David Cameron's resignation as Prime Minister in July 2016 to Rishi Sunak's arrival in Number 10 Downing Street in October 2022.

After the referendum result UK politics became decidedly more partisan. The pro Brexit press provided the framework for much of the public discourse and sections of it were prepared to lambast anyone who questioned any dimension

of the Brexit trajectory as traitors and 'enemies of the people' (Daily Mail front page headline, 2016).

Theresa May, Cameron's successor, had inherited Brexit (something she had voted against herself) and it was very much a poisoned chalice. Three things are worth noting as May embarked on delivering Brexit in the second half of 2016: Firstly, there had never been a clear outlined roadmap for Brexit nor any agreement about what the nature of the UK's departure from the EU. Secondly, she could have tried to articulate and explain to the wider public the difficult and dangerous road that lay ahead. She did not and her mantra of 'Brexit means Brexit' (from July 2016) lacked any credible vision of what the UK's new relationship with the EU would look like. Thirdly, in theory she could have worked with the Labour Party to try and secure a more moderate Brexit but her loyalty to the Conservative party, its electorate and her own constituents and her determination to damage limitation and to hold the party together she ruled out any compromise with the Labour Party. To be fair to May the opposition Labour Party under Jeremy Corbyn showed no interest in seeking a compromise position and preferred to watch a Conservative government in difficulty and struggling to maintain party unity.

The scene was set for political turmoil and argument from the moment that May triggered Article 50 in March 2017. The period of political intrigue and instability within the governing Conservative party in the period from 2016 to the present has been well covered by commentators from outside the party (Riley-Smith, 2023) and also from within the party's own ranks (Stewart, 2023). It is interesting to observe how leading Brexiteers within the staunchly Eurosceptic European Research Group (ERG), now expressing a majority opinion in the Conservative parliamentary party, continually pushed for a much harder variant of Brexit than had ever been campaigned for during the referendum. In so doing they rejected all the available options, as advanced by the EU chief Brexit negotiator, Michel Barnier, in his infamous step diagram. The possibilities had included; membership of the European Economic Area (the so-called Norwegian option); a customs union arrangement with the EU (the so-called Turkish model) and a series of bilateral treaties with the EU (as in the Swiss model). Many of the hardline Brexiteers favoured the bottom step and a no-deal scenario as the best outcome of the Brexit negotiations between the UK and the EU.

With hindsight, May was never found herself in a position to placate such demands and her already weakened authority in parliament became more difficult when she lost her majority in the House of Commons after calling a surprise general election in July 2017. She clung on to power for another two years earnestly attempting to secure an acceptable agreement to both sides, but her

position was regularly undermined by ERG members. She proved incapable on three separate occasions of securing safe passage of her negotiated (and softer landing) Withdrawal Agreement with the EU through parliament in 2018 and 2019. By this stage she had little other choice but to step down as prime minister and paved the way for Boris Johnson, the darling of the party grassroots, to succeed her.

Immediately on becoming Prime Minister in July 2019 Johnson turbocharged his pro Brexit rhetoric and cast the die for a harder Brexit. To this end all options were open, even attempting (if unsuccessfully) to prorogue parliament in August 2019, an audacious move that directly involved Queen Elizabeth II in his machinations. He even removed the Conservative whip from 19 of his parliamentary colleagues (the 'saboteurs') in September 2019 who he regarded as trying to thwart his Brexit ambitions via a second referendum. Any hopes that the divisions unleashed by the Brexit campaign could be easily overcome proved illusory. The process of delivering of Brexit had not just overshadowed the post referendum environment in parliament (2016-2019) but generated a political stalemate that led the EU to grant the UK government extra time to work out its Brexit plans. This avoided a 'No Deal' scenario and enabled Johnson to secure his own Withdrawal Agreement with the EU in October 2019. Yet, still facing significant opposition within the House of Commons Johnson called another election in December 2019 that brought him a 200 seat majority to finally 'get Brexit done'. Events moved quickly thereafter and Johnson's WA passed easily and paved the way for the UK to leave the European Union on 31st January 2020.

With stage one of the Brexit process complete the UK government turned its attention to the UK's future relationship with the EU. Much had still to be determined. There was scant degree of trust between the negotiating teams in Brussels and London throughout most of 2020 but with the possibility of a No-Deal settlement looming, a last-minute scramble secured acceptance of a rather thin Trade and Cooperation Agreement (TCA) on 24th December 2020. This was merely a temporary fix with many issues still to be resolved across a substantive list of policy areas.

Prime Minister	**Period of Office**	**Failures/Achievements on Brexit**
David Cameron	11th May 2010 – 13th July 2016	Called and lost the referendum on EU membership – resigned

Prime Minister	Period of Office	Failures/Achievements on Brexit
Theresa May	13th July 2016 – 23rd July 2019	3 failed attempts to get support for her Withdrawal Agreement – resigned
Boris Johnson	23rd July 2019 – 5th September 2022	Secured Brexit and the Trade and Cooperation Agreement (2020) but inability to govern – was forced to resign
Liz Truss	6th September 2022 – 24th October 2022	Economic crisis via a 'mini-budget' – resigned
Rishi Sunak	24th October 2022 – present	Windsor Framework as new UK/EU deal over Northern Ireland – facing electoral defeat

Table 1: The Swinging Door to 10 Downing Street: Six UK Prime Ministers in Five Years, 2016-22

For scholars trying to account for Brexit the period from 2016 to the early 2020s was a particularly difficult one to traverse, because for so much of this time frame the actual Brexit trajectory was never easy to discern. This context may have worked well for journalists who were skilled at reporting daily on the political machinations in parliament and the interactions between the UK government ministers and EU officials. The uncertainty in actual policy trajectory and the possibility of a No-Deal Brexit often left academic authors trying to predict a range of competing scenarios and possibilities. In truth much of the academic work on the politics of Brexit after the referendum often lacked conceptual clarity, focus and precision. It was only after the Withdrawal Agreement (2019), the Trade and Cooperation Agreement (2020) and the emergence of new UK legislation in former areas of EU competence that the academic community has been truly able to analyse developments and provide meaningful contributions to the understanding of the UK's emerging relationship with the EU.

On 31st January 2020 Johnson hailed Brexit as the start of the revival of the UK's 'power of independent thought and action' and herald 'real national renewal and change' (The Guardian, 31 January 2020 – https://www.theguardian.com/politics/2020/jan/31/boris-johnson-promises-brexit-will-lead-to-national-revival). The government may have proudly proclaimed that it had delivered on its Brexit promise, had restored sovereignty, and taken

back control and projected a future where the UK re-established itself as a major global actor. Did the WA and the TCA pave the way for regained sovereignty and policy independence and how much of a game changer would these instruments of Brexit turn out to be?

The arrival of the Covid pandemic in February 2020 and Russia's invasion of Ukraine in February 2022 certainly overshadowed the UK's European policy and arguably masked the difficulties of securing real positives from Brexit. Nevertheless, this period saw the emergence of some new UK based policies that enabled observers to analyse the exact nature of Brexit, its opportunities and questions just how far the UK could disentangle itself from the EU? This chapter focuses on the last point with specific reference to state aid.

II. Brexit as De-Europeanisation?

The UK may have formally left the EU on 31st January 2020, it may have agreed the basis of a post Brexit relationship with the EU via the TCA, but much had still to be done as successive British governments will need to determine the scope and level of policy interactions with the EU. How much of this will result in some form of alignment or greater UK divergence from EU laws remains to be seen. Brexit, in its purest form, was about de-coupling the UK from the EU's institutional architecture and its numerous policy arenas. It was about regaining sovereignty for British decisionmakers alone, bringing an end to the transfer of UK monies being into the EU's budget and liberating the British courts from the jurisdiction of the Court of Justice of the European Union.

In short, Brexit should be considered as a project that enabled in theory the UK to escape the EU's orbit of influence and can be understood as a means of de-Europeanising the UK. Securing a new post Brexit orbit was in theory possible, but it was far from being straightforward. It required a complete re-orientation in economic and trade policy and this necessitated the UK government being able to secure substantive new trade deals across the globe. These have not yet materialised as easily as Brexiteers had suggested. By the start of 2024 the UK had signed trade agreements with Australia (2021) and New Zealand (2022) and become a member of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and entered into digital deals with Singapore and Ukraine (House of Commons Library, 24 November 2023 at https://commonslibrary.parliament.uk/research-briefings/cbp-9314/#:~:text=Signed%20agreements,the%20end%20of%20May%202023.) In 2022 the EU27 accounted for 42% of UK exports (some £340 million of goods and services. The UK imported also imported £432 billion from the EU27, or some 48% of all imports (House of Commons Library 11 May 2023

at https://commonslibrary.parliament.uk/research-briefings/cbp-7851/#:~:text=Short%2Dterm%20trends%20in%20trade,surplus%20with%20non%2DEU%20countries. The EU market remained a key feature for the health of UK's economy, and the realities of established economic exchanges between the EU and the UK alongside the priorities of many British businesses and trade communities and other international obligations will limit just how much substantial divergence can occur. Brexit is an ongoing process and not one single event. Some eight years after the vote to leave the European Union (EU), Brexit may no longer be making the headlines in the British press, but it continues to loom large as a factor for the current Sunak administration and is reflected in policy developments in many formerly Europeanised areas of the UK's policy base post Brexit.

Under the terms of the 2019 Withdrawal Act all EU law had been converted into UK domestic law. This 'copy and paste' exercise – amounting to some 5020 pieces of legislation and covering 300 policy areas – was far from the true Brexit demanded by many Brexiteers but it was deemed an interim measure. The new Retained EU Law (Revocation and Reform) Act (REUL) of 2023 was designed by the Conservative governments of Johnson, Truss and Sunak) as the intended vehicle to remove these 'imported' EU laws from the UK stature books (UK Government, 2023). REUL raised significant questions about how much of this so-called retained law could be removed and how much should be retained or amended? In future we will be able to analyse developments as the government has pledged to publish data on its REUL dashboard every six months from January 2024 until 2026 (Department for Business and Trade) 8th November 2023 – https://www.gov.uk/government/publications/retained-eu-law-dashboard

There is another important dimension to the process of Brexit and it relates directly to the realities of a devolved UK political system. The British government's catalogue of retained laws has never provided a comprehensive analysis of all the legislation that falls under the powers of the devolved administrations. In the devolved settlements with Northern Ireland, Scotland and Wales the Brexit assumes greater complexity as many former EU policy competences, such as agriculture and the environment, now fall under the responsibility of the Scottish parliament and the Assemblies in Belfast and Cardiff. There will be a pressure to maintain a common approach across the UK for a British internal market and any such requires the development of Common Frameworks in policy areas that were governed by EU law but now form a part of devolved policy competences. Policy divergence is allowed for, but how much, where and why have yet to be fully determined. Much remains opaque and the situation in Northern Ireland generates its own unique set of issues.

Northern Ireland, the home of some 1.9 million people, is the smallest nation in the UK but it is the only part of the British state that shares a 310-mile land border with the EU (Republic of Ireland). It remains under the terms of the WA within the EU's single market for goods. As such EU law still applies and this region falls under the jurisdiction of the Court of Justice of the European Union.

In short, the seemingly straightforward suggestion that EU laws could be removed from the UK statute books was yet another manifestation the of 'omnishambles' (Diamond and Richardson 2023) of the Brexit process. Put another way while the UK may have set its key priority as escaping the EU's influence, its desire for continuing access to the EU single market, the Northern Ireland factor and the wider area of devolution placed limits on the realities of de-Europeanisation. As such together all three aspects necessitate a re-examination of how much distance is occurring.

III. Brexit as orbiting Europeanisation?

Almost 60 years of British engagement with an ever-evolving EU entailed a considerable degree of Europeanisation (Featherstone and Radaelli, 2003; Knill, 2001; Ladrech 2010; Olsen, 2002, Radaelli, 2003 and Saurugger and Radaelli, 2008). i.e. where many domestic policies and policy regimes came to reflect and adopt EU norms and practices, had taken place in the UK. Prior to Brexit many areas of the UK policy base – agriculture and fisheries, defence, the environment, immigration and asylum and trade – had been heavily Europeanised. The UK had been in most cases an engaged and constructive EU member state and had positioned itself as a vanguard in the implementation, refinement, and design of many core EU achievements such as competition policy (McGowan, 2005) and the single market.

Brexit posed immediate challenges for this established and Europeanised policy base. Indeed, if Brexit were about distancing the UK from the EU (De-Europeanisation) then existing policies had to be renationalised or seen to be modified by the public to both demonstrate and allow for an improved British design and British control. De-Europeanisation is often applied to democratic backsliding in existing member states (Agh, 2015) and manifests itself in cases of non-implementation of directives or partial adoption of the same (Dimitrova, 2021). The departure of the UK from the EU opens a new opportunity to apply the concept to a former member state. Herein lies a fundamental question: Are we seeing de-Europeanisation or ongoing Europeanisation?

The Brexit strategies pursued by the May, Johnson and Truss governments envisaged de-alignment and disengagement from the EU policy base and its governance structures. All effectively pursued a de-Europeanisation, that is 'progressive detachment' (Tomini and Gürkan, 2021) from the EU and its influence. It embodies a mirror image of Europeanisation. The simplicities of the 'political rhetoric of leave' had simply ignored the impact of a 47 year membership of the EU on the UK policy base. It overlooked the potential constraints to a Brexit given the inter-connectedness of economic markets and retaining access to the EU single market. Of course, keeping any form of common rule book with the EU also left the UK government vulnerable to potentially damaging charges that it had become an EU rule taker. Yet, this is what is occurring. This chapter raises two hypotheses.

The first argues that the goal of complete de-Europeanisation (removing all EU laws from the UK statute books post Brexit) may be theoretically attainable, but given the UK's continuing proximity and desire for access to the EU single market, the fact that Northern Ireland remains in the EU's single market for goods and when facing common challenges on the security and migration fronts the UK will maintain a close regulatory alignment with many, if not all, existing EU policies.

Evidence of the EU's continuing impact on UK policy has been illustrated in relation to environmental policy (Gravey and Jordan, 2023) and their consideration of de-Europeanisation through the prism of 'disengaging and re-engaging' and some of the latest work on agricultural policy which refers to both 'divergence and continuity' (Greer and Grant, 2023). These themes of re-engaging and continuity suggest only partial de-Europeanisation, so we need to re-think our approach.

The second hypothesis maintains that several new UK policies may look different and may go further than similar EU policy, but that EU policy remains the *de facto* starting point for some of these emerging UK policies. This has led some commentators to refer to placebo policies (McConnell, 2020; Garcia, 2023).

The chapter argues that while the existing literatures on De-Europeanisation and Differentiated Integration (Leruth, Gănzle and Trondal 2019a; 2019b) provide excellent contributions to the study of the EU integration process, they do not fully capture the dynamics of the UK's post Brexit relationship with the EU. Both literatures focus on third states who are intent on establishing and maintaining close working relationships with the EU whether they are, for example, members of the European Economic Area or are in a customs arrangement with it. In theory, the idea of de-Europeanisation would seem the most

applicable approach when analysing developments in a former EU member state. However, in practice is this what occurs or is there a better way to describe a new relationship between the EU and a former member state? The UK, as a longstanding EU member state, makes for an interesting case study to analyse given the degree to which its domestic regulatory base had been Europeanised.

So, rather than viewing Brexit as a case of de-Europeanisation, we should approach it as a case of partial or even orbiting Europeanisation (McGowan, 2023), i.e. where the UK chooses, albeit for a variety of reasons and pressures, to maintain a degree of policy alignment with the EU across a range of policy arenas. The actual degree is the important point here. This is a claim that Brexit's most ardent supporters will be certain to repudiate as it raises substantial questions about Brexit's deliverables and purpose.

The concept of orbiting Europeanisation presents an innovative means to understand the new EU/UK relationship. It utilizes the writings of Johannes Keppler (1571-1630), himself building on the works of Nicolaus Copernicus (1473-1543), who first pioneered our understanding of orbits and the gravitational pull that the Sun has on the eight planets in our own solar system. The idea of orbits is deployed here to illustrate how the UK government has been unable given its geographical proximity to the EU to break free from the EU's gravitational pull given the EU's market of 480 million people. Conceiving the EU as a large planet and the UK as a rocket allows us to present a scenario where the rocket is trying to blast free from its EU orbit. Orbits, of course, are not permanently fixed and it is theoretically possible for rockets to have sufficient velocity to secure a new orbit around a neighbouring planet.

The idea of orbiting can also be interpreted as possessing negative connotations. These arise when a government's efforts to move from a existing orbit to another preferred one have not yet proved possible and consequently, confines a government to its original orbit. The escape velocity for Brexit's 'Global Britain' is dependent on the signing of substantial new trade agreements. Can the UK escape the EU's orbit and what does it need to do so or is it trapped within it? This chapter now presents a brief overview of the new post Brexit state aid policy in the UK to illustrate the references to both placebo policy making and orbiting Europeanisation.

IV. State Aid Policy in the UK

The logic that drove Brexit demanded the repatriation of all EU policy competences. State aid policy was no exception. EU state aid policy is an example of a highly Europeanised policy and one where, during the UK's EU membership decision-making rested with the European Commission in Brussels with appeals coming before the Court of Justice of the European Union (CJEU) in Luxembourg.

The EU state aid regime was portrayed negatively by leading Brexiteers. It was charged with being too bureaucratic and sufficiently irresponsive to the needs of the British economy. Securing a pure Brexit meant escaping the role of the Commission and the Court of Justice and the opportunity for a new UK policy serving UK interests. Indeed, for many Brexiteers only a purely British subsidy regime would enable greater investment in those enterprises facing huge start-up costs as for example in sectors such as high-tech development and artificial intelligence. Only a domestic approach, they argued, could facilitate the Johnson government's much heralded levelling up agenda.

The EU state aid regime had always been an easy target for criticism, but it had so often served as useful camouflage for British ministers to justify a decision not to intervene in certain economic areas. In truth, the EU rules had never really 'curtailed successive governments' ability to grant state aid' (House of Lords, 2018) and the EU regime allowed for exemptions to the rules. For all the UK governments from 1973 to 2016 the operation of the EU state aid regime had caused little concern.

Brexit demanded change. This raised questions about how different a UK system would be in terms of shape, structure and priorities from the EU regime and especially when given the European Commission's insistence that access for British companies to the EU's single market was dependent on common state aid rules and a level playing field. Anything less, from the European Commission's perspective, potentially placed EU member states at a real competitive disadvantage. Paragraphs 77-79 of the Withdrawal Agreement's Political Declaration had established early expectations of minimal change when it stated that '*Given the Union and the United Kingdom's geographic proximity and economic interdependence, the future relationship must ensure open and fair competition, encompassing robust commitments to ensure a level playing field… …The Parties should in particular maintain a robust and comprehensive framework …for state aid control that prevents undue distortion of trade and competition.*'

By the start of 2020, however, Johnson's preference for complete dealignment from the EU was explicitly set out when he declared that; 'there is no need for a free trade agreement to involve accepting EU rules on competition policy, subsidies, social protection, the environment, or anything similar, any more than the EU would be obliged to accept UK rules' (Politico, 2020). Johnson was effectively reinforcing his Brexit credentials and his de-Europeanisation agenda. On 30th June 2021 his government unveiled its Subsidy Control Bill (UK Parliament, 2021) as its planned mechanism for dealing with state aid post Brexit, insisting that the bill marks a 'clear departure from the EU state aid regime'. The Subsidy Control Act (2022) became law on 28th April 2022 (UK Parliament, 2022) and looked very much like an example of clear de-Europeanisation. However, a closer analysis raises doubts about the accuracy of any such assessment.

The Act when deciphered led one source to claim that 'despite differing wording' the text adopted substantially similar criteria to the definition of state aid under EU law (Herbert, Smith Freehills, 2021). This is particularly true in relation to many of the seven underpinning principles (as agreed under the TCA) of the new SCA. Its definition of subsidy where financial aid, designed to favour one undertaking over another and hence, thwart the competitive process, is the same as the EU regime. Very interestingly, however, the drafters of the new Act tried to make it look distinctly different from the EU regime and more inherently British through their use of language throughout the Act. Reference was made to subsidies rather than 'state aid', enterprises rather than 'undertakings' and services of public economic interest rather than services of general economic interest (DGEI).

The reality is that the process of carving out a British regime has been surrounded by degree of smoke and mirrors. While there is much in common the new SCA does include a degree of new innovation is on display in an additional 9 principles (that go beyond the TCA) and which cover, for example, environmental and energy subsidies. Yet, these are minor tweaks to an Act that largely reflects and resembles the EU rules. Of course, new British institutions now hold responsibility for administering the SCA but they will still be watching developments in the EU.

The SCA may bring a new UK law onto the stature books, and it may look distinctly British in design and scope, but it has been constructed around the norms and practices of the EU regime. EU state aid policy in this particular case served as the *de facto* starting point for the SCA. It is arguably a placebo policy than real evidence of de-Europeanisation.

The case against any de-Europeanisation analysis is further strengthened by the reality that the UK has still not escaped the rulings of the Court of Justice in Luxembourg as Northern Ireland remains, under the terms of the Ireland Northern Ireland Protocol agreed between the UK and the EU in 2019, subject to the EU state aid rules.

The Protocol was effectively a mechanism to avoid a hard border on the island of Ireland. As such Northern Ireland remains within the EU's single market for goods and all rules pertaining to it, including state aid. The Protocol emerged as a very divisive issue in Northern Ireland politics with politicians from the unionist parties holding the Protocol and its 'Irish Sea border' provisions as effectively weakening the historic and cultural links between Northern Ireland and the rest of the United Kingdom. This opposition suspended the power sharing arrangements for devolved government in Northern Ireland for almost two years (February 2022 to February 2024) until minor amendments to ease the flows of goods between Great Britain and Northern Ireland to secure a UK internal market were agreed (January 2024) by the UK government and the Democratic Unionist Party.

State aid has never received as much attention from unionist politicians in stark contrast to their position and pronouncements on the 'Irish Sea border', but concerns have been expressed about the likelihood of inter-regional competition within the UK and a possibility of NI losing out if greater subsidy arrangements were available for GB but not for Northern Ireland.

The Protocol's provisions relating to state aid are contained within Article 10. George Peretz QC, one of the UK's leading state aid practitioners, maintains that all attempts to understand its significance requires a very 'diligent' (Peretz, 2022) eye and an appreciation of legalese. Article 10 states that UK subsidies for undertakings that affect Northern Irish goods within the EU27 potentially fall under the scope of the EU state aid rules. So, for example, if the UK government supported a Manchester based company manufacturing bricks that had a subsidiary in Northern Ireland which was exporting bricks freely across the Irish border, the European Commission would be concerned about the impact on the EU single market. It follows that the European Commission's involvement would prove problematic for the UK government's pro Brexit regained sovereignty narrative. The fact that Article 10 requires the UK competition authorities to liaise closely with the Commission, even having to send drafts of its reports to the European Commission once again challenges any suggestions of de-Europeanisation.

This significance of this situation is important because to keep consistency regarding subsidy control within the UK single market, there is the strong possibility that EU state aid provisions applying to British owned firms operating in Northern Ireland can indirectly influence the making of subsidy policy in Great Britain. This concept of 'reach back' is real as the protocol provides a backdoor (Peretz, 2019) for the application of the EU's state aid rules in the UK.

Post Brexit the UK is now confronting two mutually exclusive state aid regimes. It has not yet managed to break free from the EU rules. Indeed, it remains tied to and is still being shaped by EU rules. Agreement between the UK and the EU on the Windsor Framework (February 2023) to ease the implementation of the Protocol has not substantially altered the European dimension to state aid policy. In short, the concept of orbiting Europeanisation provides a better understanding of the UK's relationship with the EU in relation to state aid.

V. Conclusions

The UK's departure from the EU seemingly challenged the readily accepted logic of European integration and the concept of ongoing Europeanisation, but is the picture so black and white? Brexit was supposed to be about uncoupling the UK from the EU's institutional architecture, restoring sovereignty to the UK parliament, escaping the judgements of the Court of Justice of the EU, ending financial contributions to the EU budget, securing new meaningful trade deals with non-EU member states, stopping illegal immigration, and developing a whole range of truly independent policies. All these objectives signalled a clear de-Europeanisation trajectory that were to be improved upon with the newly found Brexit freedoms, but just how many, beyond the first aim, have been achieved is open to question.

The September 2023 decision by the UK government, for example, to rejoin the EU's Horizon research programme illustrates a reverse course of action and clear evidence of renewed Europeanisation. decision once again enables British universities to lead collaborative research projects with other European universities and was enthusiastically welcomed by UK universities. This move not only confirmed the UK's position within the EU orbit, but crucially also ensures that the UK government is once more making financial contributions to the EU.

Brexiteers such as Kami Badenoch, the current Secretary of State for Business and Trade, may readily demand more divergence from the EU but this raises another hugely important problem. The more any UK government seeks to di-

verge from the EU, the more potential divergence will emerge between Great Britain and Northern Ireland given the latter's continuing membership of the EU's single market for goods. The Sunak government now seems set on preventing too much divergence from the EU as a means of persuading the unionists in Northern Ireland to return to power sharing and thus, avoid any potential questions arising over the future of Northern Ireland as a constituent part of the UK. Limiting divergence is one possible solution to limiting the realities of the Irish Sea border, but does this imply that the UK will converge with any new EU rules that pertain to the operation of its single market?

With the prospects of a Labour government by the end of 2024 looking ever more likely, any momentum for UK divergence from the EU will grow more distant. Indeed, it is expected that a Labour administration will seek to retain a close alignment with the EU. What does this mean for our understanding of Brexit?

It is still too soon to provide any definitive answer to this question of whether the Brexit vision is delivering or whether it can ever fully deliver on its objectives. Brexit could be portrayed as a fantasy project that in June 2016 struck a chord with many about positive future possibilities and untapped opportunities outside the EU. It could also be seen as a misreading of the economics and politics of the early twenty first century or even worse a series of untruths and half truths from prominent Brexit supporters in the political arena including Boris Johnson.

As we move forward over the next decade there will be many more questions to be asked about the UK, the EU orbit and the 'political imbecility' (O'Brien, 2024) of Brexit. Public polling now indicates that a majority of the British electorate (some 55 per cent) now hold that Brexit was the wrong choice for the UK (Statista, 24 January 2024). If this 'Bregret' (UK in a Changing Europe, 2023) continues might a future British government (at least some 10 years in the future and after two different administrations in power) make a case the UK to rejoin the EU? For now, the UK remains in its EU orbit.

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Western Balkans/EU: current developments

Jelena Ceranic Perisic

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I. Introduction

The term Western Balkans has a geopolitical rather than a geographical meaning and it refers to Albania and the territory of former Yugoslavia, except Slovenia and Croatia. Originally, this term also referred to Croatia, but Croatia joined the EU in July 2013. In fact, EU institutions have generally used the term Western Balkans referring to the Balkan area that includes countries that

are not members of the European Union. Currently, these are (in alphabetical order): Albania, Bosnia and Herzegovina, Montenegro, North Macedonia, and Serbia.

"The future of the Western Balkans is within the European Union"[1] – thus reads the commitment the European Union made to the European future of the Western Balkans two decades ago. These words were included in the Thessaloniki declaration in June 2003. The Western Balkan countries have referred to this document like a Bible for twenty years. Although the EU has never withdrawn this promise to the region, only Croatia has since become a member. Over the next two decades no other country was close to membership. Compared to the high hopes of 2003, this situation can be considered a failure, both from the point of view of the Western Balkan countries and from the point of view of the EU and its enlargement policy.

The accession prospects of the Western Balkan countries have remained blurred for two decades. However, after a lengthy period of stagnation in the enlargement policy, there is some significant news that refers also to the Western Balkan countries.

At the beginning of 2022, enlargement of the European Union (EU) was not on the immediate political agenda. But 18 months later, after the beginning of the war and Ukraine having been accepted as candidate for EU membership, the situation has changed dramatically. EU leaders are beginning to think about the issues at stake if new members, including Ukraine, join the EU in the future.[2]

In September 2023, the Franco-German expert report on how to best reform the EU was presented. It remains to be seen whether that experts' proposal will change anything and in which direction. Regardless of the political outcome of the report, it is significant for analysis due to its comprehensiveness in addressing the EU challenges and the wide range of its recommendations.

This paper attempts to present current developments in relations between Western Balkan countries and the EU and to shed light on some potential scenarios in perspective. After short introductory notes (Part I.), the paper gives a brief overview of the current position of the Western Balkan countries in the EU accession process (Part II.). Thereafter, the failure of the Western Balkans

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1 Thessaloniki Declaration, 21 June 2003, <https://ec.europa.eu/commission/presscorner/detail/en/PRES_03_163>.

2 GÖRAN VON SYDOW/VALENTINE KREILINGER, Introduction: What Do We Mean by 'Fit for 35', in: VON SYDOW/KREILINGER (eds.), Fit for 35? Reforming the Politics and Institutions of the EU for an Enlarged Union, Sieps, pp. 10–13, p. 10.

states to make more progress towards EU membership after the Thessaloniki Summit is examined. (Part III.). Then it is discussed how war in Ukraine has changed the integration process (Part IV.). Finally, the paper focuses on the expert report pitched in September 2023 "Sailing on High Seas: Reforming and Enlarging the EU for the 21st Century" (Part V.).

II. Current position of the WB countries

Not all Western Balkans countries are in the same position regarding EU integrations. Although they are all now official candidates, three groups of countries can be distinguished. The first group consists of countries that have opened accession negotiations earlier. Those are Serbia and Montenegro, and they are considered as front runners in the region. In the second group one can find countries that have quite recently, on 19 July 2022, started accession talks after many years of vetoes and disputes. Those are North Macedonia and Albania. The third group includes only one country and that is Bosnia and Herzegovina. Bosnia and Herzegovina received the status of a candidate only recently in December 2022.

A comprehensive analysis of the position of each country in the EU integration process goes beyond the scope of this chapter. Therefore, this table sheds light on the current position on each of them regarding the dates of obtaining candidate status and opening the negotiations, the number of opened chapters and provisionally closed chapters and the length of negotiation process.

Although a new enlargement methodology grouped negotiating chapters into six clusters, we are still referring to chapters.

Country	Obtaining candidate status	Opening the negotiations	Opened chapters	Provisionally closed chapters	Length of negotiation process
Albania	June 2014	22 July 2022	0	0	10/1
Bosnia and Herzegovina	15 December 2022		0	0	
Montenegro	December 2010	June 2012	33	3	14/12
North Macedonia	December 2005	22 July 2022	0	0	19/2

Country	Obtaining candidate status	Opening the negotiations	Opened chapters	Provisionally closed chapters	Length of negotiation process
Serbia	March 2012	January 2014	18	2	12/10

III. The failure of the Western Balkan countries to make more progress towards membership after Thessaloniki Summit

The failure of the Western Balkans countries to make more progress towards EU membership after the Thessaloniki Summit is a result of combination of several factors, which can be divided into two groups: internal factors (challenges of the Western Balkan integration) and external factors (challenges of the EU itself).[3] The combination of all these factors placed the people of the Western Balkans between the proverbial rock and hard place.[4]

1. Internal factors

When it comes to the internal factors and challenges of the Western Balkan integration, two groups of challenges can be recognized: those stemming from the countries' past and those coming from EU conditionality.

a) Historical dimension

On one hand, the Western Balkan region faced challenges stemming from a turbulent past, democratic vulnerabilities, lacklustre reform processes, as well as from bilateral issues with EU Member States.[5]

Although the problems of the 1990s were never fully resolved, the Western Balkan states remained mostly stable throughout the last two and a half decades. Therefore, Europe's security and stability has not been threatened and consequently the sense of urgency associated with the region's EU integration was eliminated. Moreover, there was an opinion that the region is not

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3 CERANIC PERISIC JELENA, Western Balkans – Integration perspectives, in: KELLERHALS/BAUMGARTNER (eds.), European Integration Perspectives in Times of Global Crises, EIZ Publishing 2023, pp. 121–138, p. 123.

4 DELEVIC MILICA/MAROVIC JOVANA, Keeping the Thessaloniki promise: How to make enlargement work for all 20 years later, <https://biepag.eu/publication/keeping-the-thessaloniki-promise/>.

5 *Ibid.*

ready for integration based on the Western Balkan countries' dysfunctional politics, democratic backsliding, weak rule of law, or inability (or unwillingness) to decisively address corruption and organized crime.[6]

The accession process thus lost momentum and hopes for membership were pushed ever further into the future. This locked the EU and the region into a vicious circle of hypocrisy – the former pretending to be serious about enlargement and the latter pretending to be serious about reforms. The enlargement process, once seen as the EU's most important foreign policy instrument, was effectively grounded to a halt.[7]

b) Conditionality dimension

On the other hand, the Western Balkan region is facing challenges stemming from EU conditionality. Joining the EU is in theory recognized as a process in which external conditioning is a key instrument of integration. In this process, the EU conditions membership on fulfilling a number of conditions, among which is the harmonization of the legal framework and practice with the *acquis communautaire*.[8] A particular challenge lies in the fact that the conditions are unilaterally set by the EU and need to be met even before the promised reward reflected in membership is received.

2. External factors

In the last two decades following the Thessaloniki Summit, the European Union has been facing a series of challenges, which are considered as external factors that affect the enlargement policy. Those external factors also have their own internal and external dimension.

a) Internal dimension

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

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6 *Ibid.*

7 *Ibid.*

8 KNEZEVIC BOJOVIC ANA/CORIC VESNA/VISEKRUNA ALEKSANDRA, European Union External Conditionality and Serbia's Regulatory Response, Srpska politicka misao 2019, pp. 233–235, p. 233.

From May 1, 2004, to July 1, 2013, three enlargement waves took place, and 13 countries joined the EU.[9] "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."[10]

Since the preparation for the accession of these countries took a lot of time and resources, the EU was generally exhausted which led to a certain *enlargement fatigue*. Thus, the willingness of the EU Member States for future enlargement decreased, impacting the efficiency of the EU enlargement process.

On the other hand, while some countries joined the EU, for the first time in the history of EU integration, one Member State expressed its intention to leave the EU – the United Kingdom (UK). In a referendum held on June 23, 2016, the electorate of the UK voted to leave the European Union – Brexit.

The Lisbon Treaty was the first document to predict the process of leaving the EU. Carefully conducted, the EU and the UK concluded their negotiations in December 2019 about the terms of withdrawal and the framework for future cooperation. The UK officially left the EU on January 31, 2020. Nevertheless, the entire process of negotiations on the terms of withdrawal has put an additional burden on the EU and its fragile enlargement policy. Brexit appears to have had an impact on certain candidate countries, as evidenced by the decline in public support for European integration.[11]

b) External dimension

During the past twenty years, many external factors have influenced the EU integration policy: the economic crisis, the refugee crisis, the Covid 19 pandemic and the ongoing Russian-Ukrainian war.

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9 First, in 2004, the countries joined the EU: Poland, the Czech Republic, Slovakia, Hungary, Estonia, Latvia, Lithuania, Slovenia, Cyprus, and Malta. Then, in 2007, Romania and Bulgaria joined the EU. Finally, in July 2013, Croatia joined the EU.

10 WUNSCH NATASHA/OLSZEWKA NICOLE, 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.

11 CERANIC PERISIC JELENA, Western Balkans – Integration perspectives, in: KELLERHALS/BAUMGARTNER/REBER (eds.), European Integration Perspectives in Times of Global Crises, EIZ Publishing, Zurich 2023, pp. 121–138, p. 125;

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

At a time when the EU was struggling with an economic crisis, a migration pressure began. The phenomenon of a massive movement of migrants and refugees from the Middle East towards Europe 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.[12] The response to the crisis can be characterized as an imbalance between solidarity and security.[13]

The Covid-19 pandemic severely impacted all aspects of life and placed the whole planet under lockdown for several months. One can offer insights into significant shifts in the social reality, such as the nature of the international order, the comprehension and application of human rights and freedoms, the operation of political institutions, the use of contemporary technology in business, the movement of money and people's preferences, the manner in which public employees carry out their various duties, etc.[14] Consequently, the EU enlargement policy is also affected by those changes.

Finally, the EU is currently facing the Russian-Ukrainian war which has a significant impact on all aspects of political and social life not only at the European, but also at a global level. This war has had a huge impact on enlargement policy as well.

3. Between a rock and a hard place

People from the Western Balkan countries have for many years effectively been caught between a rock and a hard place. The EU capital's indecision on the enlargement question and the technical character of the European in-

12 CERANIC PERISIC JELENA, 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.

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

14 DJURIC VLADIMIR/GLINTIC MIRJANA, Rec urednika, DJURIC/GLINTIC, (eds.), Pandemija Kovida 19: pravni izazovi i odgovori, Beograd 2021, p. 7.

tegration process make up the rock. The incapacity (and frequently unwillingness) of the Balkan governments to act appropriately and representatively while in office constitutes the hard place.[15]

a) The rock

As aspiring members, the Western Balkan countries are obliged to accept all EU conditions. External conditioning has become a key instrument of integration.[16] Even if they sincerely want to, politicians find it challenging to represent and interact with their constituents due to the dominance of the EU integration process in the area. Furthermore, it has the unintended consequence of frequently enabling the region's political elites to break their campaign pledges by passing off all controversial measures as "made in Brussels".[17]

According to a recent survey, public opinion in the region continues to be overwhelmingly in favour of EU membership, although a declining trend can be noted in recent years. However, even in the Republic of Serbia, which is nowadays considered as the region's biggest sceptic, a majority of respondents support their country's goal of joining the EU.[18]

One can say that people in the Balkans still support the EU integration process because they see it as an opportunity for much-needed change in their countries' quality of governance and economic performance.[19]

Moreover, it is likely that people in the Balkan countries accept the 'stick' of the European integration because they value the other EU 'carrots', which include freedom to work and travel but also peace and security.[20]

b) The hard place

For the time being, national politicians and institutions are in the centre of the public's dissatisfaction. Even after twenty years of European integration, the region's democratic performance still lacks a positive drive. Neither the adoption of democratic constitutions nor the EU's rigorous democratic condi-

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15 STRATULAT CORINA/KMEZIC MARKO/TZIFAKIS NIKOLAOS/BONOMI MATTEO/NECHEV ZORAN, Between a rock and a hard place: Public Opinion and Integration in the Western Balkan, <https://www.researchgate.net/publication/347212157_Between_a_rock_and_a_hard_place_Public_opinion_and_integration_in_the_Western_Balkans>.

16 See above III.1.b).

17 DELEVIC/MAROVIC.

18 *Ibid.*

19 *Ibid.*

20 *Ibid.*

tionality have managed to overcome the informal power structures, but rather have consolidated them. The rule of law, the independence of judiciaries, and the freedom of the media in these countries are recognized as the weakest points.[21]

IV. Radical Shifts: how has war in Ukraine changed the process?

The evolving geopolitical landscape and the EU's approach to the Ukraine are likely to have profound implications for the Western Balkans. Undoubtedly the most important implication is the revival of the enlargement process. War on the European continent and the determination of the Ukrainians to achieve their European destiny – a goal they have been pursuing since the Maidan revolution in 2014 – have fundamentally transformed the dynamics of the EU enlargement.[22] Ukraine and Moldova became candidates in June 2022 and Georgia in December 2023.

In general, the governments of the Western Balkan countries express their support for Ukraine. They are worried, though, that the present crisis is taking focus and resources away from their own accession procedures. The EU has recently, at least ostensibly, increased its engagement in the Western Balkan region because it is fully aware of the detrimental effects of years of stagnation of the integration process of the region.[23]

Even if there seems to be, for the first time in a while, a realistic chance to progress, two problems remain. The first is the persistence of internal problems such as dysfunctional structures and democratic backsliding as well as a number of unresolved bilateral issues. The second is a lack of trust. People from the Western Balkan countries are not Eurosceptics, but they have a lack of trust in EU integration as a process that will eventually lead them to membership in the EU. Western Balkan elites and citizens have little confidence in the EU's assurances and even feel a degree of bitterness about the EU launching another enlargement project without having delivered on the promise it made to the Western Balkans more than twenty years ago.[24]

The following graph shows the public opinion in Serbia on the EU integrations. Public opinion is still predominantly in favour of EU membership.

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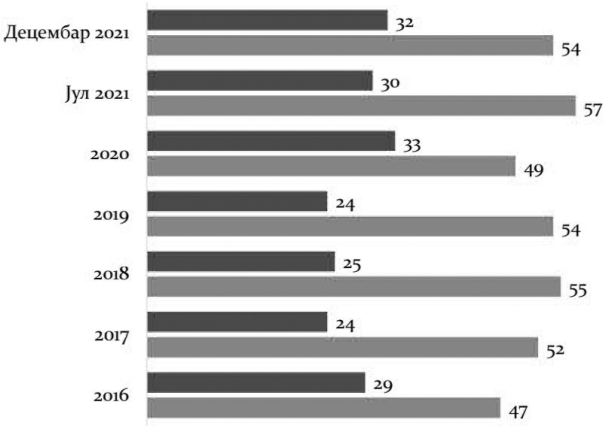
21 *Ibid.*

22 *Ibid.*

23 *Ibid.*

24 *Ibid.*



Source Ministry of European Integration, Serbia, December 2021

V. "Sailing on High Seas": Reforming and Enlarging the EU for the 21st Century

While the war has given political impetus to the EU's enlargement policy, enormous challenges remain for all the potential future members and for the EU itself. Before joining the EU, each potential new member state must undertake challenging reforms. The internal reforms that the EU likely needs are equally difficult to agree on and implement.[25]

Therefore, in January 2023 a group of twelve independent experts was initially commissioned by French and German ministers to reflect on what reforms the EU would need to undertake to be fit for future enlargement.

In September 2023 France and Germany presented their joint pitch on how the EU could adapt to new members during a meeting of European affairs ministers in Brussels.[26] The report comes as the EU enlargement debate intensifies, with European Council President Charles Michel setting a 2030 target for the bloc to be prepared to accept new members.

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25 GÖRAN VON SYDOW/VALENTINE KREILINGER, Introduction: What Do We Mean by 'Fit for 35', in: von SYDOW/KREILINGER (eds.), Fit for 35? Reforming the Politics and Institutions of the EU for an Enlarged Union, Sieps, p. 10, pp. 10–13.

26 Report on the Franco-German Working group on EU Institutional Reform, Sailing on the High Seas: Reforming and Enlarging EU for the 21st Century <https://www.politico.eu/wp-content/uploads/2023/09/19/Paper-EU-reform.pdf>.

The report pitches a reform of the EU's institutions, treaties and budget, as countries such as Ukraine, Moldova and the Western Balkans countries prepare to join the bloc.

Recognising the complexity of aligning diverse Member States' visions for the EU, the report recommends a flexible EU reform and enlargement process. Therefore, the report suggests two types of measures:

- **immediate action** to improve the EU's functionality – the report proposes a list of initial steps before the next European elections;
- **more substantial reforms**, including preparations for treaty revisions – those reforms should be implemented during the new legislative term (2024 to 2029).

The report envisages as the main objectives:[27]

- increase the EU's capacity to act,
- get the EU enlargement ready, and
- strengthen the rule of law and the EU's democratic legitimacy.

The report is divided into three main sections, dealing with:[28]

1. The rule of law
2. Institutional reforms, and the process to reform,
3. Deepen and enlarge the EU.

VI. Protecting the rule of law

The rule of law is a non-negotiable constitutional principle for the EU's functioning and a precondition for joining the EU. Ultimately, the EU cannot function without reciprocity, mutual trust and without all its members adhering to its principles. Achievements in the rule of law are the very backbone of the EU accession process. Over the past decade, the rule of law has come into the focus of EU internal policies. Rule of law is not an abstract duty but has gained considerable substance.[29]

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27 *Ibid.*

28 *Ibid.*

29 KNEZEVIC BOJOVIC ANA/CORIC VESNA, Vladavina prava – načelni izazovi i presek stanja u Srbiji na odabranim primerima iz oblasti pravoduđa, in: CERANIC PERISIC/DJURIC/VISEKRUNA (eds.), 65 godina Rimskih ugovora – Evropska unija i perspektive evropskih integracija, Institute of Comparative Law, Belgrade 2022, pp. 51–72, p. 51.

It is important to point out that ten years ago, the Commission introduced the "fundamentals first" approach to enlargement, which states that without results on democracy and the rule of law, there will be no overall progress in the negotiations.

1. Addressing institutional challenges

The report addresses five key areas, all of which are crucial to serve the three defined reform goals. It acknowledges other topics in the EU's future debate, but it concentrates on these because of their importance and feasibility.

First, the EU's current institutions lack agility and are penalized by complexity and an abundance of players. The report suggests: 1) the number of European Parliament members should not be increased beyond the current 751, 2) a new system of allocation of seats in the European Parliament, 3) modification of the 'trio' system for the rotating presidency of the Council of the EU in favour of 'quintets' and 4) reducing the size of the Commission's College to two-thirds of Member States or developing a hierarchical model.[30]

Second, the report highlights the need to reform the decision-making processes within the Council. Before the next enlargement, all remaining policy decisions should be transferred from unanimity to a qualified majority. This would mean that EU countries would no longer be able to veto decisions such as economic sanctions, arms supply, or financial support. Additionally, except for in foreign, security and defence policy, this should be accompanied by full co-decision with the European Parliament to ensure appropriate democratic legitimacy.[31]

Third, the report underscores the significance of democratic legitimacy in EU decision-making and proposes four sets of measures to bolster it (e. g. harmonisation of electoral laws across member states for European Parliament election).[32]

Fourth, the report discusses several key aspects related to the powers and competences of the EU. It recommends reforms such as clarifying EU competences, etc.[33]

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30 Report on the Franco-German Working group on EU Institutional Reform.

31 *Ibid.*

32 *Ibid.*

33 *Ibid.*

Fifth, the report also tackles the thorny issue of the EU's budget and funding distribution in a bigger Union. The budget would need to be bigger in size, with more flexibility on spending decisions and joint debt instruments. Smaller groups of EU countries within the bloc could also make "intergovernmental financing agreements" to move forward with their own spending plans.[34]

2. Deepening and widening the EU

Within the third part, devoted to the deepening and widening the EU, the report first provides options for the Treaty change. Then it analyses the differentiated integration, focusing on the four tiers of EU integrations. Finally, it discusses how to manage the EU enlargement process.

a) Options for the Treaty change

The report discusses six options for the Treaty change. The default option is a Convention, followed by an Intergovernmental Conference (IGC). If no agreement on this is reached, the report considers a 'simplified revision procedure' as being a second-best alternative. It explores three alternative scenarios reforming the EU as part of a package with the accession treaties. In the absence of unanimity on Treaty change, a supplementary treaty among willing Member States would allow for differentiation within the EU.[35]

b) Differentiated integration

Differentiation is a constitutive feature of European integration. Not all member states participate in all EU policies to the same extent. Some have negotiated 'opt-outs' or exemptions from entire EU policies or specific EU rules. The Danish opt-outs from the Maastricht Treaty are the prototypical example. Others are excluded from participation in EU policies for a fixed period – as is typically the case for the free movement of labour from new member states – or until they meet certain conditions, such as the convergence criteria for membership of the Eurozone area.[36]

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34 *Ibid.*

35 *Ibid.*

36 SCHIMMELFENNING FRANK, Fit through Flexibility? Differentiated Integration and Geopolitical EU Enlargement, in: VON SYDOW/KREILINGER (eds.), Fit for 35? Reforming the Politics and Institutions of the EU for an Enlarged Union, Sieps, pp. 14–26, p. 14.

With an entire title dedicated to general enabling clauses for closer (enhanced) cooperation between member states which are willing and able to further cooperation among themselves, "The Treaty of Amsterdam has turned the exception into a constitutional principle."[37] Since the conditions for the use of enhanced cooperation were very strict, this mechanism was the subject to the numerous amendments provided by the Nice and the Lisbon Treaty.[38]

The report recalls that the EU already has various differentiation mechanisms and that they will be needed to accommodate the diverse preferences of over 30 EU Member States.[39]

The history of European integrations indicates that whenever the external borders of the EU have changed, in terms of increasing the number of Member States and consequently its diversity, the discussion on differentiated integration has intensified.

c) Four tiers of European integration

According to the Franco-German proposal, not all European states will be willing and/or able to join the EU in the foreseeable future. It is also possible that some current member states may prefer looser forms of integration. Therefore, the report recommends envisioning the future of European integration as four distinct tiers (or concentric circles),[40] each with a different balance of rights and obligations.

Thus, differentiation could lead to four tiers of European integration:[41]

1) The inner circle: This circle consists of countries that already participate in forms of deeper integration in areas like the Eurozone and Schengen, with either permanent or temporary exemptions for the non-participating countries. Nowadays, there are already several uses of the mecha-

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37 PHILLIPART ERIC/SIE DHIAN DO MONICA, "From Uniformity to Flexibility: The Management of Diversity and its Impact on the EU System of Governance", in: DE BÚRKA/SCOTT (eds.), Constitutional Change in EU: From Uniformity to Flexibility, Hard Publishing, Oxford 2000, p. 300.

38 CERANIC JELENA, Differentiated integration – a good solution for the increasing EU heterogeneity?, in: KELLERHALS/BAUMGARTNER (eds.), Multi-speed Europe, Zurich 2012, pp. 13–26, p. 15.

39 Report on the Franco-German Working group on EU Institutional Reform.

40 FABRINI SERGIO, From Multi-speed to Multi-tier: Making Europe Fit for Herself, in: VON SYDOW/KREILINGER (eds.), Fit for 35? Reforming the Politics and Institutions of the EU for an Enlarged Union, Sieps, pp. 69–82.

41 Report on the Franco-German Working group on EU Institutional Reform.

nism of enhanced cooperation according to Article 20 Treaty on European Union (TEU). These coalitions of willing states could be further used in different policy areas such as climate, energy, taxation etc.

2) The European Union itself: All EU member states, current and future, share the same political goals, must abide by Article 2 TEU, and are eligible for cohesion funds and redistributive measures.

3) A larger circle of associate members: Simplifying the many forms of connection with the EEA nations, Switzerland,[42] or even the UK would be possible with the implementation of a first outer tier. Associate members would not be required to adhere to "ever closer union" or increased integration, nor would they take part in more in-depth political integration in relation to other areas of policy like EU citizenship or Justice and Home Affairs. Nonetheless, adhering to the common ideals and principles of the EU, such as democracy and the rule of law, would be the fundamental prerequisite. The single market would be the primary area of involvement.[43] Institutionally, associate members would not have representation in the European Parliament or the Commission. Instead, they would be allowed to speak in the Council but not vote. They would be subject to the CJEU's authority. Associate members would contribute to the EU budget, but at a lesser rate (for instance, for shared institutional expenses) and receive fewer advantages (such as lack of access to funding for agriculture and cohesion).

4) The European Political Community (EPC): A second outer tier would not permit access to the single market and would not incorporate any kind of binding EU law or particular requirements for the rule of law. Rather, it would prioritize political collaboration and geopolitical convergence in areas of mutual importance and relevance, such as energy, environment, and climate policy, among others. The institutional foundation of the recently established EPC might be improved to offer more structured collaboration. It would be necessary for the EPC to change from its current loose structure to one with more institutional linkages so that the EU budget could mobilize some financing and the Commission could take on a more coordinating role.

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42 KELLERHALS ANDREAS/BAUMGARTNER TOBIAS, 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.

43 VISEKRUNA ALEKSANDRA, *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.

These two outer tiers are separate from the accession process because membership in them can be permanent, even though they are open to all European nations, including those who are accession candidates. While it is not a requirement, EPC membership might be a helpful first step toward EU membership. Countries along the southern Mediterranean coast may also be included in the EPC and awarded guest status or even permanent guest status.[44]

Countries would voluntarily join one or both outer tiers, either because they intend to leave the EU or because they have no intention of entering it at all. Careful negotiations will be required to strike the best possible compromise between institutional involvement and a narrower definition of integration while maintaining the greatest possible benefits for all EU member states.[45]

The idea of 'gradual integration' for EU aspiring countries is also not new, as it was already included in the European Commission's new enlargement methodology from 2020.[46] It is provided that if countries move sufficiently on reform priorities agreed in the negotiations, this should lead to 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. That was a real novelty in the EU integration process, which has not been offered to any country in the accession process so far.

d) Managing the enlargement process

The fact that Ukraine, Moldova and Georgia have joined the list of candidates due to geopolitical challenges is not the only reason why the next enlargement will be different from the previous ones. "More predictable, more credible (based on objective criteria and rigorous positive and negative conditionality, and reversibility), more dynamic, and subject to stronger political steering" is the stated goal of the revisions made to the accession process.[47] Instead of 35 separate chapters, the negotiations are now organized around six clusters, and candidate countries can progressively adopt specific EU policies and initiatives.

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44 Report on the Franco-German Working group on EU Institutional Reform.

45 *Ibid.*

46 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.

47 *Ibid.*

Although there may have been some technical effects from the recent enlargement process change, there has not been much political momentum for the EU's enlargement policies. In addition to preparing the EU for enlargement, tangible actions must be made to assist candidates during their transition and revive a merit-based admissions procedure in order for the next enlargement to take place.[48]

The EU should aim to be prepared for enlargement by 2030 in order to reestablish credibility, and applicants for membership should strive to meet the requirements in order to join the EU as soon as possible. This shared commitment would strengthen the confidence that has been eroded over the previous years by a lack of commitment and progress in the accession process. It clarifies that membership into the EU is not free and that the timeline is an aim rather than a fixed date.[49]

It is unknown if there will be a "regatta", with several candidates joining at different times, or a second Big Bang enlargement, with numerous candidates joining "en bloc". Each choice has advantages and disadvantages. The "en bloc" approach anticipates that the candidate countries will encourage and assist one another's reform initiatives. However, it is incompatible with the merit-based system, which assigns each candidate the role of initiator of their own admittance. This indicates that either the more developed candidates must wait for the less developed to catch up, or that they set the pace of accession, implying the inclusion of nations that are not yet prepared to join.[50]

The merit-based premise would be better complied with via a "regatta" method. But it would enable all Members, even those who have just joined, to prevent certain countries from joining because of bilateral disputes. Clauses in their accession treaties about a temporary period that denies them the ability to vote on future enlargements for a mutually agreed-upon duration could help to reduce this risk. Additionally, consideration of admission could wait until disputes between applicant nations have been settled. Taking these factors into account, the report suggests dividing the accession rounds into smaller groupings of nations (a "regatta") while adhering to the merit-based approach and taking potential bilateral tensions into account.[51]

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48 Report on the Franco-German Working group on EU Institutional Reform.

49 *Ibid.*

50 *Ibid.*

51 *Ibid.*

VII. Concluding remarks

The Western Balkans' integration perspectives cannot be viewed in isolation but must be considered in a wider context. In this sense, they 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 policy.

The European Union has been facing the biggest crisis since its foundation, including the latest geopolitical challenges in the East of the continent. Given that the EU does not have adequate legal mechanisms to respond to numerous challenges, EU reform is necessary. Therefore, the processes of institutional reform of the EU, enlargement of the EU and creation of the European Political Community should take place in parallel.

This is exactly what the Franco-German report from September 2023 is dedicated to. Regardless of the political destiny of the aforementioned report, the EU should go through reform process and redefine its relations with its neighbours. At the moment, differentiated integration seems to be the most appropriate solution to the numerous challenges.

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Relations Armenia/EU: Chances and challenges with CEPA

Garine Hovsepian

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I. Introduction

Over the past centuries, both regional and global powers have competed for dominance in the South Caucasus. The region has economic significance due to its location along the Silk Road and geopolitical importance as a buffer zone situated between regional powers such as Russia, Turkey, Iran,[1] even China. Following the disintegration of the Soviet Union, disputes over the Soviet-era autonomous entities led to the wars in Nagorno-Karabakh, Abkhazia,

[1] (Gafarli, et al. 2016, 2).

and South Ossetia bringing economic instability and security problems to the South Caucasus. These on-going conflicts provided an opening for the regional `and global powers to restart their competition for influence over the region.[2]

The United States' policies in the South Caucasus were mainly driven by energy interests and the rivalry with Russia for regional influence. Since post-Cold War, the US backed Turkey's increasing influence in the region to establish alternative energy routes that would bypass Russia.[3] The EU's policy towards the South Caucasus is a result of its internal debates and the sometimes divergent interests of its member states.[4] Institutional involvement of the EU in the South Caucasus began with Partnership and Cooperation Agreements (PCA) with Armenia, Georgia and Azerbaijan in 1996 (in force in 1999). "The region gained importance for the EU due to its energy resources and as a transportation corridor between East and West, North and South, as well as for security purposes in terms of building 'a ring of friends' outside the EU borders. The EU development and integration policies for the region have been between political constructivism and idealism. Since 2008, the EU's Eastern Partnership (EaP) program has been important for the former Soviet countries of Azerbaijan, Georgia, Ukraine, Belarus, and Armenia, and the 'New Europe' countries played an important role in this coordination."[5]

Since President Putin came to power in 2000, Russia's objectives have centered around reinstating and upholding its influence in the former Soviet Union, notably in the South Caucasus region. This includes efforts to hinder the expansion of the EU and especially NATO into the South Caucasus, and prevent what Russia perceives as "the encirclement of Russia" by Western powers.[6]

In addition to Russia, the USA and the EU, Turkey and Iran are also major actors in the South Caucasus neighboring the region.

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2 (Gafarli, et al. 2016, 2) Gafarli, Orhan; Anapiosyan, Arevik; Chapichadze, Khatuna; Fatih, Mehmet Oztarsu, "The Role of Global and Regional Actors in the South Caucasus" 2016, p. 2. <https://www.researchgate.net/publication/324536796_The_Role_of_Global_and_Regional_Actors_in_the_South_Caucasus>.

3 (Gafarli, et al. 2016, 3) For example, the Baku-Tbilisi-Ceyhan (BTC) oil pipeline and the BakuTbilisi-Erzurum (BTE) natural gas pipeline.

4 (Gafarli, et al. 2016, 3).

5 (Gafarli, et al. 2016, 8).

6 (Gafarli, et al. 2016, 11-12).

Geopolitical developments in the region continue with the interaction, competition and/or conflict of these major actors in the region constituting the background, paradigm and constraints of those developments.

"After Armenia's defeat in the 2020 Artsakh/Nagorno-Karabakh war and the shift of the geopolitical balance of power in the South Caucasus in favor of Azerbaijan, new external factors emerged that have shaped the future of the region. Some of these factors were related to geopolitical developments such as the war in Ukraine, the Indian-Pakistani rivalry, and the war between Israel and Hamas. Moreover, some geo-economic trends and the rise of new economic actors in the region had an impact on the political landscape. The expansion of BRICS (an intergovernmental organization comprising Brazil, Russia, India, China and South Africa) and competition over regional economic corridors have deepened cooperation, and sometimes mistrust, between local actors, as new alliances have emerged."[7]

"Armenia is the most vulnerable among the regional states. The major issue for this nation is a preservation of its sovereignty, territorial integrity, and security for its population. The Azerbaijani leadership continuously makes territorial claims and provokes tensions along the line of contact."[8]

Today, the EU's relations with Armenia are based on the EU-Armenia Comprehensive and Enhanced Partnership Agreement (CEPA), which was signed on November 24, 2017 and entered into force on March 31, 2021.[9] It replaced the 1999 EU-Armenia Partnership and Cooperation Agreement (PCA). The road leading to CEPA was not smooth, however. CEPA is seen as a compromise solution, following Armenia's joining of the Eurasian Economic Union (EAEU) in 2014. CEPA is not an Association Agreement (AA). It is sometimes called an "Association Agreement lite" or an Association Agreement without the free trade component or DCFTA.

How long can Armenia's membership in EAEU be compatible with its obligations and enhancement of cooperation in areas covered CEPA? What challenges lie ahead? Will incompatibilities arise in time leading to a fork in the road and forcing Armenia to choose, or can Armenia become a bridge between

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7 (Tashjian, How are external factors complicating the political landscape in the South Caucasus? 2023).

8 (Novikova 2021).

9 COMPREHENSIVE AND ENHANCED PARTNERSHIP AGREEMENT between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Armenia, of the other part (hereafter CEPA), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22018A0126(01)&from=EN>.

the two Unions? Will broader geopolitical developments ultimately overtake and dictate Armenia's future choices both with EU and EAEU, despite its preference to continuing balancing relations with both.

II. EU-Armenia relations: A bumpy road

To give a brief chronology of EU-Armenia relations, the EU-Armenia Partnership and Cooperation Agreement (PCA) entered into force in 1999. Signed in 1996, it covered wide-ranging cooperation in the areas of political dialogue, trade, investment, economy, law-making and culture. Similar agreements were signed with Georgia and Azerbaijan at the same time.

In 2004, Armenia was included (as a southern Caucasus country, along with Georgia and Azerbaijan) in the European Neighbourhood Policy (ENP). Then, in 2009, Armenia was included in the Eastern Partnership (EaP).

In 2010 the EU and Armenia began negotiations toward an Association Agreement (AA) including a Deep and Comprehensive Free Trade Area Agreement (DCFTA) to replace the 1999 PCA. Negotiations were finalized in 2013 and signatures were expected in November 2013.

However, in September 2013, the AA and DCFTA negotiations ended in failure, following what some considered as Armenia's "U-turn".

Armenia's 2013 pivot towards the Eurasian Economic Union:

In September 2013, some two months before the Armenia-EU AA/DCFTA was expected to be signed, Armenia decided to negotiate its membership in what was, at that time, the Eurasian Customs Union of Russia, Belarus and Kazakhstan (established in 2000, and then succeeded by the Eurasian Economic Union or EAEU). This came as a surprise to both Armenians and the EU, as the declaration (and decision) was announced in Moscow by then president of the Republic of Armenia (RA) Serge Sargsyan. It was a surprise, also because "for a long time, RA Prime Minister Tigran Sargsyan, as well as Deputy Foreign Minister Shavarsh Kocharyan, called RA's membership in EAEU impossible, arguing that an economic unit with which [Armenia] does not have a direct common border with its member states cannot be effective."[10] Civil society and some political circles in Armenia were also nervous about acceding to the EAEU for various reasons.[11]

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10 (Galoyan 2022).

11 (Minasyan 2015).

Analysts agreed that the September 2013 decision was based on thinly veiled threats from Moscow that Yerevan would not be able to rely on Russian security guarantees if it were to sign the EU agreement.[12] The backdrop to consider: Armenia's security and economic, namely energy dependency on Russia, as well as geopolitical realities.

Security considerations: The Armenian-Russian security partnership has been of vital importance to Armenia. Armenia is a member of the Collective Security Treaty Organization (CSTO), a military alliance formed in 2002 of six post-soviet countries including Russia. It also has a bilateral security pact with Russia, which has military bases in Armenia.[13]

There has been consensus among Armenia's political leadership (at least up until 2021) that the security partnership with Russia is irreplaceable and a critical defensive shield against security threats stemming from neighbouring Azerbaijan and Turkey.[14] Also, the Armenian leadership has always been aware of potential devastating effects of any military rapprochement between Russia and Azerbaijan. In fact, shortly before Armenia's 2013 "U-turn", amid intensifying AA negotiations with the EU, Russia embarked on deepening military partnership with Azerbaijan. "The nightmare scenario of Azerbaijan-Russia rapprochement left Armenian leadership no choice but abiding by the Kremlin's rules."[15]

Economic dependency: Armenia's economic, and in particular energy dependency on Russia was also an equally important reason for Armenia's decision to join the EAEU.

> "Armenia joined the [Eurasian Economic Union] in 2015, in part because of its close ties with Russia, which provides Armenia with military and economic support. Armenia's economic considerations have been the driving force behind its decision to join the [EAEU]. With Russia as a key trading partner and a significant source of investment, membership in the [EAEU] offered Armenia economic stability and potential growth opportunities."[16]

12 (Shirinyan 2017).

13 Treaty on Friendship, Cooperation and Mutual Assistance of August 29, 1997.

14 (Terzyan, Bringing Armenia Closer to Europe? Challenges to the EU-Armenia Comprehensive and Enhanced Partnership Agreement Implementation 2019, 102).

15 (Terzyan, Bringing Armenia Closer to Europe? Challenges to the EU-Armenia Comprehensive and Enhanced Partnership Agreement Implementation 2019, 102).

16 (Hayrapetyan 2023).

> "Russia supplies nearly 90% of Armenia's natural gas and almost 100% of its nuclear fuel. This energy dependence on Russia has led some to question the long-term sustainability of Armenia's economic relationship with Russia. Furthermore, the Armenian diaspora in Russia is an important factor in Armenia's relationship with Russia. Over 2 million ethnic Armenians live in Russia, making it the largest diaspora community in the world. The diaspora community has significant economic and political influence in Russia, and has played a role in shaping Russia's policy towards Armenia."[17]

Geopolitics: In addition to the economic and security dependency on Russia, pressure felt by Armenia in having to join the EAEU can be understood from the broader context at that time, namely the geostrategic struggle over Ukraine, and even the earlier 2008 Georgia-Russia war.

> "In Autumn 2013, Russia was aggressively pushing back the EU Eastern Partnership program, perceiving it as another Western attempt to encroach on its legitimate sphere of special interests. The trump card in that geo-strategic struggle obviously was Ukraine, and one of the reasons for Russia to press hard on Armenia was the scarcely veiled intention to send a warning message to both Brussels and Kiev.
>
> That Russian strategy seemed to have worked as Ukraine decided to postpone signature of its own Association Agreement just a week before the November 2013 Vilnius summit. But rapidly unfolding events in Ukraine dramatically changed the geostrategic juncture, putting Russia and the West against each other, and downgrading relations to their lowest point since the end of the Cold War.
>
> These developments have put additional pressure on Armenia. (…)."[18]

Armenia's president at the time noted:

> "Our choice is not civilizational. It corresponds to the economic interests of our nation. We cannot sign the Free Trade Agreement [DCFTA] and increase gas price and electricity fee three times (…)."[19]

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17 (Hayrapetyan 2023). See also (Terzyan, Bringing Armenia Closer to Europe? Challenges to the EU-Armenia Comprehensive and Enhanced Partnership Agreement Implementation 2019), p. 102.

18 (Poghosyan 2017). With regard to principled pragmatism in EU's foreign policy, the EU Global Strategy adopted in 2016 may also be considered.

19 Առավոտ, "Օրագիր իմ եւ բոլորի համար". "Հետաքրքիր մարդ եք, եկել եք էստեղ, ուզում եք Հայաստանի բախտը վճռեք", 23 September 2014, (Aravot Daily, "Diary for me and for everyone". "You are interesting people, you came here and want to determine the destiny

Interestingly, whilst announcing it would be joining the EAEU, the Armenian government proposed to the EU to initial the association agreement (or the "stick" in EU's carrot and stick approach) without its dominant component envisaging the creation of a DCFTA (or the "carrot").[20] This reflected Armenia's balancing policy, disassociating the 'civilizational' choice from economic ones. The EU, however, decided to withhold negotiations related to both the Association Agreement and the DCFTA, as membership to the EAEU was said to be 'not compatible' with both.[21]

Armenia moved forward and joined the EAEU in October 2014. On January 2, 2015, the EAEU between Armenia, Russia, Belarus, Kazakhstan and Kyrgyzstan came into effect.

Domestically, until 2018, when the "Velvet Revolution" resulted in regime change in Armenia and Nikol Pashinyan came to the helm of government, Armenia's membership in the EAEU continued to be a contentious issue between government and opposition. A fervent opponent of Armenia's joining the EAEU when he was a member of the pro-Western opposition, Pashinyan changed policy once he came to Government.[22] "As prime minister, [...] Pashinyan has become a reliable Eurasian Union backer. After taking part in his first Eurasian Union summit [2019] September, he expressed pleasant surprise at the 'passionate' arguments that took place behind closed doors, in contrast to the leaders' stodgy public statements."[23]

III. Overcoming initial setbacks of Armenia's membership to the EAEU

1. Toward a New EU-Armenia Agreement

Armenia's 2013 pivot towards the EAEU was indeed a setback in EU-Armenia relations. However, in 2015, some two years later, the will for a workaround prevailed. A key factor considered to have led to this renewal in relations was

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of Armenia?") 28 September 2014, <http://www.aravot.am/2014/09/24/499600/>, 7 May 2015. See also (Terzyan 2017).

20 Initialing agreement with EU still on Armenia's political agenda: head of presidential administration, 5 September 2013, ARKA News Agency <https://arka.am/en/news/politics/initialing_agreement_with_eu_still_on_armenia_s_political_agenda_head_of_presidential_administration/>.

21 (Stepanyan 2013).

22 (Kucera 2019).

23 (Kucera 2019).

the EU's review of its European Neighborhood Policy (ENP) presented in the May 2015 Riga Summit and inaugurated in November 2015.[24]

Thus, on October 12, 2015 the EU Foreign Affairs Council authorized the European Commission and the High Representative to open negotiations on a new, legally binding and overarching agreement with Armenia, and adopted the corresponding negotiating mandate.[25] In December 2015, negotiations for a new agreement, the Comprehensive and Enhanced Partnership Agreement (CEPA) were officially launched. Negotiations successfully concluded on February 26, 2017, CEPA was initialed (pre-signed) in March, and signed in November 2017, with substantial parts provisionally applied starting in June 2018. CEPA entered into force on March 1, 2021, after it was ratified by Armenia, all EU member states and the European Parliament.

2. The EU-Armenia Comprehensive and Enhances Partnership Agreement: a first-of-its kind.

> *"This [EU-Armenia] agreement is also the first of its kind, as it is concluded with a partner country which is at the same time a member of Eurasian Economic Union and in the Eastern Partnership."* (Federica Mogherini, 2017)

These were the words of High Representative/Vice-President Federica Mogherini in her remarks in Brussels following the signing of CEPA with Edward Nalbandyan, Minister of Foreign Affairs of Armenia.[26]

The Armenia-EU CEPA includes EU *acquis* in legally binding provisions across a range of cooperation sectors (political and economic). It also enhances trade relations, while taking fully into account Armenia's membership in the EAEU. Sectors of cooperation covered by some 8 titles, 28 chapters and 386 articles of CEPA include:

- Democracy, Governance (title II),
- Political dialogue, Domestic Reform, Cooperation in Foreign and Security Policy (title II),

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24 (Terzyan, Bringing Armenia Closer to Europe? Challenges to the EU-Armenia Comprehensive and Enhanced Partnership Agreement Implementation 2019), at p. 99.

25 "EU Relations with Armenia" (Council, Council of the EU and the European n.d.), <https://www.consilium.europa.eu/en/policies/eastern-partnership/armenia/>.

26 Remarks by HR/VP Federica Mogherini following the signing of the European Union-Armenia Comprehensive and Enhanced Partnership Agreement (CEPA) with Edward Nalbandian, Minister of Foreign Affairs of Armenia, Brussels, 24 November 2017, <https://www.eeas.europa.eu/node/36208_en>.

- Justice, Freedom, Security, Rule of law, Human rights (title III),
- Public safety and health (title III and V),
- Economic cooperation, development, market opportunities (title IV),
- Employment and social policy (title V),
- Environment & climate action (title V),
- Energy cooperation, including nuclear safety (title V),
- Transport and infrastructure, Connectivity (title V),
- Education, research, mobility (title V),
- Trade and trade related matters (title VI).

CEPA is considered an "edited" version of the Association Agreement, (or a "lite" version of a DCFTA). It is an agreement situated in between an AA/DCFTA and a Partnership and Cooperation Agreement (PCA). All post-soviet countries except Belarus have signed a PCA. However, in certain ways, CEPA is more sophisticated than most of the older generation AAs signed with the Euro-Mediterranean countries.[27]

> "[…], it could be said that CEPA was based on the draft of Armenia's former AA, which is one of the reasons for its sophisticated character. One of the signs which indicate the comprehensive nature of the agreement is the convergence of Armenian legislation into the EU *acquis*[28], the body of common rights and obligations that are binding on all EU countries as EU Members. Usually, harmonization with the EU *acquis* is suggested to applicant countries aspiring to EU membership."[29]

As mentioned, CEPA has a substantial trade title (Title VII, with 13 chapters covering some 230 articles) with commitments in several trade policy areas, while taking into account Armenia's membership in the Eurasian Economic Union (EAEU).[30] Compliance with strengthening of institutions and good governance requirements within CEPA are not in question. However, Armenia's commitments assumed within the EAEU do (or may eventually) constrain the deepening EU-Armenia economic partnership and sectorial cooperation.[31]

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27 (Barseghian 2021). See also (KAS 2020, 69-70).

28 <https://eur-lex.europa.eu/summary/glossary/acquis.html>.

29 (Barseghian 2021).

30 See the section on legal elements of the proposal (par. 2.1) of the Explanatory Memorandum in the adopted **Joint Proposal for a COUNCIL DECISION on the conclusion, on behalf of the European Union, of the Comprehensive and Enhanced Partnership Agreement (...)** JOIN/2017/037 final - 2017/0238 (NLE) available at <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=JOIN:2017:37:FIN>.

31 (Terzyan, Bringing Armenia Closer to Europe? Challenges to the EU-Armenia Comprehensive and Enhanced Partnership Agreement Implementation 2019).

IV. Anticipated challenges to EU-Armenia economic partnership under CEPA

As it has been stated also in statements and related documents during its adoption, the EU-Armenia CEPA trade title aims to improve conditions for bilateral EU-Armenia trade and cooperation in other sectors while taking full account of Armenia's obligations as a member of the EAEU.[32] The present article neither endeavors to verify that assertion, nor identify and analyze all foreseeable incompatibilities. Nevertheless, there are three sectors to which CEPA (and the ENP) attach importance, which draw attention and where constraints in deepening economic cooperation in these sectors may be anticipated.[33]

1. Sectors where deeper economic cooperation might face limitations

a) Energy cooperation

Since the formation of the Eastern Partnership policy, the energy sector has always been a subject of both bilateral and multilateral cooperation. In CEPA, cooperation with the EU on energy issues should include the following areas: • energy strategy and policy, including energy security and diversifying energy supply and production, • expanding energy security, including the diversification of energy resources and ways of its transmission, • development of competitive energy markets, • promoting the use of renewable energy resources, energy efficiency and savings, • encouraging the development of regional energy cooperation and market integration, • encouraging general regulators of trade in petroleum products, electricity and other potential energy resources, • civil energy sector, taking into account the peculiarities of Armenia and paying special attention to a high level of nuclear safety, • tariff policy, transit and transit cost system, • promoting non-discriminatory accessibility to energy networks and infrastructure, • scientific and technical cooperation.

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32 See for example the section on legal elements of the proposal (par. 2.1) of the Explanatory Memorandum in the adopted **Joint Proposal for a Council Decision on the conclusion, on behalf of the European Union, of the Comprehensive and Enhanced Partnership Agreement (...)** JOIN/2017/037 final - 2017/0238 (NLE) available at <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=JOIN:2017:37:FIN>.

33 This section is primarily based on the analysis in (Terzyan, Bringing Armenia Closer to Europe? Challenges to the EU-Armenia Comprehensive and Enhanced Partnership Agreement Implementation 2019, 103-107).

The EAEU obligates its members to have a coordinated energy policy, including the development of common electricity, gas and oil markets (EAEU 2014, art. 79, 81,83,84). Interestingly, however, the gas sector within the energy chapter of CEPA has been noted as rather superficial.[34] This is likely the reflection of the tailor-made or "differentiated" nature of CEPA (in comparison to AA-DCFTAs), taking into account Armenia's EAEU obligations as well as its overwhelming dependence on imports of Russian natural gas. Still, there remain questions about possible hindrance in the longer run to deepening cooperation with the EU in this area.[35]

b) Transport and connectivity

CEPA promotes the development and expansion of road, rail and air transport. The agreement provides for the approximation to the EU *acquis* (which is quite developed in this area). Moreover, the EU supports the development and improvement of road infrastructure in Armenia. The reviewed ENP attaches importance to cooperation in transport and connectivity, and the EU is committed to extending the core Trans-European Transport Network (TEN-T) to Eastern partners.

On the other hand, the EAEU also puts strong emphasis on transport policy. It requires a coordinated transport policy among members, with the view of gradually reaching a common transport area (EAEU 2014, art. 86). Thus, questions have already been raised about whether Armenia will have the necessary freedom to carry out transport and connectivity policy that would enable closer partnership with the EU in this area and whether EAEU membership may prove to become a hindrance in time.[36]

c) Trade

The EAEU foresees a common regime of trade of goods with 3rd parties (EAEU 2014, art. 25. See also EAEU 2014 art. 4, 5.)[37] Moreover, the EAEU's ultimate goal

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34 (Kostanyan and Giragosian 2017, 13).

35 (Terzyan, Bringing Armenia Closer to Europe? Challenges to the EU-Armenia Comprehensive and Enhanced Partnership Agreement Implementation 2019) at p. 106.

36 (Terzyan, Bringing Armenia Closer to Europe? Challenges to the EU-Armenia Comprehensive and Enhanced Partnership Agreement Implementation 2019), p. 104. The author does also argue, however, that it might be too early to make far-reaching conclusions on this, as some issues would be possible to address bilaterally between EU, Armenia and Russia (see Terzyan 2019, p. 104-105).

37 Some argue(d) that it is too early to conclude on this, as it would be possible to address bilaterally between EU, Armenia and Russia (see Terzyan 2019, p. 104-105).

is to achieve not only a common market of goods (which undoubtedly includes gas), capital, labor and services, but complete economic integration, which entails not only eliminating tariff barriers and imposing common external tariff policy, but also deeper harmonization and common macroeconomic policies. All this may suggest that Armenia "is considerably constrained to boost trade and broader economic cooperation with the EU".[38]

CEPA defines provisions on the trade and trade related matters, such as customs cooperation, national treatment and market access, in which stipulates that in EU companies will receive no less favorable treatment than that accorded to their own. CEPA stipulates that Armenia "shall take further steps … to gradually approximate its economic and financial regulations and policies to those" of the EU (CEPA, Article 22). CEPA nevertheless, does not imply any type of free trade area. It is "comprehensive in its inclusion of chapters with similar titles as used in the DCFTA, but with key substance lacking in areas that would conflict with Armenia's commitments to the [EAEU]."[39] Even so, if EAEU obligations are reinforced in time and economic integration does deepen, doubts arise as to tangible advancement in the EU-Armenia cooperation in trade that CEPA envisaged.

In brief, if we are to assume[40] that the EAEU will further develop toward its goal of a common market (goods, including gas, capital, labor) and the longer-term process of complete economic integration, which entails not only eliminating tariff barriers and imposing common external tariff policy but also deeper harmonization and common macroeconomic policies, then looming questions remain as to whether incompatibilities will arise with time, thereby limiting effective implementation of CEPA and the further deepening of EU-Armenia economic partnership. Only a deeper comparative analysis of both agreements and ensuing policy developments, and most importantly the degree of their implementation, would allow to verify or dismiss such apparent concerns of longer-term compatibility or potential limitations down the road.

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38 (Terzyan, Bringing Armenia Closer to Europe? Challenges to the EU-Armenia Comprehensive and Enhanced Partnership Agreement Implementation 2019), p. 104.

39 (Kostanyan and Giragosian 2017, 16).

40 The assumption is far from given, as many argue that 10 years into its formation, the EAEU goals toward achieving comprehensive economic integration remain unfulfilled. See, for example, (Aidarkhanova, Who Benefits From the Eurasian Economic Union? 2023) and (Aidarkhanova, Why Is the Eurasian Economic Union Broken? 2023).

2. Early optimist prospects for Armenia bridging economic relations between the two Unions

There is little doubt that Armenia's case, as an EAEU member state with such advanced legally based relations with the EU, would have been a test for checking the long-term compatibility of the two unions' norms. At the same time, one might also wonder if Armenia's balanced policy might have had the potential of reducing risks of incompatibilities that might arise, or even contribute to *rapprochement* between the EU and the EAEU or Russia? This could be beneficial not only for Armenia but also —as presumptuous as it might seem— a modest contribution toward reconciliation between the West and the East.

Theoretically, and making full abstraction of the current geopolitical context (a point which we will touch on later in this article), a free trade arrangement between the EU and the EAEU would be possible. Attitudes and initiatives seemed to be leaning in this direction before the Ukrainian crisis in 2013, and even after the Eastern Partnership Vilnius summit in February 2014.[41]

Even after Russia's annexation of Crimea in 2013, EU member states' attitudes toward cooperation with the EAEU differed, sometimes radically.[42] The EU's 'principled pragmatism' policy adopted through the EU Global Strategy in 2016 seemed to be an opening signal in this direction. In 2017, Greece even signed a joint declaration on Cooperation with the Eurasian Economic Commission (EEC). At the time, cooperation between the two blocs (or at least competitive cooperation) seemed eventually unavoidable, even desirable.[43]

In this context, when CEPA was signed in November 2017 and in the immediate years that followed, optimists in Armenia and beyond, envisaged that Armenia, the only country with deep relations both with the EU, Russia and Eurasia, could become a proactive facilitator and even a bridge between the EU & EAEU blocs.[44] During its previous presidency of the EAEU in 2019, Armenia even demonstrated its will to advocate for and facilitate multi-vector ties between

41 (KAS 2020, 65), referring to Potapov, Pavel /Overview, TCU Center for Eurasian Studies, 2019.

42 (KAS 2020, 65-67).

43 (KAS 2020, 67), referring to Potemkina, 2017.

44 (KAS 2020, 68-76). A comment in that direction was even made by the Russian Foreign Minister Sergei Lavrov in April 2018 (see (KAS 2020, 72).

EAEU and third countries and associations, such as Iran, Vietnam, Singapore and others.[45] Soon enough, geopolitical developments would come to change this outlook.

V. The current geopolitical context

Unfortunately, any optimism about Armenia's bridging potential between the two economic regions is even less realistic today. The reality of today's world[46] is quite different. Current geopolitics, most significantly the ongoing Russian war in Ukraine and its consequences and opportunities, have significantly changed the trajectories of the key players, namely the EU and Russia.

1. Deteriorating relations between Armenia, Russia and CSTO

In fact, at the time of publishing this article, developments in Armenia's foreign policy seemed to be going in the opposite direction. Russia-Armenia relations are at their lowest ever. As recently as February 23, 2024, Prime Minister Nikol Pashinyansignaled his readiness to pull Armenia out of the Russian-led Collective Security Treaty Organization (CSTO).

A few days later, Armenia's speaker of Parliament in speaking to journalists suggested that Armenia should consider seeking EU membership candidate status, even though the Government has so far not announced any such plan.[47] Leaving the Eurasian Economic Union (EAEU) is not on Armenia's agenda, however. The deputy speaker of the National Assembly of Armenia, Ruben Rubinyan, on 1 March 2024, stated this the Antalya Diplomacy Forum in Turkey—and answering the question whether Armenia plans to leave the EAEU so that membership in this organization will not interfere with the country's integration into the European Union (EU), particularly in terms of customs procedures. "No, such a matter is not on the agenda," Rubinyan said.[48] This position seems based on what the Armenian Prime Minister said on 25 December 2023, on the occasion of Armenia taking over the presidency of the EAEU, which "is based on the fundamental provision that the EAEU is an economic union that should not have a political and, even more so, a geopolitical agenda. We continue to perceive it as such and in this context develop cooperation within the framework of our economic cooperation, striving to prevent all at-

45 (KAS 2020, 74-75).

46 At the time of the Network Conference in September 2023 and since then, at the time of writing this contribution.

47 (Bedevian 2024). (Reuters 2024). (Gavin 2024).

48 <https://news.am/eng/news/810199.html>.

tempts to politicize Eurasian integration. The EAEU and its economic principles should not be linked to political ambitions."[49] Later in Antalya, on March 1, Toivo Klaar, the EU Special Representative for the South Caucasus and the Crisis in Georgia, said that "the EU respects Armenia's decision to join the EAEU. The EU respects the decisions of Armenia, as well as all our partners, regarding the political associations in which they want or do not want to participate. Armenia decided to join the EAEU, and Armenia and the EU have found a way to build relations taking this into account. Here they see the potential to develop relations in the current context," Klaar added.[50]

Beside security considerations and related developments, economic relations are also changing. In 2023, the United Arab Emirates (UAE) was the largest source of foreign investment for Armenia. "This change has happened for the first time as traditionally Russia was the largest foreign investor in our country... The work we have done with the UAE in recent years is proving to be very effective," then Economy Minister Vahan Kerobyan said in an interview. He added that work is underway with India, China and the EU to diversify investment flows.[51] Regarding trade, however, "overall Russian-Armenian trade soared by more than 43 percent to $7.3 billion. It grew steadily even before the war in Ukraine not least because of Armenia's accession in 2014 to the Russian-led Eurasian Economic Union."[52] Russia has replaced the EU as Armenia's number one trading partner. According to the Armenian government data, Russia accounted in 2023 for over 35 percent Armenia's foreign trade, compared with the EU's 13 percent share in the total.[53]

2. Enhancing EU-Armenia relations in foreign and security policy through CEPA and beyond.

Within CEPA, provisions related to dialog and cooperation in security matters are few and relatively general, when compared to other matters covered in CEPA. In the over 380 articles of CEPA, only a couple of articles touch on security matters, within the preamble and under Title II entitled "Political Dialogue and Reform; Cooperation in the Field of Foreign and Security Policy".

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49 <https://www.primeminister.am/en/press-release/item/2023/12/25/Nikol-Pashinyan-Session-of-the-Eurasian-Economic-Supreme-Council/>.

50 <https://news.am/eng/news/810199.html>.

51 <https://arka.am/en/news/economy/uae_becomes_largest_foreign_investor_in_armenia_s_economy_in_2023_leaving_behind_kerobyan_/>.

52 <https://www.azatutyun.am/a/32827996.html>.

53 Growth In Armenian Exports To Russia Moderates (azatutyun.am) February 20, 2024.

In the CEPA preamble, one paragraph refers to the parties' desire "to further develop regular political dialogue on bilateral and international issues of mutual interest, including regional aspects, including regional aspects, taking into account the common foreign and security policy, including the common security and defence policy, of the European Union and the relevant policies of the Republic of Armenia;"

In Article 1 covering the objectives of CEPA, paragraph (d) reads:

> "(d) to promote, preserve and strengthen peace and stability at both regional and international level, including through joining efforts to eliminate sources of tension, enhancing border security, and promoting cross-border cooperation and good neighbourly relations;"

In Title II, which has 9 articles, the articles related to foreign security policy are 3, 5 and 8. Article 3 outlines the aims of political dialogue, which includes:

> "(d) to strengthen cooperation and dialogue international security and crisis management, in particular in order to address global and regional challenges and related threats;
>
> (...)
> (f) to foster result-oriented and practical cooperation between the Parties for achieving peace, security and stability on the European continent;
>
> (...)
>
> (h) to develop dialogue and to deepen cooperation between the Parties in the field of security and defence;"[54]

Beyond this level, however, there are no further details elaborated in CEPA regarding security.

Nonetheless, developments have taken place. Following the 2020 '44-Day War' by Azerbaijan against Nagorno-Karabakh and Azerbaijan's continued aggression against Armenia during 2022, on 6 October 2022, the Republic of Armenia agreed to facilitate a civilian EU mission alongside the border with Azerbaijan (EU Monitoring Capacity in Armenia, EUMCAP), while Azerbaijan agreed to cooperate with this mission as far as it is concerned, for a maximum period of two months. The EUMCAP (considered temporary) became fully operational on 20 October 2022. In a letter to the High Representative received on 27 December 2022, the Foreign Minister of Armenia invited the EU to deploy a dedicated civilian CSDP mission in Armenia. On 23 January 2023, the **European Union Mission in Armenia (EUMA)** under the EU's Common Security and De-

[54] CEPA, article 3; see also articles 5 and 8.

fence Policy (CSDP) was established with a two-year mandate.[55] By 20 February 2024, "EUMA has conducted over 1720 patrols contributing to enhanced security and stability on the Armenian side of the bilateral state border with Azerbaijan."[56]

On 13 February 2024, the 5th EU-Armenia Partnership Council[57] met in Brussels. Ahead of the Partnership Council, the EU issued its Partnership Implementation Report on EU-Armenia relations, the first since the previous Partnership Council and related implementation report in May 2022. The report underlined that Armenia continued implementing an ambitious reform agenda with strong EU support including financial assistance. It concluded that EU-Armenia relations have never been stronger.[58] The Council meeting confirmed the mutual interest and commitment of the EU and Armenia to deepen their relations. "To this end, they agreed to launch work on a **new EU-Armenia Partnership Agenda**, establishing more ambitious joint priorities for cooperation across all dimensions." "[…] The new EU-Armenia Partnership Agenda will aim to unlock the full potential of the CEPA."[59]

Perhaps foreshadowing what this new partnership agenda might include, in his press remarks following the EU-Armenia Partnership Council meeting, EU High Representative Josep Borrell stated: "We discussed other areas to strengthen Armenia's resilience, and I expressed my full commitment to further enhancing our cooperation **in the area of security and defence**. We will build our dialogue on foreign and security policy in the coming months."[60] This statement seems consistent with discussions related to Armenia's security during the EU Foreign Affair's Council held a few months earlier, in September 2023, and the October 2023 and November 2023 European Council meetings.

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55 <https://www.consilium.europa.eu/en/press/press-releases/2023/01/23/armenia-eu-sets-up-a-civilian-mission-to-ensure-security-in-conflict-affected-and-border-areas/?utm_source=dsms-auto&utm_medium=email&utm_campaign=Armenia: EU establishes a civilian mission to contribute to stability in border areas>.

56 <https://www.eeas.europa.eu/euma/eu-mission-armenia-marks-its-1st-anniversary_en>.

57 The Partnership Council is the body established by CEPA to supervise and regularly review itsImplementation. See CEPA, article 362.

58 <https://www.eeas.europa.eu/delegations/armenia/joint-press-statement-following-5th-meeting-eu-armenia-partnership-council_en>.

59 <https://www.eeas.europa.eu/delegations/armenia/joint-press-statement-following-5th-meeting-eu-armenia-partnership-council_en>.

60 <https://www.eeas.europa.eu/eeas/armenia-press-remarks-high-representative-josep-borrell-after-eu-armenia-partnership-council_en>.

> "The October 2023 European Council discussed how to further strengthen the EU cooperation with Armenia and support its democratically elected authorities, its resilience, its security and the continuation of reforms in the country.
>
> Building on that, the Council agreed to explore the possibility to provide non-lethal support to Armenia under the European Peace Facility and strengthen the EU Mission in Armenia, to allow for more observers and more patrols, including into sensitive areas."[61]

Thus, security and defence have become part and parcel of the Armenia-EU relations, which, according to EU Commissioner for International Partnerships Jutta Urpilainen, "have never been stronger than today."[62]

All this at a time when the Russia-led "Collective Security Treaty Organization, in [Armenia's] estimation, has failed to fulfill its obligations in the field of security towards the Republic of Armenia. In particular, in 2021 and 2022, and this could not go unnoticed by [Armenia] and without consequences. And the consequence in practice is that we have essentially frozen our participation in the Collective Security Treaty Organization."[63] The Armenian Prime Minister explains: "We have not said that we deny and reject cooperation with Russia in general and in the security sector in particular. What we have said is that we are going **to diversify our relations in the security sector**. What does this mean? Does this mean that we are going to break our security relationship with Russia? No, it doesn't mean that, but it means that in the field of security, we are preparing and ready, and we are discussing and working to establish relations, for example, with the European Union, which is already a reality by and large, with France, which is already a reality by and large, with the United States, which is already by and large a reality, with the Islamic Republic of Iran, which is already by and large a reality, with India, which is already by and large a reality, and with many other countries. Our security relations with the United States, or France, or India, or the European Union naturally are not

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61 Foreign Affairs Council, November 2023 – Main Results, available at: <https://www.consilium.europa.eu/en/meetings/fac/2023/11/13/?utm_source=social&utm_medium=twitter.com&utm_campaign=20231113-fac&utm_content=visual-card>.

62 *Armenia-EU relations have never been stronger - EU Commissioner for International Partnerships*, 27 February, 2024, available at: <https://armenpress.am/eng/news/1131292.html>.

63 (Prime Minister Nikol Pashinyan's interview with France 24 TV 2024) <https://www.primeminister.am/en/interviews-and-press-conferences/item/2024/02/23/Nikol-Pashinyan-Interview-France-24/>.

directed against Russia. This is simply the consequence of the reality that the security relationships we used to have in the past do not address our security needs."[64]

Armenia has in fact been diversifying its security partners. Just a few days after the PM's interviews with British and French media outlets, Armenia's Security Council Secretary Armen Grigoryan stated that "[as at] 2020, 96% of Yerevan's total military-technical cooperation was with Moscow, while since January 2021, Armenia has signed contracts worth several billion dollars with a number of other countries, which means military-technical cooperation with Russia has decreased from 96% to less than 10%."[65] Grigoryan noted that Armenia was forced to diversify this area, since "it was Russia's choice."

3. EU's increasing role in regional security in the South Caucasus

The EU's role in the South Caucasus is evolving. From a long-time focus on the export of European norms and values on good governance, democracy and human rights, the Union has progressively moved from political engagement and economic relations (appointment of a Special Representative for the South Caucasus in summer 2003, integration of Armenia, Azerbaijan and Georgia in the ENP in 2004, launch of the ENP in 2009) to a more active role in promoting and engaging in peace and security in the region.[66] The EU has recognized (in its self-interest) the need to increase its role and capacities as a security provider in the eastern and southern neighborhood, thus South Caucasus region, encompassing Armenia, Azerbaijan, and Georgia.[67]

"The EU Global Strategy in 2016 only discussed security challenges in the ENP in terms of resilience, although in recent years the EU discourse has become more security-focused. For example, in 2020 the EEAS declared the ambition of 'stepping up support for security dialogues and cooperation'."[68]

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64 (Prime Minister Nikol Pashinyan's interview with British The Telegraph 2023) <https://www.primeminister.am/en/interviews-and-press-conferences/item/2024/02/11/Nikol-Pashinyan-Interview-The-Telegraph/>.

65 Official: Russia's share in Armenia's defense cooperation drops to 10%, 2 March 2024, Pan Armenian Net, <https://www.panarmenian.net/eng/news/312650/>.

66 (Scotti 2023) <https://www.commonspace.eu/opinion/opinion-eu-engagement-south-caucasus-bringing-stability-and-prosperity-region>.

67 See for example Joint Communication to the European Parliament and the Council, *Joint Framework on countering hybrid threats – a European Union response*, JOIN (2016) 18 final, at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016JC0018&from=fr>.

68 (Deen, Zweers and Linder 2023).

In addition to the messages of increased engagement in security cited earlier in this section, most recently in March 2024, Toivo Klaar, the EU Special Representative for the South Caucasus, drew attention to the need for a sustainable agreement for peace to be established, saying, "When we talk about the situation between Armenia and Azerbaijan, a scenario is possible where all the Caucasus will be revived." He stressed the necessity of reaching an agreement where everyone wins through cooperation between the two sides.

"We cannot underestimate the significant role of Türkiye here. (Türkiye) is a neighbor of Georgia and Armenia and has very special relations with Azerbaijan. Türkiye also has a very unique opportunity right now because it can make this peace process much richer." Klaar also said that the peace process between Azerbaijan and Armenia will shape the cooperation agenda in the South Caucasus, stating, "We will have reached a civilian and unarmed population, and in this way, we will actually show our commitment to peace." He emphasized the financial importance of achieving tranquility in the region, stating that this would contribute to trade between Europe and China.[69]

In Armenia, some pundits have interpreted EU special representative Klaar's above-mentioned remarks as designating Turkey to be the master in the South Caucasus. Turkey's state run Anadolu News Agency seemed to concur with this reading: "EU representative praises Türkiye's peace efforts in South Caucasus."[70]

Is the EU truly ready to increase its geopolitical role and direct engagement in peace and security in the South Caucasus (does it have the tools to do so), or is it merely seeking to capitalize on current opportunities to push back Russia's influence in the region? Will this actually contribute to increased security?

VI. Conclusion

For Armenia, security concerns have been and inevitably remain a key driver of foreign policy, and a factor that is difficult to disassociate from decisions related to deepening of economic and trade relations. While EU-Armenia relations also seem to be evolving in this regard, broader consideration of Armenia's situation need not be disregarded.

> "Recent publications and academic debates show that the EU is an active player in the South Caucasus. While the EU aims to minimize Russia's influence in the region, the EU will not be able to replace Russia in the near

69 (Efesoy 2024).

70 (Efesoy 2024).

> future by exercising soft power (such as economic incentives or mediation), as long as it does not deploy leverage to push Baku to sign a peace treaty with Yerevan. For the EU, the issue of Artsakh, which was seen as one of the main obstacles to signing a peace treaty, is resolved. Following the loss of Artsakh [or Nagorno-Karabagh], the EU is pressuring Baku to fulfill its obligations and accept the EU's role in the region as a key mediating player. The question is to what extent the EU's strategy will work, amid the exclusion of other key regional actors such as Turkey and Iran. The geography and cultures of the South Caucasus are unique compared to other conflicts in Europe's neighborhood, such as in Eastern Europe. Policymakers must be aware that the South Caucasus is bordered by Iran, Turkey and Russia, and extra-regional actors such as China and India also have a share in this competition and in shaping the regional dynamics. Hence, for a stable and secure region, any peace process must be holistic, realistic and proportionally acceptable to the key actors."[71]

A late 2023 European-Armenian joint research project involving interviews with Armenian officials, EU diplomats in Armenia, and civil society representatives from both Yerevan and Brussels, highlights how "the European Union's engagement with Baku also affects the effectiveness of strengthening EU–Armenia relations"[72] and recommends to the European Union to "both demonstrate political will and take action to help address Armenia's security threats by clearly condemning the threat of force or use thereof against Armenia and following suit on the stated support to the Armenian military via the European Peace Facility."[73]

The future turn of events not only in the South Caucasus but also in other regions which would affect developments in the South Caucasus are so uncertain, that foretelling the future is a thankless task. One thing is certain, that the South Caucasus —and Armenia in particular— continue to be at the crossroads of conflicting interests and tendencies which will bring changes to the region, and inevitably also to Russia-Armenia and EU-Armenia relations.

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71 (Tashjian, Does the EU have any strategy in the South Caucasus? 2023) <https://armenianweekly.com/2023/12/13/does-the-eu-have-any-strategy-in-the-south-caucasus/>.

72 (APRI 2024) <https://apri.institute/strengthening-eu-armenia-relations/>.

73 (APRI 2024, 13) p. 13. <https://drive.google.com/file/d/1BOJNsJAANa7iJhARkLRD8fC2hpRBOu2c/view>.

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EU-Switzerland – do bilateral agreements have a future?

Andreas Kellerhals / Fatlum Ademi

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I. Introduction

The starting position for Switzerland, towards the EU, is marked by a unique set of circumstances. As a non-member state, Switzerland operates outside the EU while maintaining a complex web of bilateral agreements governing various aspects of its relationship with the EU. Historical, political, and socio-economic factors have contributed to shaping Switzerland's unique position within Europe.

This position grants Switzerland a certain level of autonomy in crafting not only domestic but also external policies. The relationship between Switzerland and the EU is largely defined by a series of bilateral agreements.[1] These agree-

[1] See also Matthias Oesch, Schweiz – Europäische Union, Grundlagen Bilaterale Abkommen, Autonomer Nachvollzug, Zurich 2020, p. 3, available at: <https://eizpublishing.ch/wp-content/uploads/2020/11/Schweiz-Europaeische-Union-V1_04-20201002-digital.pdf>.

ments cover and regulate a wide spectrum of areas, among them trade, research, Schengen/Dublin and the free movement of persons and grant Switzerland partial access to the EU markets. This access to the EU single market is crucial for the Swiss economy, making political negotiation and continuation of favorable trade agreements a priority, highlighting the importance of the high economic interdependence with the EU. The existence and future of the bilateral agreements significantly influence Switzerland's current position towards the EU and vice versa.

The Swiss find themselves in a complex current situation, akin to an "island" within the continent of Europe. Despite being economically and culturally tightly intertwined with the EU, there is a noticeable political abstinence and a lack of consensus on the topic of EU integration amongst the Swiss population, that can also be labeled as an "eternal topic" due to its long, unsolved history.[2]

Today, the bilateral approach is under pressure.[3] The EU has made it clear that it is only willing to continue this particular way of integration if Switzerland is willing to accept certain conditions such as an institutional framework or a commitment to take over coming relevant EU legislation. These conditions have led to an intensive discussion about the relationship with the EU in Switzerland. In order to achieve a common ground with the EU for the future bilateral path, it is crucial to understand how this situation has come about, explore alternative models and define in essence what Switzerland wants from this partnership with the EU. Exploring alternatives becomes imperative. Objectivity, historical awareness, consideration of alternatives, and a clear vision for the future will be key elements in determining Switzerland's path forward. This may involve reevaluating existing agreements, considering new frameworks, or exploring innovative solutions that align with the country's own interests and values, without distancing itself from the EU.

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2 Besides being perceived as an eternal topic, the history of the Swiss relation with the EU is often described as a Special Case (Sonderfall). See also: Renat Kuenzi, 25 Jahre europäischer Sonderfall Schweiz, SWI, 2017, available at: <https://www.swissinfo.ch/ger/bundespolitik/schweiz-europa_25-jahre-europaeischer-sonderfall-schweiz/43726742>.

3 Hans Hartmann, Der bilaterale Weg: vom Erfolgs- zum Auslaufmodell?, Wirtschafts- und Sozialwissenschaftliches Institut, 2021, available at: <https://www.wsi.de/de/blog-17857-rahmenabkommen-eu-schweiz-der-bilaterale-weg-vom-erfolgs-zum-auslaufmodell-33994.htm>.

II. Europe and Switzerland: Historical Development

Switzerland's historical trajectory has been marked by a pioneering role in the 19th century, establishing itself as the only Republic and most liberal state in Europe. Recognizing the importance of an active foreign policy, the Swiss Federal Council engaged very proactively on the international stage. Switzerland managed to emerge as an initiator and member of numerous international organizations, a testament to its commitment to global cooperation, including its involvement in the League of Nations.

However, the game changing impact of World War I and World War II reshaped the Swiss approach, introducing significant shifts in the relations with Europe. The post-war period saw Switzerland navigate through nine distinct phases in its engagement with the rest of the continent. These phases were characterized by evolving dynamics, adapting policies, and responding to the changing geopolitical landscape. These subsequent phases underscore the Swiss nation's ability to adapt and navigate complex international relations in the ever-changing European context.

1. Phase 1: Immediate post-war period

Switzerland's commitment to neutrality during and after World War II had a profound impact on its international standing. While maintaining a neutral stance, this isolated the nation from the conflicts of the time, but also resulted in limited international recognition.

The absence of Swiss membership in the key international organization of the United Nations (UN) reflects the consequences of this neutrality. Switzerland, despite its significant contributions to global diplomacy, did not receive an invitation from the "victorious powers" post-World War II, highlighting the challenges of remaining neutral in a politically charged global landscape.

Switzerland's decision to stay outside the General Agreement on Tariffs and Trade (GATT) and its skepticism about the International Monetary Fund (IMF) further underscore its cautious approach to international economic participation.[4]

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[4] Thomas Cottier/Rachel Liechti, Die Beziehungen der Schweiz zur Europäischen Union: Eine kurze Geschichte differenzieller und schrittweiser Integration, Basler Schriften zur europäischen Integration, Nr. 81, Basel 2006, p. 51 ff.

Furthermore, Switzerland decided to stay absent from the Council of Europe, as this institution was perceived as too political and additionally kept distance from the military alliance Western European Union. The Swiss commitment to autonomy and its non-alignment in regional security matters was exhibited finally in its political distancing from the European Communities.

2. Phase 2: Foundation of the EEC and EFTA

In the early 1950s, significant developments unfolded in Europe resulting in the establishment of key institutions. In 1952, the European Coal and Steel Community (ECSC) was founded, laying down the groundwork for supranational collaboration within the states of the continent. Subsequently, in 1958, the European Economic Community (EEC) and Euratom were established, marking a pivotal moment in European integration.

Amid these developments, the crucial question of supranational structures versus the challenge of maintaining neutrality, that would define the future path for Switzerland, had emerged. Initially, Switzerland alongside the United Kingdom, expressed a preference for a purely economic integration, as evidenced by their participation in the Organization for European Economic Cooperation (OEEC).[5]

In 1960, Switzerland and six other states founded the European Free Trade Association (EFTA). This initiative aimed to counteract the potential dangers of isolation by creating an industrial free trade zone and serving as a platform for interactions with the EEC. The establishment of the EFTA reflected Switzerland's commitment to navigating the complexities of European integration while upholding its principles and maintaining a balance between economic cooperation and national autonomy. Importantly, this decision garnered broad national consensus in Switzerland, reflecting a united stance on the need for strategic economic engagement in an ever-evolving European landscape.[6]

3. Phase 3: Attempted Association 1961-1963

In 1961, the EEC extended a proposal to the member states of the EFTA, suggesting the establishment of an Economic Association of the EFTA states. This envisioned a form of economic integration without a political finality, a cus-

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5 See also Federal Department of Foreign Affairs on the OECD, available at: <https://www.eda.admin.ch/eda/en/fdfa/foreign-policy/international-organizations/oecd.html>.

6 See also Federal Department of Foreign Affairs on the establishment of the EFTA and the EEA, available at: <https://www.eda.admin.ch/eda/en/fdfa/foreign-policy/international-organizations/efta-eea.html>.

toms union, or a common foreign trade policy. In response, the EFTA states, including Switzerland, submitted a request to open negotiations, ultimately leading to the establishment of the Integration Office. The proposal, however, proved politically controversial. It marked the beginning of debates and discussions, with the first accusations of "cherry-picking" directed at the EFTA states, insinuating selective economic integration without full commitment.

The year 1963 brought a significant development when French President Charles de Gaulle vetoed the admission of Great Britain to the EEC, which caused a standstill in the integration process. Faced with this geopolitical hurdle, the Swiss Federal Council decided to freeze the association application, recognizing the challenges and uncertainties in the evolving European landscape.

4. Phase 4: Focus on reducing general trade disadvantages 1963-1967

Following the breakdown of negotiations with the EEC, Switzerland exhibited notable restraint in its interactions with the EEC. Instead, there was a perceptible shift towards the GATT, especially during the so-called Kennedy Round, that was the sixth session on multilateral trade negotiations of the GATT. This period saw efforts to reduce tariff discrimination and its successful conclusion lead to a strengthening of the position of the EFTA, since it enhanced the prospects for further trade expansion at a time of special importance for them.

By concentrating efforts on GATT, reinforcing EFTA, and aligning with key democratic values, Switzerland sought to navigate a complex international landscape while upholding its core principles. In 1963, Switzerland took a further significant step by acceding to the Council of Europe. This move was facilitated by a strategic alignment with democratic principles and the rule of law, enabling Switzerland to navigate its neutrality policy more effectively. The focused orientation of its foreign policy, particularly in areas aligned with democracy and legal principles, made the Swiss accession unobjectionable from the perspective of its longstanding commitment to neutrality.

5. Phase 5: Free Trade Agreement 1972

In 1969, a significant shift occurred with the resignation of Charles de Gaulle, which opened the way for the expansion of the EEC. Subsequently, in 1972, the United Kingdom joined the EEC, marking a notable development in the community's composition.

Around the same time, in 1972, Switzerland concluded a crucial free trade agreement with the European Free Trade Association (EFTA). This agreement aimed at the progressive reduction of customs duties on industrial goods, excluding agriculture, until 1977. The exclusion of agriculture from the agreement allowed Switzerland to address a key export challenge for industrial goods.[7]

Switzerland's approach was distinctive in that it achieved a resolution to its significant export problem without opting for full participation in the "political" aspects of the EEC. This approach garnered a large consensus among the Swiss population, leading to a voluntary referendum in which 72.5% of the voters approved the agreement. This marked a clear demonstration of support from the Swiss people for the strategic direction taken by their government in navigating economic collaborations while maintaining their distinct political stance.

6. Phase 6: EEA and EU Accession Application

In 1987, the EEC introduced the Single Market Programme with the goal of achieving a unified market by 1992. This initiative, driven by Jacques Delors, set in motion new dynamics and accelerated integration within the EEC. Switzerland began examining its compatibility with the evolving European framework. In response to the proposal for EEA membership by the EEC as an alternative to full accession, Switzerland entered into challenging negotiations (EEA I and II). A major hurdle in the negotiations was the lack of participation rights for Switzerland. Facing difficulties in the negotiations, Switzerland submitted an application to join the EU in 1992. The concept of the EEA was viewed by some as a "training camp" for potential EU membership. However, this path faced a significant obstacle on December 6, 1992, when the Swiss people voted on EEA membership. The result was a close "no" from the people and a clear "no" from the cantons.[8]

The rejection of the EEA marked the end of a consensus on integration policy in Switzerland. The formation of political camps with differing views on the nation's relationship with the EU highlighted the complexity and division surrounding the issue of European integration within the Swiss political landscape.

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7 See also Botschaft des Bundesrates an die Bundesversammlung über die Genehmigung der Abkommen zwischen der Schweiz und den Europäischen Gemeinschaften vom 16. August 1972, BBl 1972 II 653.

8 Hans Weder, Von der «Lebenslüge» zu einer realistischen Europa-Politik, Standpunkte, Nr. 2, Zurich 2022, p. B1, available at: <https://eizpublishing.ch/wp-content/uploads/2022/02/Standpunkte-Werder-Schweiz-EU-Digital-V1_01-20220210.pdf>.

7. Phase 7: New Bilateralism

Following the rejection of the EEA bill, Switzerland embarked on a new course with a follow-up program in 1993. Notably, this program involved the adoption of Swisslex instead of Eurolex, signaling Switzerland's commitment to maintaining its (legal) autonomy.

The subsequent strategy involved the commencement of bilateral, sectoral negotiations with the EU. These negotiations were structured to address specific areas of collaboration, allowing for a more nuanced and tailored approach to cooperation.

The period from 1994 to 1998 witnessed the implementation of Bilaterals I, covering crucial aspects such as the free movement of persons, air transport, land transport, research, public procurement, trade barriers, and agriculture.[9] Building on this foundation, the years 2002 to 2004 saw the initiation of Bilaterals II, encompassing agreements on agricultural products, the environment, media, pensions, Schengen/Dublin, combating fraud, taxation of savings income, and education.[10]

Worth stressing is the implementation of the guillotine clause, a mechanism that ties the various bilateral agreements together. It is a stipulation that an adoption of a contract package depends on the adoption of all the individual treaties or contracts included. Under the guillotine clause, if only one treaty or contract is either not accepted by an involved party or canceled later, all treaties or contracts are then deemed not accepted or terminated.

While these bilateral agreements covered a range of areas, certain issues such as collaboration with Europol, participation in the European Defence Agency, competition policies, and others remained outside the scope of these negotiations.

8. Phase 8: Framework Agreement

The more recent timeline of Switzerland's engagement with the EU reflects a series of developments. This recent chapter in the EU-Swiss relationship highlights the complexities of negotiating a framework agreement and the challenges of finding common ground on key issues:

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9 See also Botschaft zur Genehmigung der sektoriellen Abkommen zwischen der Schweiz und der EG, BBl. 1999 6128.

10 See also Botschaft vom 1. Oktober 2004 zur Genehmigung der bilateralen Abkommen zwischen der Schweiz und der Europäischen Union, einschliesslich der Erlasse zur Umsetzung der Abkommen (Bilaterale II), BBl. 2004 5965.

- In 2014, negotiations on a framework agreement with the EU were initiated, signaling a potential step toward further defining the bilateral relationship;
- In 2016, Switzerland took a significant step by withdrawing its EU accession application. This decision marked a new starting position for the EU-Swiss relationship;
- By 2021, negotiations on the framework agreement reached their conclusion. Initially, the Federal Council expressed overall satisfaction. However, after consultation, concerns emerged in four key areas: wage protection, the EU citizenship directive, state aid, and the role of the European Court of Justice (ECJ). Notably, the EU was unwilling to make substantial concessions to Switzerland in these crucial areas, leading to a challenging impasse. On May 26, 2021, the Federal Council then unilaterally terminated the negotiations without a clear alternative plan. This decision was met with displeasure from both the EU but also domestically from many economic sectors and parts of the population within Switzerland.

The authors of this article believe that the unilateral termination of negotiations by the Federal Council without presenting an alternative plan was risky and basically a mistake. The decision not only complicated the EU-Swiss relations but also made opening new negotiations significantly more difficult than continuing the previous ones.

The Framework Agreement, which was on the table, was seen by many as a good agreement. Its provisions, including a Court of Arbitration, the right of rejection, and proportional compensation, were considered favorable for Switzerland. Achieving a similarly advantageous result in future negotiations with the EU would likely be challenging.

Several factors contributed to the failure of the agreement. The lack of leadership, both at the Federal Council level and among cantons, associations, and political parties, played a significant role. Domestic disagreements and a failure to present a united front weakened Switzerland's position.

Contentious issues such as the role of the EU Court of Justice, concerns related to wage protection (particularly from trade unions), and potential impacts on social services created additional hurdles. The inflexibility of the EU Commission in addressing these concerns further complicated the negotiations.

The breakdown of the Framework Agreement highlighted the importance of strong leadership, internal consensus, and flexibility in dealing with complex negotiations. The challenge now lies in rebuilding trust and finding common

ground to establish a more stable and mutually beneficial relationship between Switzerland and the EU.[11]

9. Phase 9: After the Framework Agreement

As of February 2022, Switzerland's pre-negotiating talks with the EU are marked by a new proposal presented by the Federal Council. This proposal adopts a sectoral approach, addressing each sector individually without a comprehensive institutional framework. However, the EU's response to this approach has been less favorable, indicating a lack of enthusiasm or agreement.[12]

Despite the new proposal, exploratory talks have been ongoing since the end of 2021. Unfortunately, these discussions have not yielded significant progress, resulting in a stalemate in the negotiation process. Interestingly, negotiating with Brussels appears to be less challenging than navigating the domestic landscape in Switzerland.

A notable challenge stems from the absence of a domestic political consensus within Switzerland regarding the desired outcome of the negotiations. This lack of unity poses a significant challenge in reaching a satisfactory agreement both internationally and at home.

III. Next Steps

Switzerland's ongoing negotiations with the EU must enter a new phase. The appointment of a new chief negotiator (already the fourth in four years) signals a bit of an ambivalent shift in the Swiss approach to EU relations. Despite these changes, there is optimism that exploration discussions with the EU could conclude by the end of 2023.[13]

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11 See also Gafafer Tobias, Bilaterale III, Rahmenabkommen 2.0 oder Kolonialvertrag? Wie mit Wörtern Politik gemacht wird, NZZ 2024, available at: <https://www.nzz.ch/schweiz/bilaterale-iii-rahmenabkommen-20-oder-kolonialvertrag-wie-mit-woertern-politik-gemacht-wird-ld.1774713>.

12 See also Strahm Rudolf, Ein umfassendes Freihandelsabkommen könnte die Blockade lösen, Tagesanzeiger 2021, available at: <https://www.tagesanzeiger.ch/ein-umfassendes-freihandelsabkommen-koennte-blockade-loesen-464064062231>; Baltensperger Ernst, Die Schweiz und die EU – wie weiter?, Tagesanzeiger 2022, available at: <https://www.tagesanzeiger.ch/die-schweiz-und-die-eu-wie-weiter-221647455544>.

13 Especially in the aftermath of the Russian Invasion in Ukraine in 2022, there has been a broader discussion about Swiss Neutrality. See also, Daniel Thürer, Die Neutralität der

Post-election decisions in Switzerland, following the October 2023 elections, will determine the mandate for future negotiations with the EU. This sets the stage for potential formal negotiations to commence in spring 2024, with decisions made based on the established mandate.

However, challenges arise considering the EU elections and the formation of a new Commission in the fall of 2024. The difficulty of concluding negotiations with the existing Commission prompts a realistic timeline that foresees completion in 2025.

Final decisions from both the EU and the Swiss Federal Council and Parliament are expected in 2025, followed by a Swiss referendum in 2026. If the negotiation process unfolds as planned, a new bilateral regime resulting from these discussions may eventually be implemented in 2027.

IV. Alternative to the Bilateral Way?

Switzerland`s position and potential future directions for its engagement with the EU are of strategic necessity. The question arises, what alternative models might be considered as options, as the traditional bilateral way seems to halt. There are a few possible scenarios deserving to be mentioned[14]:

- **Standalone**: this would mean to terminate all current agreements between the two entities especially the free-trade agreement of 1972. Such a move would be deadly for Switzerland's export economy and is therefore not seriously proposed by anyone.
- **Bilateral Agreement**: considering the current status, the question remains open on whether the EU is willing to expand and agree on new bilateral agreements other than keeping the existing ones going. Without a new approach, no new agreements (e.g. in the area of energy) could be made.
- **Association Agreement** (Framework Agreement): What such an agreement would be is not precisely defined, but it would certainly mean some kind of institutional framework for all existing and new agreements, something the Swiss Government just rejected two years ago.
- **Customs Union**: The concept of a customs union introduces considerations about the reduction of trade barriers and potential impacts on customs sovereignty. A reference to the "British way" suggests the need to examine

Schweiz, in: Thürer (Ed.), Wille zum Recht: Wille zur Bewahrung, zum Wandel und zur Öffnung, Grundidee Gerechtigkeit, Ed. 4, Zurich 2023, 103.

14 See also the suggestion of possible options in the bilateral way, Ambühl/Scherer, p. C8.

potential parallels with the UK's post-Brexit relationship with the EU. To form only a customs union would not serve both partners much and is therefore not considered a valuable alternative.

- **EEA:** The prospect of Switzerland's participation in the EEA raises questions about the extent of involvement and collaboration within this framework. Swiss citizens rejected that solution in 1992 and the contra arguments from then are somehow still applicable today.
- **EU Accession**: Contemplating EU accession, the discussion is framed within the context of a changed EU, operating at different speeds or with varying levels of integration. Right now, such a proposal would not gain a majority among Swiss voters in a referendum.

V. Present situation for Switzerland

With the implementation of the Bilaterals I and II, the most significant problems for cross-border business are settled. However, there is a looming risk of the expiration of the Bilateral Agreements due to the lack of updates, emphasizing the limitations of the bilateral approach. Furthermore, naturally there are limits for the continuation of the traditional bilateral approach. One challenge lies in the voluntary alignment, or "Autonomer Nachvollzug" where Switzerland aligns with EU regulations without having a direct say in their formulation.[15] This underscores the fundamental principle that cooperation requires the participation and agreement of both parties. But as seen, voluntary alignment is possible, exemplified by the "Cassis de Dijon" principle. However, under the current situation, the scope for new agreements, such as in the electricity sector, is increasingly restricted and unrealistic.

The politically loaded and recurring question of the European Integration in Switzerland – unlike for example in Liechtenstein – in every couple of years is causing some fatigue on the seemingly never-ending debate. This leads to concerns about Switzerland`s future integration policy, as it is difficult to achieve a political consensus on this topic. In addition, the elections in Switzerland add another dimension of complexity to this question.

The fractured consensus in Switzerland, compounded by challenges arising from elections, further complicates the formulation of a large pro-integration camp and therefore also of a cohesive integration policy. This prompts a critical reevaluation of objectives: What does Switzerland want, and what is realistically attainable in the current political landscape?

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15 See Oesch, p. 193.

Besides the existing difficulties for the Swiss way of European integration, there lies a series of political challenges ahead. The EU Commission's stance on withholding new agreements until old issues are resolved poses a significant obstacle to forging new agreements, adding a complex component in ongoing negotiations.[16]

Key areas of discussion with the EU encompass the role of the ECJ, concerns surrounding the free movement of people, including the "10 million is enough" initiative[17], and considerations related to immigration into the social welfare system. Additionally, the negotiation process addresses the crucial issue of protecting high salaries for Swiss workers, particularly in the context of salary dumping, reflecting the interests of labor unions.

The shrinking political support for a common EU integration policy further complicates the path to a constructive solution with the EU. Divergent perspectives from unions, socialists, conservatives, neutrality advocates, sovereignty proponents, and the potential for referendums create a multifaceted and challenging political landscape, where unity on a heated topic is difficult to achieve.

VI. What needs to be done?

Switzerland faces the imperative challenge of finding majorities within its diverse political landscape to cohesively move forward in its relationship with the EU. The key question needs to revolve around discerning the majority's desires, with a primary focus on stabilizing the EU-Swiss relationship in the medium term.

Recognizing the significance of the EU internal market basically as the real home market for Switzerland's. export industry alternative solutions such as the British model seem deemed unattractive. This prompts contemplation of a new approach, potentially through an EEA II agreement or exploring other possibilities.

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16 Switzerland's got excluded from full membership in the Horizon program, a vital platform for European scientific collaboration, and lack the mutual recognition of the equivalence for the Swiss Stock Exchange.

17 During the past 50 years Switzerland has practically doubled its population from 5 million to almost 10 million mainly through free movement of people from other EU member states like Germany.

However, a notable predicament surfaces. The access to the internal market of the EU necessitates adherence to the prevailing rules. The EU adheres to the level playing field of the member states, and will not alter these rules specifically for Switzerland as a third state.

A crucial requirement in navigating this intricate landscape is effective political leadership in Switzerland. There needs to be a decisive political direction in the Swiss approach, which is imperative to address the challenges with the EU. The elections in 2023 give hopes for better prospectives in the future.

Incredible ...but achievable – How Moldova is running for EU accession process

Viorel Cibotaru

This article discusses the Republic of Moldova's challenges in this difficult time. The regional security developments, the Russian Federation's war against Ukraine, and the economic, energy, and refugee crisis, aggravate the situation even more.

The Republic of Moldova reaffirms its unconditional support for the independence, sovereignty, and territorial integrity of Ukraine within its internationally recognized borders. We strongly condemn Russia's war against Ukraine, the illegal annexation of occupied territories (Crimea, Donetsk, Kherson, Luhansk, and Zaporojie), the aggressive rhetoric on the use of weapons of mass destruction and the indiscriminate air attacks on Ukrainian cities, and critical infrastructure. We all see the effect of those attacks on the lives of the Ukrainian people and the Republic of Moldova started also to feel more instantly. We deplore the loss of life and the human suffering. At the same time, we continue to provide support to the Ukrainian refugees, within the available resources and will be ready to support a post-conflict demining mission to Ukraine. The efforts of the Government and citizens of the Republic of Moldova in managing this crisis have been continuously supported during this entire period by international partners to whom we are very grateful.

The Republic of Moldova and Ukraine received a promising opportunity, being accepted as a candidate for EU integration, which is of high importance, but in extremely difficult security conditions. Today, besides Ukraine, the pressure placed on the Republic of Moldova as a result of the Russian war against Ukraine is much higher compared to any country in Europe. The war in Ukraine and hybrid threats deteriorated significantly the security environment through subversive actions on energy infrastructure and supply, the energy crisis on the European continent, high rates of inflation, the decrease in the standard of living, refugees and population migration, media manipulation to discredit state institutions, etc. At the same time, the Russian attacks on critical infrastructure in Ukraine directly affected the economic and social situation in Moldova.

In addition to that, the Russian propaganda, promoted by some of the local opposition parties, with a pro-Russian agenda, is putting enormous pressure on the government by trying to diminish its achievements using the dependence

on the Russian gas supply and the increase of prices. Let me be honest, without the support of our partners, it would have been very difficult for us to face all these challenges alone, and keep Moldova out of Russian control.

Russian tactics of conducting the war are a growing threat to Moldova's and regional security. Moldova remains vulnerable to potential military threats and we see possibilities from a potential low-intensity conflict to a full-scale war, but conditioned by the developments in Ukraine. It has to be noted that Moldova is a frontline state with 1200 km of border with Ukraine, 450 km of which is the Transnistrian segment not controlled by the national authorities. Among several military risks and threats generated by the war, recently Moldova has noticed a brutal violation of its airspace by Russian ballistic missiles targeted at Ukrainian territory. Later a Russian missile shot down by Ukrainian air defense fell on a village in northern Moldova and caused damage, being one of the clearest instances of violence from the war spilling into Moldova. Such aggressive actions are a grave violation of Moldova's constitutional neutrality and international legislation. It also highlights the country's vulnerabilities in the area of air surveillance and air defense, on one hand, and are a threat to international civilian aviation operating in the Moldovan airspace, to the population and territory of the country, on the other hand.

Additionally, the country's vulnerability is exacerbated by the existence, for over 30 years, of a separatist region not controlled by the constitutional authorities and the illegal presence of the Russian forces (so-called Operational Group of Russian Troops (OGRT)) and ammunitions on the Moldovan territory. We closely monitor the situation and as of today, we assess it as relatively calm but unpredictable.

The Government of Moldova remains committed to ensuring the safety and security of the population. After the brutal violation of its airspace, the Republic of Moldova addressed diplomatic demarches condemning Russia's aggressive actions. At the same time, the latest developments stress the urgent need for practical actions to address the issue. The Moldovan Government works on adopting specific preventive strategies and appropriate mitigating measures to reduce vulnerabilities of a military and non-military nature simultaneously, with the development of appropriate response capabilities. Several objectives are pursued: strengthening national security and defense capacity, not allowing the use of Moldovan territory for aggressive actions against neighboring Ukraine, and contributing to regional and European security and stability.

More than one year after signing the letter of application to join the EU we can say that this was a courageous step. And time shows that this was the right decision. It has been an intense year, full of events. Dramatic events (because of the war), as well as historic events for Moldova's European future.

After signing the application letter, an important political and diplomatic workload followed. We aimed to prove to the Commission and Member States that we deserve a positive decision. Moldovan top officials (President, Prime Minister, Minister of Foreign Affairs and European Integration, etc.) have been on calls with their EU counterparts 24/7. The institutions have done well in answering 2 Commission's Questionnaires in an expedited manner.

On 17 June 2022, the Commission issued its Opinion (with 9 recommendations) and on 23-24 June the European Council decided to grant candidate status to MD, also recognizing the European perspective for my country. Right afterward, we approved an Action Plan (9 steps) (approved by NCEI on 4 August 2022). Since then, the institutions started the implementation of this Plan. To date, Moldova has produced two Reports (non-papers) that were presented to the Commission and Member States (18 Oct 2022 and 6 Feb 2023).

In this period, we have hosted an impressive number of EU officials from Brussels and Member States in Moldova. The intensity of contact has been without precedent. On 7 February 2023, Moldova held the 7th edition of the Association Council.

The Moldova-EU relations have never been in better shape. As you know, this has been a difficult year. However, we were not alone. The EU did help us to face the challenges provoked by the war next door. And we appreciate this help very much. We had to face an influx of refugees (over 700K transiting and over 80K staying). Energy security was a major challenge. The EU and Member States (RO) have helped financially and with supply. Security and defense vulnerabilities – we address these together:

- Frontex presence
- EU Security Hub
- High Level Political and Security Dialogue
- Next CSDP advisory mission to MD
- European Peace Facility (from 7 mln to 40 mln)
- Increasing security and defense capabilities

Economic progress, improving security, and reinforcing our democracy are part of our journey towards membership in the European Union. Moldova's European aspirations have long been well known. Last May, one hundred thou-

sand Moldovans rallied in Chișinău to reassert their commitment to democracy – and EU membership.

Moldova's EU membership is not just a political choice, it is the only way to protect our liberty, peace, and democracy.

The enlargement of the EU is the sole path to ensure our neighborhood stays anchored in the free world and that we deliver better lives for our citizens. It will also demonstrate the union's commitment to peace – the very reason the EU was built.

When it comes to membership, we believe in a fair and merit-driven process and have been doing our work diligently.

We hope that significant and sustainable progress on implementation of the **9 recommendations of the European Commission** formulated in the context of granting candidate status for accession to the European Union will serve as a solid and credible basis for the European Commission to recommend and for the European Council to decide in December 2023 on **launching accession negotiations.** It is understood that several additional steps identified by the European Commission will be taken by Moldova before opening accession negotiations.

The success or downfall of one democracy resonates globally. When one thrives, it inspires hope in others; when one falters, it risks a domino effect. Today, the fight for democracy anywhere is a fight for democracy everywhere.

And in this interlinked fight for democracy, we will prevail.

The European Green Deal and the Path to Climate Neutrality – Chances and Challenges for the EU as a Green Leader

Melita Carević

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Since the adoption of the Green Deal, a comprehensive strategy for sustainable growth, the European Union has rapidly been adopting measures aimed at reducing its carbon footprint in all sectors of the economy. However, achieving climate neutrality in the European Union by mid-century will not only require the reduction of greenhouse gas emissions, which the European Union targets through the emissions trading scheme and sectoral legislation, but will also require the widespread use of carbon sinks. This paper explores the currently adopted and proposed legislative acts that are covered by the European Green Deal and how the European Union simultaneously uses several types of climate change mitigation measures to fulfil its obligations under the Paris Agreement.

I. Introduction

Environmental protection and fight against climate change have represented the main backbone of the European Commission's mandate since December 2019 and one of the umbrella policies of the Union. With the adoption of the European Green Deal (hereinafter: the Green Deal), a comprehensive strategy for sustainable development, a broad transformation of European legislation began with the aim of achieving climate neutrality by the middle of this century. To achieve this goal, the Green Deal envisages a series of reforms that concern all sectors of the economy and include changes in the way we pro-

duce food and energy, heat homes and public buildings, drive cars and use other means of transport, dispose of waste, use natural resources and produce technical devices. Therefore, as part of the Green Deal, a number of strategies were adopted, such as the Farm-to-Fork strategy, a number of measures, such as those to encourage the circular economy, as well as new environmental standards, such as those for greenhouse gas emissions for new vehicles.

The Green Deal was presented by the Commission's President Ursula von der Leyen as the European Union's response to climate challenges in the form of a "new growth strategy that aims to transform the EU into a fair and prosperous society, with a modern, resource-efficient and competitive economy where there are no net emissions of greenhouse gases in 2050 and where economic growth is decoupled from resource use."[1] Thus, already in the Green Deal, the European Commission has clearly presented its vision of a climate neutral European Union by the middle of the 21st century. However, as the Green Deal was adopted in the form of a Commission's communication, i.e. in the form of a legally non-binding soft law instrument, the European Union legally committed itself to achieving climate neutrality in 2050 a year and a half later. In June 2021 the Union adopted the Regulation (EU) 2021/1119 establishing the framework for achieving climate neutrality, better known as the European Climate Law.[2] Article 1 of the Climate Law unequivocally establishes "a binding objective of climate neutrality in the Union by 2050." The same Article also expressly states that the achievement of climate neutrality in the Union by 2050 serves to achieve the main goal of the Paris Agreement, by which the parties committed themselves to "strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty, including by holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change."[3] Achieving climate neutrality in the European Union by the middle of the 21st century is therefore a legally binding goal that serves to fulfil the Union's international obligations.

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1 European Commission, Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions - European Green Deal, COM/2019/640 final

2 Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law'), OJ L 243, p. 1–17

3 Paris Agreement, OJ L 282, p. 4-18, Article 2, Paragraph 1, Point (a)

Climate neutrality is a term that denotes the balance of greenhouse gas emissions that have been released into the atmosphere and greenhouse gases that have been removed from the atmosphere. The Intergovernmental Panel on Climate Change defines it as a "concept of a state in which human activities result in no net effect on the climate system. Achieving such a state would require balancing of residual emissions with emission (carbon dioxide) removal as well as accounting for regional or local biogeophysical effects of human activities that, for example, affect surface albedo[4][] or local climate."[5] In other words, climate neutrality does not necessarily imply that greenhouse gas emissions will be reduced to zero and will completely disappear, but that the emissions that occur will be neutralized by their removal from the atmosphere. A similar description of climate neutrality can be found in Article 2 of the Climate Law, which stipulates that "Union-wide greenhouse gas emissions and removals regulated in Union law shall be balanced within the Union at the latest by 2050, thus reducing emissions to net zero by that date, and the Union shall aim to achieve negative emissions thereafter." The European Union thus sets the long-term goal of net negative emissions after 2050, which is more ambitious than climate neutrality itself, because it requires the removal of more greenhouse gases from the atmosphere than the quantity that was released into the atmosphere in a certain period.

In order to achieve the stated goal of climate neutrality, the European Union has passed an extensive legislative package led by the Climate Law in the last four years. The subject of this paper is to show the path taken by the European Union towards climate neutrality and to analyse the main challenges on its path. The paper is divided into four sections. After the introductory remarks in the first section, the second part of the paper examines which legislative instruments the European Union has deployed since the adoption of the Green Deal in order to reach its climate neutrality target. In this regard two different sets of measures have been identified. The first set consists in measures for the reduction of greenhouse gas emissions, which include a Union-wide cap and trade system, the Effort Sharing Regulation which covers all the remaining sectors, and a carbon border adjustment mechanism which aims to ensure the environmental and economic integrity of EU's emission reduction legislation. The second set of measures that the Union has employed are measures for the

4 "Albedo (lat.: whiteness) (sign A), a physical quantity that describes the reflection of light from the surface of a body that does not shine on its own, the ratio of the flux of reflected light to the flux of light that fell on the body." Croatian encyclopedia, https://www.enciklopedija.hr/clanak/albedo, accessed 10 March 2024.

5 Intergovernmental Panel on Climate Change, Glossary, https://www.ipcc.ch/sr15/chapter/glossary/, accessed 10 March 2024.

removal of greenhouse gas emissions. After the analysis of these measures, the third section of the paper looks at their potential for achieving the EU's climate neutrality target by examining at the emissions gap between the intermediate targets set in the currently binding EU legislation and the emission reductions which are needed for the fulfilment of the carbon neutrality target in 2050. A brief conclusion is given at the end of the paper.

II. Measures of the European Union to Achieve Climate Neutrality

Achieving climate neutrality is theoretically possible either by completely eliminating greenhouse gas emissions, or by reducing greenhouse gas emissions to a certain limit and simultaneously neutralizing those emissions that have not been reduced by removing them from the atmosphere. Given that greenhouse gas emissions originate from all sectors of the economy, and given that some greenhouse gas emissions that occur in natural processes, such as the decomposition of biomass, volcanic activity and fires are impossible to avoid, the first option remains only theoretical. The European Union therefore chose the option of reducing emissions up to a certain limit and of making up for the remaining emissions that will take place by removing greenhouse gases from the atmosphere, in order to ultimately achieve a balance between total emissions and total removals of greenhouse gases. In other words, the Union plans to achieve climate neutrality by combining two sets of measures – measures to reduce greenhouse gas emissions and measures to remove greenhouse gas emissions. In the following part of the paper the main measures used for each of these types will be briefly presented.

1. Measures to Reduce Greenhouse Gas Emissions

The European Union has a long history and rich experience of using measures to reduce greenhouse gases. It is a party to the United Nations Framework Convention on Climate Change concluded in 1992, the Kyoto Protocol concluded in 1997 and the Paris Agreement concluded in 2015. In order to fulfil the obligations under by the Kyoto Protocol and later by the Paris Agreement, and generally reduce dependence on greenhouse gases, the Union has set three different goals which complement each other. The first goal and set of measures are aimed at reducing greenhouse gas emissions, the second at increasing energy efficiency, and the third at increasing the use of renewable energy sources.

The international legal framework within which the Union acts in the fight against climate change is currently set by the United Nations Framework Convention on Climate Change and the Paris Agreement. The Union independently set its nationally determined contribution under the Paris Agreement and undertook to reduce domestic net greenhouse gas emissions by at least 55% by 2030, compared to 1990 as the base year.[6] As part of the European Green Deal and the "Fit for 55" package, the Union's contribution was increased in December 2020 compared to the earlier goal, set in 2016 as the Union's first nationally determined contribution, which obliged the Union to reduce its emissions by at least 40% compared to 1990 levels.

In addition to the long-term goal of achieving climate neutrality by 2050, the Climate Law also sets a legally binding transitional goal of reducing greenhouse gas emissions by 2030, which requires a domestic reduction of net emissions by at least 55% compared to 1990 as the base year.[7]

The Union's arsenal for reducing greenhouse gas emissions consists of two main sets of measures – the first one being the greenhouse gas emissions trading scheme (the ETS), established in 2003 and operating continuously since 2005, and the second one being a mix of regulatory instruments aimed at standard-setting, which encompass all sectors not covered by the emissions trading system.

Although originally opposed to market-based mechanisms for reducing greenhouse gas emissions, such as a cap and trade system,[8] the Union has facilitated the achievement of its climate goals by establishing the ETS. The rich experience it has gained as the first jurisdiction to establish a cap and trade system for trading greenhouse gas emissions has enabled to gain an image of a climate pioneer. Although it took a long period for the ETS to operate smoothly, during which the price of emission allowances varied from just a few cents to 104 euros, today the ETS sends an unequivocal price signal to investors to reduce their emissions in the long term.[9]

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6 Update of the NDC of the European Union and its Member States, https://unfccc.int/sites/default/files/NDC/2023-10/ES-2023-10-17_EU_submission_NDC_update.pdf, accessed 10 March 2024.

7 European Climate Law (n 2), Article 4, paragraph 1.

8 Ellerman A. Denny, Convery Frank J., de Perthuis Christian, *Pricing Carbon – The European Union Emissions Trading Scheme*, Cambridge University Press, Cambridge, 2010, p. 9.

9 The price of the emissions allowance in January 2024 was about 70 euros. https://tradingeconomics.com/commodity/carbon, accessed 10 March 2024.

The greenhouse gas emissions trading system covers the electricity production and energy-intensive industries in the EU, Norway, Lichtenstein and Iceland, flights within the EU and the European Economic Area, and flights to Switzerland and the United Kingdom. From 2024, the ETS also includes maritime transport, for which obligations to surrender emission units will be gradually introduced between 2024 and 2026.

In the 2023 amendments to the EU ETS Directive,[10] a new and separate EU ETS II has been established, which will contain a special cap for greenhouse gas emissions originating from fuel combustion in buildings, road transport and several other sectors, such as small and medium enterprises. In order to achieve simplicity and administrative feasibility, the EU ETS II has been designed to encompass upstream fuel suppliers and not end consumers.[11] The reporting and verification of emissions from the covered sectors has been scheduled to commence in 2025 and the system aims to become fully operational in 2027.[12]

Buildings and road transport have for a long time been outside of the emissions trading scheme. Emissions from those sectors, in addition to agriculture and waste, altogether account for approximately 60% of greenhouse gasses in the EU and are covered by the Effort Sharing Regulation, which sets national reduction targets for each Member State.[13] As a part of legislative changes adopted under the 'Fit for 55' package, the 2023 amendments to the Effort Sharing Regulation set an EU-wide emission reduction target for the emissions it encompasses to 40% reductions below 2005 levels in 2030.[14] That EU-wide target is translated into national targets which oblige Member States to play their share in achieving the EU's goal depending on their potential to reduce emissions. The EU ETS II was developed with a view of helping Member States

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10 Directive (EU) 2023/959 of the European Parliament and of the Council of 10 May 2023 amending Directive 2003/87/EC establishing a system for greenhouse gas emission allowance trading within the Union and Decision (EU) 2015/1814 concerning the establishment and operation of a market stability reserve for the Union greenhouse gas emission trading system, OJ L 130, p. 134–202

11 https://climate.ec.europa.eu/eu-action/eu-emissions-trading-system-eu-ets/ets2-buildings-road-transport-and-additional-sectors_en, accessed 12 May 2024.

12 Ibid.

13 Regulation (EU) 2023/857 of the European Parliament and of the Council of 19 April 2023 amending Regulation (EU) 2018/842 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement, and Regulation (EU) 2018/1999, OJ L 111, p. 1–14

14 Ibid. Article 1.

achieve their individual targets, because the progress they were making in this regard proved to be insufficient for reaching the climate neutrality goal in 2050.[15]

a) Carbon Border Adjustment Mechanism – A Missed Opportunity?

An important global novelty introduced in 2023 as a part of the 'Fit for 55' package by the EU with the aim of combating carbon leakage, which can endanger the environmental integrity of EU's greenhouse gas reduction legislation, came in the form of the carbon border adjustment mechanism.[16] The main goal of the carbon border adjustment mechanism is to ensure that importers of certain carbon intensive products into the EU pay a carbon price equal to the one which is paid in the EU under the ETS, if they had not paid a similar price in the country of origin. Apart from combating carbon leakage which can in theory be problematic from both economic and environmental aspects, this mechanism results in higher prices of imported products for European consumers, which can influence their consumption habits and make them more aware of their global carbon footprint, among the highest in the world.[17] However, the Union's emission reduction targets are not impacted by the quantity of carbon intensive products imported into the EU and enjoyed by European consumers. Carbon border adjustment mechanism sets the carbon price so that it mirrors the ETS allowance price, but imported products which pay that price do not enter the emissions cap under the EU emissions trading scheme. Such a solution is in line with the production-based accounting of greenhouse gas emissions on which the Paris Agreement is premised, but it does not ensure that the Union will ever reach climate neutrality in its true sense. This issue was recently highlighted by the European Court of Auditors, which recommended that all emissions caused by the EU should be accounted for in the EU's targets.[18]

One of the main outcomes of the carbon border adjustment mechanism is that it induces carbon pricing measures outside of the territory of the European Union, since Union's trading partners will be motivated to keep the revenue

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15 https://climate.ec.europa.eu/eu-action/eu-emissions-trading-system-eu-ets/ets2-buildings-road-transport-and-additional-sectors_en, accessed 12 May 2024.

16 Regulation (EU) 2023/956 of the European Parliament and of the Council of 10 May 2023 establishing a carbon border adjustment mechanism, OJ L 130, p. 52–104

17 Joanne Scott, Reducing the EU's Global Environmental Footprint, German Law Journal (2020), 21, pp. 10–16, p. 10-11

18 European Court of Auditors, Special report: EU climate and energy targets (2023), https://www.eca.europa.eu/en/publications?ref=SR-2023-18, p. 47.

from the carbon pricing instruments in their national budgets. However, inducing the same level of climate ambition in developed and developing countries is likely to run contrary to the principle of common, but differentiated responsibilities and respective capabilities.[19]

2. Measures for the removal of grennhouse gases

Greenhouse gases that have been released into the atmosphere can be removed by certain natural processes and by using technical measures, which are altogether called carbon sinks. The most important natural carbon sinks are forests, soil and oceans. Natural carbon sinks store carbon through natural processes, without human intervention. For example, trees extract carbon dioxide, the most widespread greenhouse gas, from the atmosphere through photosynthesis, and store carbon in their trunks, roots and surrounding soil, releasing oxygen in the process. In addition to natural removals, the removal of emitted greenhouse gases can also be done artificially, using carbon capture and storage technologies.

The European Union relies on the use of natural and artificial carbon sinks in order to neutralize greenhouse gas emissions that will continue to take place on the territory of the Union and in this way to achieve climate neutrality by 2050. Even the short-term goal of the European Union for 2030, under which the Union committed itself to reduce its greenhouse gas emissions by at least 55% compared to 1990 as the base year, is set as a target for a net reduction of emissions.[20] However, although emissions that will be removed using carbon sinks are included in the Union's 2030 target, the Climate Law limits the contribution of net removals to 225 million tons of CO_2 equivalent.[21]

Under the Green Deal and the "Fit for 55" package increased attention is being paid to carbon sinks as an indispensable instrument for achieving the Union's climate goals. In order to protect natural carbon sinks and to increase their role, the Regulation on Land Use and Forestry (the so-called LUCLUF Regula-

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19 Marïn Duran, G. (2023), Securing compatibility of carbon border adjustments with the multilateral climate and trade regimes, International and Comparative Law Quarterly, 77(1), 73–103, p. 87.

20 European Climate Law (n 2), Article 4, paragraph 1. According to first calculations, inclusion of carbon sinks into the calculation of net emission reductions has lowered the required emission reductions to 53% by 2030. Euractiv, Commission under fire for including 'carbon sinks' into EU climate goals, https://www.euractiv.com/section/climate-environment/news/commission-under-fire-for-including-carbon-sinks-into-eu-climate-goals/, accessed 12 May 2024.

21 European Climate Law, Article 4, paragraph 1.

tion), which regulates emissions and carbon removal in the sector of land use, land conversion and forestry, was revised.[22] The revised LUCLUF Regulation set a net removal target of 310 million tons of carbon dioxide equivalent for the Union as a whole until 2030.[23] The stated goal represents an increase in the use of carbon sinks in the sector of land use, land conversion and forestry by 15% compared to the current situation.[24] A series of strategies in the agricultural sector have been dedicated to the protection of natural carbon sinks, and have been presented in the Communication of the Commission on Sustainable Carbon Cycles,[25] which promotes sequestration, i.e. storage of carbon in agricultural lands, which is achieved by changing the practice of managing that land.

In addition to natural carbon sinks, great expectations are placed on carbon capture and storage technologies, such as direct capture and storage of carbon from the air (direct air carbon capture and storage (DACCS))[26] and capture and storage of carbon in the production of bioenergy (bio- energy carbon capture and storage (BECCS))[27]. It is precisely on the use of these technologies that the latest European industrial strategy is based. In March 2023 the Commission put forward a proposal for the Act on Industry with a Zero Net Emission Rate, as a response to the American Inflation Reduction Act.[28] In this proposal, carbon capture and storage technologies are marked as strategic and

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22 Regulation (EU) 2018/841 of the European Parliament and of the Council of 30 May 2018 on the inclusion of greenhouse gas emissions and removals from land use, land use change and forestry in the 2030 climate and energy framework, and amending Regulation (EU) No 525/2013 and Decision No 529/2013/EU, OJ L 156, p. 1-25

23 Regulation (EU) 2023/839 of the European Parliament and of the Council of 19 April 2023 amending Regulation (EU) 2018/841 as regards the scope, simplifying the reporting and compliance rules, and setting out the targets of the Member States for 2030, and Regulation (EU) 2018/1999 as regards improvement in monitoring, reporting, tracking of progress and review, OJ L 107, p. 1–28, Article 4, paragraph 2.

24 European Commission, Climate Law, Land Use Sector, https://climate.ec.europa.eu/eu-action/land-use-sector_en?prefLang=hr, accessed 10 March 2024.

25 Communication from the Commission to the European Parliament and the Council - Sustainable Carbon Cycles, COM (2021) 800 final

26 International Energy Agency, Direct Air Capture – A key technology for net zero, available on https://iea.blob.core.windows.net/assets/78633715-15c0-44e1-81df-41123c556d57/DirectAirCapture_Akeytechnologyfornetzero.pdf, accessed 12/8/2023.

27 International Energy Agency, https://www.iea.org/energy-system/carbon-capture-utilization-and-storage/bioenergy-with-carbon-capture-and-storage, accessed 10 March 2024.

28 European Commission, Proposal for a Regulation of the European Parliament and of the Council on establishing a framework of measures for strengthening Europe's net-zero technology products manufacturing ecosystem (Net Zero Industry Act), COM (2023) 161 *final*

the importance of facilitating and enabling the implementation of the projects for the development and use of these technologies is highlighted, such as the increase of availability of carbon dioxide storage geospaces. However, these technologies are currently relatively new and expensive and there is not enough experience with their wide commercial application and their long-term ecological integrity.

In this regard, it is important to point out that the removal of greenhouse gases can contribute to the achievement of climate neutrality only if emissions are removed permanently, or at least for a sufficiently long period. The legal framework for environmentally safe geological storage of carbon dioxide was established in 2009 by the Carbon Capture and Storage Directive (the so-called CCS Directive).[29] Furthermore, as one of the measures that serve to strengthen confidence in the credibility of emissions removal, the Union is currently considering the adoption of a regulation on the certification of carbon removal, which would establish rules for monitoring, control and verification of achieved removals in the forestry, agriculture and industry sectors on a voluntary basis.[30] The described measures represent important steps towards preventing manipulative green marketing, which falsely presents certain procedures or products as beneficial for the environment. The use of the carbon sinks, as at first glance a simple and relatively painless solution to the climate crisis, is heavily susceptible to greenwashing and therefore requires close scrutiny.

In a recent report from January 2024 the European Scientific Advisory Committee on Climate Change highlighted the necessity of directing EU policies that support carbon capture and storage or reuse technologies to those activities and sectors where there are no other options for reducing greenhouse gas emissions as one of the main recommendations.[31] The use of these technologies should therefore represent a measure of last resort, and not means of avoiding the reductions of greenhouse gas emissions that can be achieved,

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29 Directive 2009/31/EC of the European Parliament and of the Council of 23 April 2009 on the geological storage of carbon dioxide and amending Council Directive 85/337/EEC, European Parliament and Council Directives 2000/60/EC, 2001/80/EC, 2004/35/EC, 2006/12/EC, 2008/1/EC and Regulation (EC) No 1013/2006, OJ L 140, 5.6.2009, p. 114–135.

30 European Commission, Climate Lawion, Carbon Removal Certification, https://climate.ec.europa.eu/eu-action/sustainable-carbon-cycles/carbon-removal-certification_en, accessed 10 March 2024.

31 European Scientific Advisory Board on Climate Change, Towards EU climate neutrality: progress, policy gaps and opportunities, Assessment Report 2024, p. 12., https://climate-advisory-board.europa.eu/reports-and-publications/towards-eu-climate-neutrality-progress-policy-gaps-and-opportunities, accessed 20 January 2024.

such as reduction of emissions from fossil fuels. There are several reasons for this approach. Carbon capture and storage technologies are inherently more risky in terms of environmental sustainability due to the possibility of releasing the stored carbon back into the atmosphere. The same applies to carbon capture and storage technologies in the production of bioenergy, which use biomass in which carbon is stored to produce fuel or energy, and the carbon dioxide emissions released in the process are captured and then stored. In addition, the use of energy is necessary for the application of both mentioned technologies, and from that point of view, they are less effective than measures to increase energy efficiency and to reduce emissions.[32] Furthermore, there is a limited number of locations suitable for safe long-term geological carbon storage on the territory of the Union, and therefore the spatial capacities do not allow the widest use of these technologies.[33] Finally, the application of the these technologies in practice result in capture of only 90% of emissions or less, which means that they cannot completely neutralize the release of greenhouse gases.[34]

III. The Current State of Play and the Emissions Gap

Despite significant dedication of EU's mainstream policies to the green transition, strong challenges are still present on the EU's path to climate neutrality. The Commission's recent assessment of Member States' National Energy and Climate Plans revealed three important gaps in regard to EU's main climate policy targets. The analysis was performed on the basis of 21 timely submitted national plans and showed that "despite a substantial reduction in recent years, net greenhouse gas (GHG) emissions in 2030 are estimated to be 51% lower than in 1990, 4% percentage points short of the 55% target set in the Climate Law."[35] In this respect, the targets under the Effort Sharing Regulation and Land Use, Land-use Change and Forestry Regulation have been circled out as being the ones which require further efforts in order to be achieved.[36] When it comes to the EU's renewable energy target for 2030, the study showed that the "share of renewable energy in final energy consumption could reach be-

32 Ibid., p. 74.

33 Ibid.

34 Ibid.

35 European Commission, Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee And The Committee Of The Regions, EU wide assessment of the draft updated National Energy and Climate Plans - An important step towards the more ambitious 2030 energy and climate objectives under the European Green Deal and RePowerEU, COM(2023) 796 final, p. 3.

36 Ibid.

tween 38.6% and 39.3% in 2030",[37] which is well-below the target of an at least 42,5% share set by the 2023 amendments to the Renewable Energy Directive. Last but not least, the Commission's study identified that "the 2030 final energy consumption at Union level could reach 814.3 Mtoe," which is "higher than the 763 Mtoe, corresponding to a reduction of 11.7% compared to the 2030 projections, set in the 2023 [Energy Efficiency Directive] recast. Only a handful of Member States propose a sufficient level of ambition on either primary energy consumption, final energy consumption or both."[38]

Similar findings have also been reached in the 2024 Assessment Report of the European Scientific Advisory Board on Climate Change, which called for urgent implementation of the 'Fit for 55' package.[39] The same urgency for further action was also emphasised in the United Nations Environment Programme report which identified a 9% emissions gap in reaching EU's nationally determined contribution under the Paris Agreement,[40] which coincides with the EU's current emission reduction target for 2030. In line with these findings, unsurprisingly, Climate Action Tracker assesses that the current EU climate targets and policies put the global temperature increase on track between a 2°C and a 3°C.[41] Climate Action Tracker furthermore also warns that the EU's newly proposed target of 90% emission reductions by 2040 relies heavily on carbon capture and storage technologies and points out that it does not include a phase-out of fossil fuels.[42] Instead, an at least 95% reduction target by 2040 is considered more appropriate and in line with the EU's fair share in implementation of the Paris Agreement.[43]

Finally, as pointed out earlier, when assessing its climate neutrality, the EU should also be held responsible not only for the greenhouse gas emissions which take place on its territory, but also for the emissions it consumes in imported goods. In this regard, according to the Eurostat survey, in 2018 the EU's

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37 Ibid.

38 Ibid.

39 European Scientific Advisory Board on Climate Change, Towards EU climate neutrality: progress, policy gaps and opportunities, Assessment Report 2024, p. 8-9, https://climate-advisory-board.europa.eu/reports-and-publications/towards-eu-climate-neutrality-progress-policy-gaps-and-opportunities, accessed 20 January 2024.

40 United Nations Environment Programme, Emissions Gap 2023 - Broken Record Temperatures hit new highs,yet world fails to cut emissions (again), https://wedocs.unep.org/bitstream/handle/20.500.11822/43922/EGR2023.pdf?sequence=3&isAllowed=y, p. 19.

41 Climate Action Tracker, EU, https://climateactiontracker.org/countries/eu/, accessed 20 May 2024.

42 Ibid.

43 Ibid.

share in global emissions stemming from its territory and consumed in the EU was 7%, and its share in global consumption of emissions outside of its territory an additional 3%.[44]

Given all the aforementioned factors, it can only be concluded that the EU's path to climate neutrality in reality remains partially uncharted and challenging.[45]

IV. Conclusion

Reaching climate neutrality by the middle of the 21st century is by all means an ambitious objective, given how in 2024 our economies are still heavily dependent on fossil fuel combustion and other sources of greenhouse gas emissions. However, the scientific consensus is strong that this target is non-negotiable if the main goal of the Paris Agreement is to be reached and the increase of global temperatures kept to well below 2°C above pre-industrial levels and potentially to no more than 1.5°C. By September 2023, 97 parties to the Paris Agreement adopted some form of net-zero pledges, which cover 81% of global greenhouse gas emissions.[46] However, none of the G20 countries are on track to reduce their emissions in line with their pledges,[47] which makes the credibility of those net-zero targets questionable.

The European Union is without doubt one of the parties which has showed strong progress in lowering its greenhouse gas emissions and has adopted a mix of legislative changes which will allow investor certainty and further

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44 Eurostat, Sustainable development in the European Union, 2022 Edition, https://ec.europa.eu/eurostat/documents/3217494/14665254/KS-09-22-019-EN-N.pdf/2edccd6a-c90d-e2ed-ccda-7e3419c7c271?t=1654253664613, p. 342.

45 The need for further efforts on behalf of the EU for reaching its climate neutrality goal has recenty been elaborated in Oberthür, S., & von Homeyer, I. (2022). From emissions trading to the European Green Deal: the evolution of the climate policy mix and climate policy integration in the EU, Journal of European Public Policy, 30(3), 445–468. https://doi.org/10.1080/13501763.2022.2120528, p. 463.For a literature overview, an assessment of the EU's progress in achieving its climate neutrality goal and a warning of potential inequalities that the green transition might emphasize, see Dupont, C., Moore, B., Boasson, E. L., Gravey, V., Jordan, A., Kivimaa, P., Kulovesi, K., Kuzemko, C., Oberthür, S., Panchuk, D., Rosamond, J., Torney, D., Tosun, J., & von Homeyer, I. (2024). Three decades of EU climate policy: Racing toward climate neutrality? WIREs Climate Change, 15(1), e863., https://doi.org/10.1002/wcc.863, p. 7.

46 United Nations Environment Programme, Emissions Gap 2023 (n 40), p. XIX.

47 Ibid., p. XX.

progress in the upcoming years. Still, there is ample room for improvement even in the EU's action.

This paper has identified two main issues which can seriously jeopardise that the European Union contributes its fair share in the implementation of the Paris Agreement, and does not hide behind reaching climate neutrality only on paper. The first challenge in this regard is not to over rely on the use of carbon sinks. Given how uncertain the use of carbon capture and storage technologies currently is, further emphasis should be put on the reduction of those greenhouse gas emissions which can be achieved, instead of continuing with business as usual scenarios and hoping that those emissions will be deducted later on. The second main challenge consists in including consumption-based emissions in the accounting of the European Union's climate neutrality. This solution is the only one which can ensure that climate neutrality is truly reached on behalf of the EU.

Relations EU-Russia: a paradigm shift

Henri Vogt

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These brief observations have two interrelated historical aims – a prescriptive and a normative. Firstly, the following remarks sketch out the European Union's efforts to influence and cooperate with Russia since the collapse of the Soviet Union until the beginning of atrocities in Ukraine in February 2022. Secondly, this overview helps us understand the paradigm shift of EU-Russia relations, a shift that had been in the making for several years but was eventually only fulfilled with the launch of the brutal full-scale (and unbelievably idiotic from the perspective of Russia's own interests) war in Ukraine; or perhaps we should go a bit further and understand this as a paradigm shift of the EU as a whole. As for the third aim, the one that seeks to go beyond the insights of existing literature, the article offers a few preliminary thoughts about the possible path forward in terms of what could be called 'pragmatic connectivism'. Very idealistically, this mode of thought might provide some backing towards finding a reasonable long-term solution to this tragic crisis and establishing an at least minimally functioning future relationship between the EU and Russia, even if it should remain lukewarm in essence. The notion of *connection* underlies and inspires the discussions below: creating a myriad of connections, cutting them off, wondering how and in what form they could be reconstructed.

I. The age of optimism: the EU's policy towards Russia 1991-2004

After the collapse of communism in 1989, or perhaps already much earlier, the European Community /Union's grand design was to transform its neighbourhood, the countries of East-Central and Eastern Europe, by the means of a fundamentally *liberal* political agenda. The liberal ethos was, of course, in the DNA of the Union: it had, after all, successfully managed to rebuild the con-

tinent under the signs of peace and cooperation since the world wars. The smooth inevitability of the revolutions of 1989-91 and the subsequent end of the Cold War further reinforced the primacy of this genetic legacy. The logic of liberal internationalism was thus expected to have a transformative impact on the conditions of post-communism and in many if not all country contexts, especially in the countries of the 'European' cultural hemisphere.

This ideological stance was to materialise in terms of various types of linkages and interdependencies that the European Union began to establish with the former communist states from the early 1990s onwards, including those that had emerged after the dissolution of the Soviet Union. Economic cooperation, particularly in the trade and energy sectors, composed the bulk of these activities. These cooperative efforts were backed by a number of large programmes involving funding for a range of different kinds of rebuilding projects, from educational support to issues of internal security. Surprisingly quickly, one could say, the horizon of true membership in the EU was also opened for countries in the immediate neighbourhood, more precisely at the Copenhagen Summit of 1992. The so-called Copenhagen criteria, based on three main elements – democracy, functioning markets and administrative capacity to implement the EU acquis – still function as the backbone of any discussions on EU membership. The awareness of the potentially negative *vulnerabilities* that interdependencies might create were hardly in EU leaders' thoughts at the time.

Up until the 2004 wave of EU enlargement and the Orange Revolution in Ukraine, the focus of cooperative interdependence-building was on *East Central Europe*, that is, on those countries that were truly seen as potential new member states, and to a limited degree on the countries farther east. To illustrate, the main financial instrument, covering the geographic area of the former Soviet Union (excluding the Baltic countries but including Mongolia) and called TACIS, included 7.3 billion dollars of financial aid during the 1990s, but this sum was only half of the money spent on assisting the countries that joined in 2004-7 (with a much lower number of inhabitants) through the so-called PHARE programme.

Russia, because of its former superpower role and the vastness of its resources – especially in the energy sector, was approached with some sort of confusion by the EU. Culturally and in terms of its sheer size, the country was deemed somehow incompatible with 'Europe'. In general, however, Russia was seen as inconvertibly weak at the time, hardly a risk in any way, and the belief in its positive development was widespread – in spite of the fact that, for example, President Boris Yeltsin did not give an impression of strong leadership and despite Vladimir Zhirinovsky's ultranationalist Liberal Party of Russia managing

to win the 1993 elections with 23 percent of the vote. Because of this confusion, perhaps, along with the Union's limited resources and East Central European focus, the plans to engage Russia in shared European institutional and human connective frameworks in any systematic manner remained feeble, also reflecting the difficulty or even paradox of *inclusive* external governance (Lavenex 2004). With the benefit of hindsight, these plans should probably have been much better orchestrated, given the importance and resources of Russia from a long-term perspective.

Cooperative linkages did however gradually emerge. The EU already signed a Partnership and Cooperation Agreement (PCA) with Russia in March 1992, i.e. only a couple of months after the disappearance of the Soviet Union, but that agreement did not include a membership scenario for Russia; instead, future cooperation was to take place under a 'strategic partnership'. In the Cologne European Council of 1999, the 'Common Strategy on Russia' was adopted by the EU member states, with the prime aim of safeguarding Russia's future as an integral part of Europe and its democratic pluralism. (Haukkala 2001 and 2009.) Another example of collaborative efforts is that Russia signed the Bologna Declaration in the field of higher education in 2003 (Telegina & Schwengel 2012). Indeed, Russia's ability to respect the shared values of democracy and also develop them further was hardly in doubt during the first post-communist decade. It is also noteworthy that Russia's military operations in the former Soviet countries (Georgia; Tajikistan) were tolerated, apparently as justified efforts to increase stability in the region, by the European leaders during this period (cf. Forsberg & Patomäki 2023, 9).

Russian attitudes towards the EU varied a great deal at the time among its different elites, from accusations of the Union having caused the demise of the country's superpower status – a narrative of humiliation – to strong support of institutional cooperation and a shared European House; in the 1990s, there was, after all, a true democratic sphere of public debate in Russia. In the early 2000s, the latter, more positive views still seemed to have a foothold. In a 2002 policy report, for example, Vladimir Baranovsky (2002, 169) clearly saw reasons for optimism in this respect as he wrote, after having emphasised the plurality of Russian views about the EU, that 'the general trend seems to point to the direction of developing a more positive and constructive attitude towards the EU'. In a similar vein, an OECD report assessing the TACIS programme unequivocally called the programme 'a success story' – as late as in 2006. On the other hand, the NATO bombings of Kosovo in 1999 already raised significant critical questions among Russian elites about the future security order in Europe.

Confusion or ambivalence may also characterise the EU's relations with Ukraine in the 1990s and early 2000s (Kupicek 2005). Overall, the picture of the country was largely negative: its democracy appeared to be merely electoral, not substantiated, and the level of corruption remained high – still in the early 2010s Ukraine was ranked among the most corrupt countries in the world. The country was also plagued by deep internal cleavages, above all between the western ('Ukrainian') parts and eastern ('Russian') parts, and the Crimea posed a major future problem due to its constant tug-of-war with the Kiev central administration. On the other hand, and particularly during the early years of Leon Kuchma's presidency (i.e., 1994-1997), Ukraine clearly made progress in terms of its democratic credentials and the European vector of its foreign policy strengthened – to the extent that one could already then begin talking about Ukraine's European Choice. A Partnership and Cooperation Agreement was already signed with Ukraine in 1994, the TACIS programme was activated, and in the mid-1990s, cooperation in the field of security with European actors became more intense as well. The positive development was, however, by no means linear: by the early 2000s there was a great deal of frustration in terms of the successes of the cooperative efforts as they were not having the expected positive effects. There was, moreover, hardly any consideration of Ukraine's future membership in the European Union at the time, while Turkey still appeared a much more realistic candidate.

II. The slow turn: 2004 – 2022

At the turn of the new millennium, the optimistic EU mood towards Russia's potential to develop into a truly democratic system began to wane gradually – too slowly, one might be willing to say from today's perspective. The Second Chechen War from late 1999 and the Orange Revolution in Ukraine between November 2004 and January 2005 are possibly the two most significant explanatory factors here. The war in Georgia in 2008 and perhaps also the Russian president's Munich speech of 2007 further strengthened suspicions about Russia among EU elites – but were not yet sufficient to erase the dominance of liberal internationalism as a guiding ideology for the Union's external affairs.

The Russian reactions to the Orange Revolution, in particular, unveiled a worldview that was still based on a zero-sum framework of great power politics. Russia's leaders obviously attached a great deal of importance to the country's traditional imperial spheres of influence – and Kiev was seen as more than that, the heart of Russianness – which naturally meant that both NATO and EU expansion posed a real problem for them. The anti-corruption,

anti-electoral-fraud Revolution, however, made it clear that a great number of Ukrainians, the majority perhaps, preferred to orientate their country towards 'Europe' rather than towards the main successor country of the Soviet Union. In this context, it also became increasingly clear that NATO enlargement, particularly to the Baltic States, was viewed with deep contempt among Russian foreign and security policy elites. The Russian interpretation was clearly that the West had broken its promise given in the negotiations on German unification in 1990 not to expand NATO (cf. Sarotte 2021).

The EU was not capable or perhaps willing to really understand these Russian views at the time, possibly because of the continued strength of the Union's liberal ethos. Indeed, there was still hardly a renewed conception of big power politics in the EU's foreign policy agenda. The threat of terrorism (terrorism was supported by relatively small powers) dominated public discourses in the mid-2000s, coupled with the internal rift between 'Old' and 'New' Europe over the appropriate means to fight that threat. These new security threats also clearly dominated the European Security Strategy of 2003, the Union's most important foreign policy statement for the next decade.

The Union's involvement in the East European region, also with Russia and Ukraine, thus continued, or was believed to continue, much along the same guidelines as before, i.e. by way of economic cooperation, supporting policy programmes and strategic partnerships. After 2004, having gained a number of new neighbours following the 'big-bang enlargement', the various support programmes were bundled together into the European Neighbourhood Policy (ENP), with the straightforward aim 'to help the EU support and foster stability, security and prosperity in the countries closest to its borders'. (EU 2015, 1) The ENP's eastern dimension was re-labelled 'Eastern Partnerships' in 2009, covering six former Soviet states (Armenia, Azerbaijan, Belarus, Georgia, Moldova and Ukraine).

Russia was not included in the ENP, but cooperation was instead to take place under the so-called 'Common Spaces' launched in 2005. There were four of them: economic; freedom, security and justice; external security; and research, education, and culture. Within some of these spheres, progress did materialise in terms of increased cooperation over the following years. In justice and internal security matters, to take a random example from a 2010 analysis, cooperation had indeed intensified but further improvement would have required 'a certain change of approach and mentality' (Potemkina 2010, 551). Indeed, after the 2008 war in Georgia, cooperative efforts within these spaces increasingly faced difficulties – and in the field of external security they became virtually impossible; the gradual deterioration of the EU-Russia relation had become evident. In spite of this, the five-year review of the European

Security Strategy (2009) still expressed a certain degree of optimism and a belief in the Union's founding values. Although the Georgian war had seriously damaged Russia's image within the EU, this was *not* seen as irreversible in the final analysis:

> 'Our relations with Russia have deteriorated over the conflict with Georgia. The EU expects Russia to honour its commitments in a way that will restore the necessary confidence. Our partnership should be based on respect for common values, notably human rights, democracy, and rule of law, and market economic principles as well as on common interests and objectives.' (Council of the European Union 2009)

The EU (and the US) strongly supported the Euromaidan protests of late 2013 – early 2014 in Kiev that followed President Yanukovych's decision not to sign an Association Agreement with the EU. This was seen by Russia as a further effort of the 'West' to undermine Russia's strategic position and ambitions in the region. For Russia, therefore, the annexation of Crimea and invasion of eastern oblasts of Ukraine two months later, were arguably part of an effort to stop any further increase in EU and US involvement in Ukraine and its neighbouring countries; it was meant to stop Ukraine from sliding away from the Russian hemisphere and the Eurasian Economic Union, now cherished by that country's leadership as *the* main foreign policy vision. Russia's leadership thus interpreted EU policies towards Ukraine as being based on the logic of either-or – either with the EU or against it. Along with these realist considerations, as Roy Allison has convincingly argued (2014; cf. e.g. Sinkkonen et al. 2023), this resort to military means can also be understood in terms of identity-political ethnonationalist values or as the regime's (successful) effort to consolidate power domestically, to turn Russia into a truly authoritarian system. The support for the regime did increase with these actions, and according to some polls, up to four fifths of the population accepted the annexation of the Crimea.

It is unclear to what extent Russia expected the turn to military means to halt the European Union's willingness and ability to operate in the region – how systematically Russia considered all possible post-conflict scenarios remains unclear – but this surely did not happen (e.g. Nováky 2015). On the contrary, the EU continued to pursue policies that intensified cooperation with Ukraine (while it simultaneously sanctioned Russia), and even cautiously opened the door for the country's full membership. Moreover, the new Ukrainian president, Petro Poroshenko, proved increasingly resolute in his orientation towards the European cooperative frameworks. Hence, for example, visa-free travel between Ukraine and the EU became possible in June 2017, and an Association Agreement with Ukraine was finally signed that same year. Thinking in terms of networks of positive dependence, positive connections apparently

remained strong among the EU's leaders. And although the mutual relationship with Russia further deteriorated, the risks of military escalation from the part of Russia were still seen as minimal; the costs would have been too great in this networked world, the argument maintained (cf. Forsberg & Patomäki 2023, 35).

The ideological foundation of EU external relations also began to change around this time (or perhaps already earlier), however, not only due to Russia's belligerent ambitions. China's increasingly intensive connectivity policies in the world, primarily in Africa, also requested a change of paradigm, as did the popularity of an unhinged presidential candidate by the name of Donald Trump in the US, and the critique that third countries had contributed towards the Union's complacent democracy agenda over the years. The Union's most important foreign policy strategy, the Global Strategy from 2016, thus propagates a distinctly pragmatic approach to other actors – principled pragmatism, as it was named. Despite the invasion of Crimea, for example, the Union was ready to cooperate with Russia, 'if their interests overlap'.

It is interesting, and worth studying in the future, that this change of mood influenced the foundations of cooperation in the energy sector to only a very limited degree, although economic cooperation was otherwise sanctioned and counter-sanctioned. There was hardly any disconnection from Russian energy sources – interests were indeed overlapping.

III. No longer a civilian actor: the EU's policy towards Russia since February 2022

This gradual pragmatic change of EU foreign policy may have had unforeseen ramifications – but causalities remain very tricky to verify. The increasing emphasis on pragmatism may in fact have disillusioned Russian pro-European counter-elites, some of whom surely expected to see a much stronger condemnation of the military interventions of 2014. It is also conceivable that Russia misunderstood this new outlook as a greater preparedness to accept and even endorse traditional interest-based power politics, even if it were executed with military means. Indeed, one can ponder whether the EU's policy agenda ought to have continued to adhere to 'strict value-based democratic liberalism', without any sort of naïve idealism, with no gap between words and deeds, as Arkady Moshes (2022) tried to argue a couple of months after the outbreak of the war in Ukraine in February 2022.

Be that as it may, and as is well known, the European Union has acted very decisively during this brutal war, to the extent that it is difficult to see that this would *not* have surprised Russia's leadership. Above all, the member states

acted in unison from the outset and showed a great deal of solidarity towards Ukraine (cf. Anghel & Jones 2023; Meister 2022). This initial *shared actorness* by the Union member states in fact contrasts drastically with the early days of the Corona pandemic when the member states primarily acted independently and only after a few weeks established functioning collaborative networks. Further, the member states have steadfastly shared a strong pro-Ukrainian agenda throughout the Ukraine crisis, although Hungary has occasionally shown more understanding towards Russia than other members states. The majority of European citizens have also been willing, or so it seems, to lower their own material standards of living for the cause of Ukraine.

Nearly all economic, cultural, educational and social ties with Russia have been cut off. In February 2024, two years after the outbreak of the war, the 13th package of sanctions against Russia was accepted by the European Council (sanctions also cover Belarus and Iran). Continental Europe's energy production has been reconstructed, and dependency on Russia's energy is now highly restricted, although the gas pipelines have not been shut entirely. Moreover, the membership perspective for Ukraine, along with other countries of the region, has been further reinvigorated; connections of all kinds have become stronger in this context. It is also noteworthy that the EU has clearly intensified its cooperation with NATO – in Russian eyes the real security threat – and the perennial neutral member states of Finland and Sweden have joined or are set to join the defence alliance. On the other hand, the European Union has probably not really understood, or been aware, of how easily Russia has been able to circumvent the EU's efforts to weaponise its interdependent relations with the country. It has not proved particularly difficult for Russia to strengthen its relations with third countries, to the benefit of its war economy (Rodrigues Vieira 2023).

Between 2022 and early 2024, direct aid to Ukrainian armed forces, in the range of 6.1 billion euros overall (including lethal weaponry), was primarily channelled through the so-called European Peace Facility, operational since 2021 with this highly misleading name – European Force Facility would be a more appropriate designator. In many respects, the Facility, with an overall budget framework of 12 billion for 2021-27, in fact epitomises the new EU approach to international affairs, an approach that is no longer primarily civilian or normative but rather based on traditional geopolitical considerations (e.g. Siddi 2022; Raik et al. 2023). Even more importantly, at the time of writing in early February 2024, the European Council has just made the decision to establish a new Ukraine Facility for the period 2024-27, and channel 50 billion euros through it for the 'repair, recovery and rebuild of Ukraine'. Overall, if one

includes all types of support measures, the Union now estimates that it and its member states' aid to Ukraine has amounted to 138 billion euros since the beginning of the war. (European Commission 2024; European Council 2024.)

In spite of these measures, it is still worth considering, whether the rhetoric or overall commitment towards ending the war in some way or the other could be stronger still, somehow more resolute and concrete? Many questions can be posed to the Union: What kinds of measures have been taken to reach the wider public in Russia – that is, to spread reliable information in lieu of the public media lies within the country? On what terms have such potential influencers as China actually been approached in this issue and with which carrots? If peace can be reached at some point, with which kinds of support measures could it be substantiated in the long term? To what extent has the desired nature of the future post-war order been conceptualised, with what roles for the EU itself, Russia, Ukraine and many other actors? Creative, thoroughly contemplated answers are needed, but there seems to be very few of them around.

IV. Concluding reflection: pragmatic connectivism

The way in which the European Union has severed virtually all connections with Russia is and will be by no means unproblematic, although it may be morally right and justified. It is obvious that in many fields of international governance, Russia's participation would be crucially important. This concerns the environment in particular, and for example such specific questions as the protection of the Baltic Sea, the most vulnerable sea on earth; climate change is an even wider existential problem than the war. Moreover, and as already indicated, cutting off all Europe-Russia ties simply tends to mean that Russia will establish connections with (questionable) actors from other regions. It is, indeed, neither desirable nor possible to disconnect Russia from the rest of the world completely.

The idea of *connectivity*, a hugely important phenomenon in current world politics, may offer one way to approach this conundrum. Since the early 2010s, the world's major actors have sought to expand their spheres of influence by way of distinct, comprehensive connective strategies. China's Belt and Road Initiative was the first of these but other actors have followed suit: for example, the US, Japan and Australia initiated the Blue Dot Network (BDN) in 2019; the European Union introduced its Global Gateway, building on several earlier connectivity strategies, in 2021; and the G7 launched its Partnership for Global Infrastructure and Development (PGII) in 2022. These (and other) strategies operate in a great range of fields, from material infrastructures to joint regulation and human interaction, all following several distinguish-

able logics. Some connective pursuits facilitate *cooperation*, mutually beneficial connections, whereas some actively *coerce* other actors to connect in a particular way; actors also copy what others are doing within their strategies or seek to contain or hedge against them (Gaens et al. 2023). The connective strategies are thus intentional and dynamic, and the connective spheres are not clearly defined. Like economic investments, their major justification lies in imagined *future* benefits.

In this context, what I propose here could be called the principle of *pragmatic connectivism*, a weak normative ideal or a minor thought experiment that may or may not make peace more possible in the shores of the Black Sea. It denotes a form of intentional connectivity that creates possibilities for mutual encounters, even venues of minimal shared understanding, but does not establish any new mutual vulnerabilities (and absolutely does not support any war efforts by the aggressor). It is ultimately a matter of cunning, careful strategic thinking and practices, involving both short- and long-term considerations and even demands, and requiring human and material resources. I thus decisively do not join the ranks of those who have blamed 'the blue-eyed liberal internationalists of the European Union' for having established too many linkages with Russia over the post-Cold War decades. In fact, there should rather have been *a greater number* of systematically established connections in all walks of life, but more pragmatically oriented ones, perhaps a more realistic form of liberal internationalism.

In the short term, therefore, all kinds of minimalistic human contacts and connections with ordinary Russians should be promoted and cultivated by the EU leaders and by ordinary Europeans. Borders with Russia and channels of public information should remain open to the greatest extent possible. The Russian exile communities' possibilities to speak for peace should be systematically supported; stronger contacts ought to be forged with whatever is left of Russia's (war-critical) civil society and free media. The teaching of Russian language should be endorsed. Above all, the objective and possibility of peace should be propagated much more intensively and at all levels of European societies, even while making decisions on support measures in terms of developed weaponry for Ukraine; the EU's aim is not to prolong the war but enable a reasonable peace – and rhetorical nuances do play a role. All types of connective concessions and confidence-building measures also need to be carefully considered. Unilateral reductions of nuclear arsenals in Europe could be a first step; and it needs to be made clear and repeated time and again that no one threatens Russia (in spite of the scepticism towards the rationality of the country's current regime that one surely feels). Russia should be able to participate in the activities of OSCE, possibly the last international forum where

some sort of minimal leadership contacts could still theoretically materialise, but lies should not be tolerated in this or any other context of mutual encounters.

Moreover, connections with those actors that can possibly influence Russia, or that Russia finds interesting for itself, need to be paid special attention to and positively developed. China is key here, of course, but countries such as India, Indonesia and Brazil also belong to the category of countries that, at least in theory, might be able to put pressure on Russia. This is, from the EU's perspective, a matter of the 'cushioning' or hedging logic of connectivity, or containment by way of the assistance of other actors. Above all, it represents a conscious strategy of giving more importance to emerging powers in the world, even at the expense of one's own (European) power resources.

From a long-term perspective, pragmatic connectivism requires a great deal of sensitivity towards all the kinds of vulnerabilities that connections can produce between two actors – and this can occur in spite of a continued emphasis on the benefits of global cooperation. In the field of security, sensitivity towards security dilemmas, on both sides, is centrally important. After all, dangerous security dilemmas evolve only through misunderstood mutual connections.

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Relations EU-China: economic interests vs. human rights

Ralph Weber*

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Different terms have been used to describe a foreign policy strategy aimed at modifying the behavior of an unsavory and ideologically opposed country by increasing interaction and exchange, at least in some realms, particularly in the economic realm. American president Jimmy Carter, for example, pursued an "engagement" policy with the People's Republic of China (PRC) when normalizing diplomatic relations between the two countries in 1979, and president Bill Clinton later built on this in his approach to countries such as China, Russia, North Korea and Vietnam. In Germany, Willy Brandt's *Ostpolitik* was following Egon Bahr's idea of *Wandel durch Annäherung* (change through rapprochement) and pursued a similar line of reasoning. Whatever the rationales and historical merits of these policies, the entry of the PRC into the World Trade Organization (WTO) on 11 December 2001 proved to be a milestone, the conclusion of a development that had been under way for many years, seeing, for instance, a doubling of imports from the PRC to the United States between 1996 and 2001. As the PRC had to undergo significant reforms to accede the WTO and its leaders, party-secretary and president Jiang Zemin and premier minister Zhu Rongji, genuinely seemed to foreground economic matters, it was broadly assumed that political reforms would quite naturally follow. It was not a question of *whether*, but *when*. Some might have consciously or unconsciously embraced a kind of end of history thinking, which would have rationalized the reforms in the PRC as part of a larger inevitable historical movement towards liberal democracy and free trade. Others, particularly commercial actors and in their wake many liberal-democratic governments, might have simply followed their own narrow interests in profit-making and reelection, respectively. An opening-up China literally fitted the

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bill. The fact that the PRC was continuously doing very badly in terms of human rights, democracy and rule of law was by no means out of sight or even unacknowledged, but that political difference simply stepped into the background as there appeared to be small signs of improvement on the ground in China and as trade relations and the growth rates of the Chinese economy were catapulted from year to year in a seemingly endless upwards spiral. For many, engagement seemed to pay off. And the doctrine of *Wandel durch Handel* (change through trade), particularly heralded (*mutatis mutandis*) under the Gerhard Schröder and Angela Merkel chancellorships, provided a comfortable rationale for the development.

Today, the situation appears much different. The doctrine *change through trade* is broadly considered a failure.[1] Instead of political reforms following economic reforms, the PRC has, if anything, seen a strengthening of autocratic rule and engagement has given way to more confrontational policies, adopted on all sides. Indeed, a trade war between the economically massively entangled US and the PRC and an increasing great power rivalry between these two nations are among the defining features of today's global order. Economic reforms in the PRC have also not played out in the desired way. A good example relates to the WTO's commitment to open, market-oriented policies and the fate of Article 15 of the protocol (WT/L/432) through which the PRC joined the WTO in 2001.[2] In it, China was assigned a non-market economy (NME) status, which allowed the use of anti-dumping measures and was to last for 15 years, at which point the status was supposed to have changed into one of a market economy. In 2016, however, the US, India and the EU (see European Parliament P8_TA[2016]0223) showed no inclination to grant the PRC such a status, with the consequence that the PRC filed a complaint with the WTO against the EU merely one day after the 15 years' transition period had elapsed.[3] In June 2019, before the result of its WTO suit was to become public and as much of the ruling was expected to have gone against Beijing, the PRC halted the dispute

1 "The long-held belief/hope/mantra that China would become 'more like us' with the policy of 'change through trade (Wandel durch Handel)' has been dispelled by China's own moves." François Godement and Gudrun Wacker, "Promoting a European China policy – France and Germany together," *SWP Working Paper* Nr. 1, November 2020, p. 2.

2 World Trade Organization, Accession of the People's Republic of China, decision of 10 November 2001, <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/L/432.pdf&Open=True>.

3 World Trade Organization, China files WTO complaint against US, EU over price comparison methodologies, news from 12 December 2016, <https://www.wto.org/english/news_e/news16_e/ds515_516rfc_12dec16_e.htm>.

(WT/DS516/13).[4] As recently as in early 2022, the United States Trade Representative annual report of 2021 to the Congress on China's WTO Compliance reiterated the US view that the PRC continues to have a "state-led, non-market approach to the economy and trade," that its record of compliance with WTO rules "remains poor" and that its "concept of 'economic reform' [...] appears to mean perfecting the management of the economy by the government and the Party and strengthening the state sector, particularly state-owned enterprises."[5] But also the EU's stance has hardened. Under Ursula von der Leyen's presidency of the European Commission, relations with the PRC have indeed become so strained as to make it a major policy point to emphasize that the European Union is not seeking to decouple from the PRC, but merely to pursue a strategy of de-risking. Only a few years back, in the *Elements for a New EU Strategy on China in* 2016, the PRC was still presented as a "strategic partner," whereas the word making the rounds in Brussels today is the one of a "systemic rival."

There are many angles from which to study this development in EU-China relations (the decline of normative power Europe, offensive vs. defensive normativity, EU rhetoric vs. actual policy, or the problem of mixed messages due to pragmatic national vs. normative EU-level interests), and many important actors to focus on. A recent article examining media frames in Germany on China identifies the shift from "partner" to "rival" to have occurred around 2016/17.[6] In this article, I am interested in highlighting and examining the different formulas that have guided the EU's stated view of the PRC across the two most recent decades and particularly during the last few years. Taking up a bird's eye view, thus trying to put the development into perspective, I intend to study the conceptual continuities and discontinuities expressed by these various formulas and particularly whether and to what extent they rely on a logic of "compartmentalization," a term adopted from psychology referring to the effort of keeping cognitions that seem to conflict with each other apart in one's mind. As we will see, not every new formula that has guided EU-China relations has meant a substantive change, while keeping to one and the same formula may still translate into rather different emphases.

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4 Tom Miles, China pulls WTO suit over claim to be a market economy, Reuters, 17 June 2019, <https://www.reuters.com/article/idUSKCN1TI107/>.

5 United States Trade Representative, 2021 Report to Congress on China's WTO Compliance, February 2022, <https://ustr.gov/sites/default/files/files/Press/Reports/2021USTR ReportCongressChinaWTO.pdf>, pp. 2, 8, and 11.

6 Lena Marie Hufnagel, Gerrit von Nordheim, and Henrik Müller, "From Partner to Rival: Changes in Media Frames of China in German Print Coverage between 2000 and 2019." *International Communication Gazette* 85(5), 2023, pp. 412–435.

I. Reexamining *change through trade*

The doctrine of *change through trade* presupposes two actors standing in a symmetric relation as concerns trade and in an asymmetric relation as concerns the object of change (as only one actor is envisaged to change). The nature of the intended change is not explicitly named in the doctrine, but it is commonly understood that the aim of the policy is straightforwardly political. Liberal democracies engage in trade with non-democratic or autocratic regimes to make them apparently by themselves, but more precisely by the effects of the trade, undergo political change and eventually become a democracy or something sufficiently similar and acceptable. The doctrine itself has two defining characteristics. It relies on a sequential logic and a seemingly strict compartmentalization of economic and political aspects.

The sequential logic is implied by the fact that the doctrine has trade happening *first* and only through it, that is over time, will there *then* be change. The practical translation of the doctrine, however, is fraught with problems, on both sides of the relation. What if change in the targeted country does not come about, not because trade is not occurring, but because the forces of political change that trade is supposed to and perhaps even does trigger are actively countered or altogether suppressed by the political leadership? The autocratic political leadership might be satisfied with having trade relations boost its economy, but have no interest whatsoever in allowing for significant political change to happen (particularly if that change would mean to undermine its own power). This would lead to a situation where political pressure would have to be exerted, but that would go against the doctrine, which relies exclusively on the economic mechanism. It is a peculiar feature of the doctrine that it combines the straightforward presupposition expressed in the asymmetric relation as to who is supposed to change politically with a complete disregard of the political instruments that might or might not be needed to pressure the autocratic power into allowing the trade effects to do their political work. Yet, the sequential logic of the doctrine might even make support for any such political pressure unlikely in the liberal democracy (the EU in some periods itself largely abstained from using the word "democracy" and significantly reduced mention to "human rights" in EU-China relations[7]). Trade creates interests on the side of economic actors that the continuing solidification and refinement of relations or barely the promise of future relations only strengthen. With every step along the way, this dynamic increases the costs of restricting trade that would have to be enacted to enforce political change

[7] Mikael Mattlin, "Dead on Arrival: Normative EU Policy towards China," *Asia Europe Journal* 10, 2012, pp. 187 and 189.

or even insist on the agreed upon rules and milestones. Organized interests know how to make their voices heard and, given the importance of the economic sector in liberal democratic societies, are frequently successful. As a consequence of all of this, the political aims of the doctrine are left in limbo and any political action is easily rebutted by arguments such as that the time for change has not yet come or that simply more trade is needed to unlock its political magic. What is more, the doctrine even allows those pursuing economic interests to insist that only the exclusive focus on the economic aspects of their actions can do justice to the aim of bringing about political change. Ironically, someone might hold the position that they cannot but must abstain from any concern for politics simply *because* they are so fully committed to the desired political goals.

The second defining characteristic that the doctrine relies on is this apparently strict compartmentalization of economic and political aspects. But how strict and how consequential is this compartmentalization? In liberal democracies, economic actors are supposed and encouraged to pursue their self-interest in making profits. Preferably, no political allegiances are demanded of them and the state should not intervene into their entrepreneurial decisions. Preferably, that is, since liberal democracies cannot always follow through in practice. And state intervention is often explicitly desired. As a matter of fact, the state often intervenes, much to the chagrin of the more libertarian hearted. The state variously intervenes in how the economic actor has to conduct business, from accounting rules to environmental laws and child labor prohibitions. So it is entirely conceivable in a liberal democracy that the state would change the legal framework so as to commit commercial actors to the very political order that guarantees them their economic liberties. Obviously, these kinds of restrictions should not be enacted lightly since a society with all too many restrictions will hardly count as a liberal society anymore. And to demand outright political allegiance of economic actors smacks of illiberalism. Yet, the problem of strict compartmentalization runs even deeper. For one thing, the doctrine *change through trade* perceives of economic actors as engaging in economic actions, and as mentioned decidedly not in political actions, yet their economic actions are purposely designed to have political effects (a political spillover). But if they have political effects, can they truly be considered economic actions? Ironically, it appears that those pushing politically for the doctrine, that is, those genuinely interested in its long-term political effects, seem to use economic actors as tools for bringing about these political effects. For another thing, the compartmentalization that the doctrine upholds meets in autocratic states a situation where politics is always intermingled with economy. It is exactly this feature that has been singled out by those rejecting the PRC's status as a market economy. In the PRC, economic

actors must curry and depend on the favor of the party-state. Demonstrations of political allegiance are inevitable, also for foreign economic actors, who are supposed to do the non-political but political work of the *change through trade*-doctrine. Commercial actors are of course aware of this condition and have met it variously in sometimes rather creative fashion.

Change through trade seems to make much sense at first sight and as a political doctrine boasts a lofty goal, but it runs into a host of problems when translated into practice. While economic actors are supposed to be the ultimate tools for bringing about political change, the doctrine is easily turned on its head and into a convenient instrument for commercial actors to pursue their economic interests unhindered by political concerns. Meanwhile, the cozying up to the autocratic state has meant that economic actors became more and more invested into the relations that the engagement policy wanted them to entertain. Under these conditions, calls for human rights, democracy and rule of law – the very essence of what *change through trade* promised to bring about – came to be more and more understood as merely disruptive elements. It seemed like the political goal of the doctrine gave incrementally way to a view that normalized the autocratic state itself and, aided by propaganda from the party-state, made it a valid alternative to liberal democracies. The vector of the asymmetric relation had changed. The same economic actors who were to act as ideological tools to bring liberal democracy to autocratic states were now advocating the benefits of strong men rule and autocratic efficiency and stability in their own societies. The PRC became a partner more than anything else.

II. Strategic partnership

The creation of the EU-China Comprehensive Strategic Partnership goes back to the year 2003. Since then, the two sides have both broadened and deepened their cooperation, and "have become highly interdependent as a result," as the *EU-China 2020 Strategic Agenda for Cooperation* (2013) registers.[8] That document, adopted by both *partners*, represents an effort to carve out the possible space for cooperation. It demonstrates the eye-level relationship, as a broad range of sectors is identified for cooperation and to bring about "win-win results," from peace and security, prosperity, sustainable development, to people-to-people exchanges. It also clearly carries the marks of the financial crisis and the much-heightened awareness of climate change, while taking for granted both the coming about of a multipolar world and the continued im-

[8] EU-China 2020 Strategic Agenda for Cooperation, 23 November 2013, <https://www.eeas.europa.eu/sites/default/files/20131123.pdf>.

perative of economic globalization as inevitable world trends. The explicit articulation of political differences finds no space in this document, as perhaps befits a text devoted to a strategic agenda for cooperation.[9] But political differences are implicitly articulated. The document features phrases and policies dear to each side that are merely put one next to the other. For example, the Chinese party-state's "ecological civilization" is twinned with the EU's "resource efficiency agenda."[10] These pairings might show more or less conceptual overlap. Some of them certainly show very little overlap. A most interesting pairing appears, for instance, in the Foreword: "The EU and China have both put forward strategic development plans – China's two centenary goals and the 12th Five Year Plan, the EU 2020 Strategy – which present potential for synergies to enhance cooperation for win-win results."[11] On the European side, the reference to the strategic development plan is to *Europe 2020: A strategy for smart, sustainable and inclusive growth* that dates to the year 2010 and is devoted to how to respond to the financial crisis, strengthen political governance and making Europe fit for the future (e.g. in terms of increasing competitiveness, combating climate change and the search for safe and efficient energy), while the political values that define the EU are not much stressed (but, it seems, taken for granted).[12] On the Chinese side, the 12th Five Year Plan is highlighted, but also the "two centenary goals." The second centenary goal is set for 2049 (one hundred years after the establishment of the PRC) and embodies the vision of China as *a strong, democratic, civilized, harmonious, and modern socialist country*. The adjectives all qualify how the *socialist* country is supposed to be. *Strong* refers to military might, *democratic* to (Lenin/Mao-style) democratic centralism. It is at least noteworthy that given the second centenary goal, "potential for synergies to enhance cooperation and win-win results" would be stressed.

In June 2016, two important documents were published. The *EU Global Strategy* and the *Elements for a New EU Strategy on China*. The *EU Global Strategy* is entitled *Shared Vision, Common Action: A Stronger Europe* and it focuses on foreign and security policy. The EU pledges to bolster its resilience and to seek more strategic autonomy while emphasizing the will to "reach out

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9 For an alternative view, see Ralph Weber, "Zum diplomatischen Umgang mit grundlegender politischer Differenz," Das Deutsch-Chinesische Dialogforum, <http://www.deutsch-chinesisches-dialogforum.de/Statements-2022/Prof-Dr-Ralph-Weber/>.

10 EU-China 2020 Strategic Agenda for Cooperation, p. 9.

11 Ibid., p. 2.

12 European Commission, Europe 2020: A Strategy for Smart, Sustainable and Inclusive Growth, COM(2010) 2020 final, 3 March 2010, <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:2020:FIN:EN:PDF>.

and engage with others."[13] While the strategy does not mention China explicitly in its section on partnership, it refers to "core partners" and "like-minded countries" before mentioning the intention to "partner selectively with players whose cooperation is necessary to deliver global public goods and address common challenges."[14] Elsewhere in the strategy, the EU commits to engaging China "based on the respect for the rule of law" and to "deepen trade and investment with China," while seeking "dialogue on economic reform, human rights and climate action."[15] The European Commission's *Elements for a New EU Strategy on China* offer additional insights into EU-China relations in 2016. The strategic partnership is underlined, as the EU proposes a strategy "based on a positive agenda of partnership coupled with the constructive management of differences."[16] There are manifest remnants of the *change through trade*-doctrine, for example, when the EU presents itself as "a partner in China's reforms" and resolves to "engage China in its reform process in practical ways."[17] At the same time, the communication clearly depicts a changed China that claims a more central role on the world stage. It explicitly refers to the PRC's "internal repression," its "authoritarian response to domestic dissent" and "a new and worrying extraterritorial dimension," together with its increased "external assertiveness."[18] This mixture of a continuing engagement emphasis on the one hand (the EU should seek "to build trust and co-operation with China") and some more portentous observations on the other hand (the EU must "deal with the reality that China is a one-party system with a state-dominated model of capitalism") shows how the doctrine of *change through trade* has been slowly losing its foothold.[19] There is also another telling exam-

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13 European Union, Shared Vision, Common Action: A Stronger Europe – A Global Strategy for the European Union's Foreign and Security Policy, June 2016, <https://www.eeas.europa.eu/sites/default/files/eugs_review_web_0.pdf>, p. 17.

14 Ibid., p. 18.

15 Ibid., pp. 37–38.

16 European Commission and the High Representative of the Union for Foreign Affairs and Security Policy, Joint Communication to the European Parliament and the Council: Elements for a new EU strategy on China, JOIN(2016) 30 final, 22 June 2016, <https://www.eeas.europa.eu/sites/default/files/joint_communication_to_the_european_parliament_and_the_council_-_elements_for_a_new_eu_strategy_on_china.pdf>, p. 2.

17 Ibid., p. 2 and p. 5.

18 Ibid., p. 3, p. 4 and p. 13.

19 Ibid., p. 17. See also Men Jing, who underlines the contrast of previous EU policy papers from the years 1995, 1998, 2003 and 2006, which all included a phrase stating the goal of "supporting China's transition to an open society based upon the rule of law and the respect for human rights," whereas the 2016 policy paper merely mentions to "promote respect for the rule of law and human rights within China and internationally." Men Jing, "Principled

ple of the twinning problematic pointed out above, but this time notably in a document crafted entirely and solely by the EU. When pointing out the principles that guide the EU's external action, the communication lists "democracy, the rule of law, human rights and respect for the principles of the UN Charter and international law," but adds that these principles "are reflected in the Chinese constitution."[20] The assertion that democracy as advocated by the EU is in some way "reflected" by the commitment to Leninist democratic centralism in the PRC Constitution (Art. 3) is certainly questionable, as is the underlying assumption that principles mentioned in the PRC Constitution (which indeed lists fundamental rights quite extensively) would *stricto sensu* establish constitutional rights in an authoritarian context. Overall, what is yet conspicuously absent in the *Elements for a New EU Strategy on China* in 2016 is any mention of the PRC as a designated rival.

Both documents highlight the idea of principled pragmatism, which leads a step away from the doctrine of *change through trade*. The *Elements for a New EU Strategy on China* has only a short sentence specifying that the "EU's engagement with China should be principled, practical and pragmatic."[21] The *EU Global Strategy* features a bit more detail, presenting principled pragmatism as "guide for external action." Echoing the widespread conceptual move from a liberal world order to *a rules-based global order*, the document repeats twice the passage: "We will be guided by clear principles. These stem as much from a realistic assessment of the current strategic environment as from an idealistic aspiration to advance a better world."[22] Different from isolationism or interventionism, the EU pledges to "engage the world manifesting responsibility towards others and sensitivity to contingency."[23] How exactly the circle of a principled pragmatism is supposed to be squared or what criteria will guide the pragmatic use of principles, is left unaddressed,[24] as is any reflection of what it means for principles when they are subjected to a pragmatic use: what for instance, does it mean to say that adherence to human rights sometimes has the status of a principle, sometimes not?

Pragmatism: Understanding the EU Position on Economic Relations with China." *China International Studies* 70, 2018, p. 90.

20 Ibid., p. 4.

21 Ibid., p. 5.

22 The EU Global Strategy, p. 8 and p. 16.

23 Ibid., p. 16.

24 See, for instance: Ana E. Juncos, "Resilience as the New EU Foreign Policy Paradigm: A Pragmatist Turn?," *European Security*, 26:1, 2017, pp. 1–18.

III. A new formula: "partner, competitor, rival"

In the most recent years, EU-China relations have seen a new formula rise to the center of debate. The Voice of German Industry (*Bundesverband der Deutschen Industrie*) might have pre-conceived the formula, when it published a Policy Paper in January 2019, distinguishing between China as a partner and a systemic competitor.[25] The paper mainly focuses on the PRC's state-controlled economy and bids farewell to the *change through trade*-doctrine: "For a long time it looked as if China would gradually move towards the liberal, open market economies of the West by integrating into the world economy and reshaping its economic system. This theory of convergence is no longer tenable."[26] The PRC is instead "consolidating its own political, economic and social model," and the authors of the Policy Paper see this as a "new systemic competition."[27] There is no mention of China as a rival, rather, "systemic differences and divergences do not necessarily mean conflict but require the reliable and resilient management of common interests."[28] The systemic differences are largely tied to the different economic models. Decoupling tendencies in the US are demarcated as a concern and a path not available to Europe: Germany and the EU, it is stressed, "must strike the right balance in their reactions to China," which includes continued dialogues with China and a strict adherence by the EU to its "principles of openness."[29]

It is in March 2019, in a document called *EU-China – A Strategic Outlook*, that the new formula (closely tied to principled pragmatism) gets its classic rendition and the third element of systemic rivalry finds its first expression:

> China is, simultaneously, in different policy areas, a cooperation partner with whom the EU has closely aligned objectives, a negotiating partner with whom the EU needs to find a balance of interests, an economic competitor in the pursuit of technological leadership, and a systemic rival promoting alternative models of governance. This requires a flexible and pragmatic whole-of-EU approach enabling a principled defense of interests and values.[30]

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25 BDI, Partner and Systemic Competitor – How Do We Deal with China's State-Controlled Economy?, Policy Paper, January 2019, <https://www.wita.org/wp-content/uploads/2019/01/201901_Policy_Paper_BDI_China.pdf>.

26 Ibid., p. 2.

27 Ibid., p. 2.

28 Ibid., p. 6.

29 Ibid., p. 6–8.

30 European Commission, European Commission and HR/VP contribution to the European Council: EU-China – A Strategic Outlook, 12 March 2019, <https://commission.europa.eu/system/files/2019-03/communication-eu-china-a-strategic-outlook.pdf>, p. 1.

This formula would dominate the discussion on China and be readily absorbed by EU member states and all kind of other actors. As of April 2022, the formula has found reconfirmation in a factsheet, although the increasing deterioration of EU-China relations is duly and prominently noted:

> Over the past year, EU-China bilateral relations have deteriorated, notably related to a growing number of irritants (i.e., China's counter-measures to EU sanctions on human rights, economic coercion and trade measures against the single market, and China's positioning on the war in Ukraine). [...]. In that regard, the EU's current approach towards China set out in the "Strategic Outlook" Joint Communication of 12 March 2019 remains valid. The EU continues to deal with China simultaneously as a partner for cooperation and negotiation, an economic competitor and a systemic rival.[31]

The formula marks an important shift in direction away from the *change through trade*-doctrine. The emphasis is no longer on political change, at least not along an asymmetric relation, but the guiding idea is a rivalry where both sides try to prevail with their system. The *EU-China – A Strategic Outlook* explicitly mentions different "models of governance" as defining aspect of the rivalry. At the same time, the formula of "partner, competitor, rival" continues a logic of compartmentalization. China is considered to be all of these things, tackled "simultaneously, in different policy areas." The compartments are more complex than the *change-through-trade* division of politics and economy. Cooperation is reserved for matters such as sustainable development, global health or the provision of public goods. Economy has to some extent left the realm of cooperation, but is now marked by competition, particularly in view of technology. And the "models of governance" variously refer to differences in ideology, state direction of economy, visions of the global order, etc. The compartmentalization, if anything, is stricter, since no cross-compartment effects (like trade effecting political change) are any longer envisaged. The strict compartmentalization seems, however, very hard if not impossible to translate into practice. How can climate change be fought with the PRC as a partner when one is a competitor in terms of technology leadership, supposedly including technology that would be needed to mitigate the effects of climate change? Or how can one be an economic competitor when that competition is troubled by different levels of state direction?

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[31] European External Action Service, EU China Relations, December 2023, <https://www.eeas.europa.eu/sites/default/files/documents/2023/EU-China_Fact-sheet_Dec2023_02.pdf>.

It did not take long before such tensions prompted some observers to advocate for a further adaptation of the formula that quintessentially amounted to a fatal adaptation in emphasis. Already back in June 2020, a SPD Parliamentary Group Position Paper suggested such a shift of emphasis, arguing that the EU's three-pronged approach to China is still valid, but that systemic rivalry must condition the other two elements.[32] Germany, as one of the authors of the Position Paper reportedly put it, cannot approach China as "a partner on Monday, competitor on Tuesday, rival on Wednesday. Systematic rivalry conditions and limits the scope for partnership and competition. It puts breaks and restrictions on how we deal with China in the future. We have to understand the overarching effects of systemic rivalry."[33] Three years later, in the context of the presentation of the new *Strategy on China* (2023), German Foreign Minister Baerbock would take up this point and say: "For Germany, China remains a partner, competitor and systemic rival. In the last few years, however, the systemic rival aspect has come more and more to the fore."[34] The emphasis on rivalry conditioning partnership and competition has huge consequences. If followed through, it would effectively mean the end of compartmentalization, bringing about a re-politicization of all realms.

IV. Conclusions

It is for the same reasons that the element of systemic rivalry gained priority that Ursula von der Leyen felt compelled to make it clear that the EU is not seeking to decouple from China. In a speech in March 2023, she said: "I believe it is neither viable – nor in Europe's interest – to decouple from China. Our relations are not black or white – and our response cannot be either. This is why we need to focus on de-risk – not de-couple."[35] Although the de-risking strategy mainly targets the reduction of existing dependencies, there is a possible underlying compartmentalization difficulty. The strategy implies that there

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32 SPD Fraktion im Bundestag, Statement by the Social Democratic Party of Germany (SPD) Parliamentary Group in the German Bundestag: A Social Democratic Policy on China – Assertive, Rule-Based and Transparent, 30 June 202o, <https://www.spdfraktion.de/system/files/documents/positionspapier_china_engl.pdf>.

33 Andrew Small, *No Limits: The Inside Story of China's War with the West*, Brooklyn and London: Melville House, 2022, p. 76.

34 Federal Foreign Office, Speech by Foreign Minister Baerbock at MERICS on the future of Germany's policy on China, 13 July 2023, <https://www.auswaertiges-amt.de/en/newsroom/news/policy-on-china/2608766>.

35 European Commission, Speech by President von der Leyen on EU-China relations to the Mercator Institute for China Studies and the European Policy Centre, 30 March 2023, <https://ec.europa.eu/commission/presscorner/detail/en/speech_23_2063>.

are some sectors in which activities should be reduced in order to lower dependencies (e.g. certain raw materials, green manufacturing) and other sectors in which cooperation with China could continue in some way. What is unclear is to what extent such latter cooperation would be conditioned by the element of systemic rivalry (the three-pronged formula with emphasis) or seen as a compartmentalized and sanitized sector (the three-pronged formula without emphasis). The fact that Germany has recently written a version of the formula with emphasis into its *Strategy on China* ("China's conduct and decisions have caused the elements of rivalry and competition in our relations to increase in recent years") suggests that the rivalry is considered to be a defining mid-to-long term characteristic of relations with the PRC.[36]

The problems attached to compartmentalization approaches are set to continue to haunt the EU's quest for managing its relation to the PRC along a principled pragmatism and a de-risking strategy. The only currently entertained alternative appears to be the three-pronged formula of partner, competitor, and rival with an emphasis on rivalry as determining the other two elements. The EU, as much as many countries that also pursue an engagement approach, will have a difficult course to chart in the coming years factoring in the rivalry without making de-risking to be merely a euphemism for decoupling, which it knows it cannot afford or realize in the near future, and pursuing a principled pragmatism that risks undermining its own credibility as a normative power.

[36] The Federal Government, Strategy on China of the Government of the Federal Republic of Germany, 2023, <https://www.auswaertiges-amt.de/blob/2608580/49d50fecc479304c3da2e2079c55e106/china-strategie-en-data.pdf>, p. 11.

Future Scenarios for the EU 2050*

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* Contribution by the author on 26.9.2023 at the 14th Network Europe Conference "EU Enlargement and European Integration: Challenges and Perspectives", organized in Stockholm by the Europa Institute at the University of Zurich (EIZ) and the Institute of European Law of Stockholm University. The manuscript of this article was finished before the Report of the Franco-German Working Group on EU Institutional Reform "Sailing on High Seas: Reforming and Enlarging the EU for the 21st Century" was published on 18.9.2023. The reader will notice certain similarities.

On 9 May 1950, the then French Foreign Minister *Robert Schuman* laid the foundation of a European cooperation with the "Schuman Plan", a cooperation which is now embodied in the European Union (EU). This article attempts to consider what the Union might look like 100 years later – the year 2050 is not so far away!

I. Number of Member States

The first European Treaty, the European Coal and Steel Treaty, had six Member States with just under 200 million inhabitants at the beginning of 1952. Currently, the EU has 27 Member States with 448 million inhabitants. It is the third most populous country or entity on earth after China and India. It has brought peace and prosperity to its members and is the largest successful integration project of modern times.

The scenario presented here assumes that the EU will continue to exist in 2050 and will then have 35 Member States. The first two new Member States expected to join will be Ukraine and Moldova. Both countries applied for membership in February and March 2022, respectively, and are unlikely to be refused once the Russian attack on Ukraine is resolved (which everyone hopes will happen soon). Candidate status was granted to both countries in June 2022. It can be assumed that the so-called Copenhagen criteria,[1] which normally have to be fulfilled by candidates for accession, will be interpreted extraordinarily generously by the EU, at least with regard to Ukraine. Never before has a country devastated by a war of aggression completed an accession to the EU, but never before has it been so geostrategically necessary to admit a country.

[1] Political criteria: Democracy, stability, rule of law (which includes the battle against corruption), respect for fundamental rights; economic criteria: functioning market economy; adoption of the EU's common body of law; willingness to assume all obligations of membership.

The next step will probably be the accession of the six "remaining West Balkan states": Albania, Bosnia-Herzegovina, Kosovo, Montenegro, North Macedonia and Serbia. Even if there is currently much concern about ongoing and further violent conflicts between these states with their complicated ethnic groups, including Muslims for the first time, the EU will probably have to round off its geographical borders,[2] if only to limit violent conflicts in its immediate neighbourhood in the future. No one can afford another war on the former Yugoslavian territory, not even France, which is much more reticent than Germany about the accession of these states.

Turkey becoming part of the EU in the next few decades no longer seems a realistic scenario. After various attempts in the past,[3] the relations with the regime, which puts in danger more and more democratic principles, have cooled down to such an extent that no one in the EU really believes that there will be a common denominator in the near future. Added to this are the country's latent entanglements with Russia. For yet other reasons, no one believes that the United Kingdom will soon return to the European family that it left in 2020 after 47 years of membership, nor does anyone believe in admitting a then perhaps split-off Scotland as an own new state. Switzerland, too, is likely to remain in its current relation with the EU as a closely linked third country, relations with which it is basically comfortable, as are the small states of Monaco, Andorra and San Marino and also the Vatican, which again has a different profile. Georgia, which would very much like to become an EU Member State in order to get protection from its close neighbor Russia, seems geographically too far away, as also Aserbaidschan and Armenia, which additionnally have permanenet conflicts between each other.

So it can be speculated that the EU will have 35 Member States in 2050, 30% more states than at present. Despite the EU's internal tensions with Poland and Hungary, which will be discussed later, withdrawals in the near future are unlikely. On the one hand, 30% new Member States seem a lot. On the other hand, in terms of population, these countries will only bring 14% more people.[4] Assuming the expected demographic developments, including immigra-

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2 See *Timothy Garton Ash*, Homelands: A Personal History of Europe, 2023. It is interesting to note that the population of the Western Balkan States is not everywhere largely in favor of an accession to the EU, i.e. in Serbia, not many more than 50% of all inhabitants.

3 Turkey has been an official candidate since 1999. Negotiations were opened in 2005, but have not been pursued since 2016. The EU is paying Turkey billions of Euro as so-called "pre-accession aid", and considerable money is also flowing into this country as well as into other Mediterranean countries in the context of the migration issue.

4 The increase from 6 to 27 Member States between 1952 and 2023 also raised the population of the EU only from 200 million to 448 million.

tion, will materialize, the EU will then have 512 million inhabitants. When the United Kingdom was still a Member State, the EU had already 515 million inhabitants. In this perspective, not too much will change. Rank 3 of the most populous states or entities on the planet will still be a given for the EU, but the EU will also not grow enormously, compared to other states.[5] A different question is the economic output of all these new states, which is naturally expected to increase.

II. Relationship between large Member States and small and medium-sized ones

It will be interesting to see how the ratio between large and small Member States will be assessed in such a scenario. Currently, there are five large Member States (Germany, France, Spain, Italy and Poland), 12 small and 10 medium-sized ones. The large Member States account for 19% of the number of states compared to 81% of the small and medium-sized ones. In the 2050 Scenario, six large Member States, which will then include Ukraine (with 44 million, Ukraine has more inhabitants than Poland with 38 million, unless the Russian attack decimates the population even further), will account for 17% of the number of states against 83% of small and medium-sized states.

Again, it is interesting to look at the relationship of these percentages to population figures. At present, 66% of the EU's inhabitants live in the 19% of large Member States and 34% in the 81% of small and medium-sized ones. This will be identical in the 2050 scenario with the 17% of large Member States, which will then also have 66% of all EU-inhabitants, while the inhabitants of the remaining 83% of the Member States will make up 34% of the total population, as they do today in small and medium sized States. So everything stays the same?

The disparity between large and small Member States is striking and has been discussed since the beginning of the European cooperation. On the one hand, it is evident that large Member States have a different standing and can override smaller ones. On the other hand, this was never too much of a prob-

[5] In the 2017 White Paper, p. 8, which will be discussed later, very instructive statistics indicate that in the year 1900, Europeans accounted for 25% of the worldwide population. This percentage were decreased to 11% in 1960 and to 6% in 2015. In the year 2060, Europeans would probably comprise only 4% of the world population. Even if it may have been difficult in 1900 to find reliable figures and even if the shape of Europe at the various time settings is subject to discussion and immigration is probably not taken into account, these figures show an importent trend: Even on rank 3, today's 448 million EU citizens equal only 5,6% of the world population of roughly 8 billion. This is definitely less than in the year 1900.

lem in the past – small or medium-sized countries like Belgium and Luxembourg were able to occupy excellent niches and important EU-posts, also later the Baltic states with their high level in modern technologies. Depending on alliances, many successes were achieved between small, medium and large countries which would not have been possible between large countries only. A country's self-confidence depends not only on its size, and new projects can often be tested better in a small territory. On a negative scale, small countries may be more susceptible to the influence of foreign investment, as can be seen in Malta and Cyprus where Russia used to play an important role as an investor. Therefore, it will certainly have to be closely observed how the future small member countries of Eastern Europe, which are already being targeted by China, will fit into the existing group. More efforts will have to be put into assimilating them than was the case during the Eastern enlargements of 2004 until 2013, when the existing Member States thought they had done all they needed to do by accepting the new countries as Member States and let things take their course.

III. Unanimity in Voting in the Council

The biggest problem with many Member States, even more so if there is a large disparity in their weight, is decision-making. Votes in the Council or the European Council have to be unanimous in certain areas, which is not to the liking of all large – and not necessarily of all small and medium-sized – countries. The current discussion on this issue is heating up strongly, and a change at any price is being demanded from a wide variety of parties. It is helpful to first bear in mind which areas are actually affected by the need for unanimous voting: these are the amendment of the founding treaties, the accession of new Member States (Art. 49 para. 1 TEU), the control of the values of the EU, especially the rule of law, by the Member States (Art. 7 TEU), the budget (Art. 311 et seq. TFEU), the authorisation of enhanced cooperation between a group of Member States (Art. 329 TFEU), the common foreign and security policy, e.g. sanctions against third countries (Art. 24 TEU), specific areas of justice and home affairs and of asylum and immigration (Art. 77 TFEU), indirect taxation (Art. 115 TFEU), specific areas of social policy (Art. 153 TFEU), as well as fundamental decisions of environmental policy, e.g. concerning water resources and energy structure (Art. 192 para. 2 TFEU).

Except perhaps for the last two policy areas and the enhanced cooperation between a group of Member States, to which we will return, these are areas where it is understandable that a state would want to retain its sovereignty. Many EU insiders find that the struggle for unanimous solutions has always

been worth the time to find them, and that a great pacifying effect comes from them.[6] The discussions of late have rather been inflamed by the fact that it is feared that Poland and Hungary, by intimidating the judiciary and important groups of society, like it was the case in communist times, are abandoning the path of the rule of law and, moreover, that they are using the refusal of certain approvals, for example on sanctions against Russia, to gain other (financial) advantages. The torpedoing of one's own values from within is a development that never existed in the EU before and rightly gives rise to the greatest fears. Thus, the vehement desire to abolish the principle of unanimity actually hides the hope of a "patent remedy" for how the EU can deal with tendencies that destroy it from within its own ranks.

Breaking up unanimity would certainly be helpful. If it were to succeed, it would have to be done before the admission of new Member States. However, as is in the nature of things, unanimity can only be abolished by unanimity. The following approaches are conceivable: the introduction of a "particularly qualified" majority for certain decisions, perhaps of 80 or 90% of the Member States, the introduction of emergency clauses that allow for a different decision-making behaviour, for example in the area of foreign and security policy, possibly also a better use of the existing "bridging clause" or "passerelle" of Art. 48 para. 7 TEU. This provision, which was actually forgotten after its intensive discussion in the context of the Lisbon Treaty 2009, states that the European Council, with the participation of the national parliaments, can decide unanimously to transfer an area subject from unanimity to a qualified majority voting in the future. This has only happened once so far, namely in 2011 with regard to the Euro bailout fund, which was then adopted by qualified majority, after amending Art. 136 TFEU which initially foresaw unanimity in the decision taking. However, it is also true for this specific bridging clause, as can be seen, that the abolition of unanimity can only take place unanimously.

IV. Qualified Majority in Voting in the Council

The virulent voices which are in favour of abolishing unanimity in voting in the Council do not always bear in mind that 80% of all decisions within the EU are currently not taken in unanimity, but according to Art. 16 TEU and Art. 289, 234 TFEU in the "ordinary" legislative procedure with qualified majority and in co-decision of the Council with the European Parliament. The qualified ma-

[6] A master of long deliberations in order to reach unanimous solutions was the former German Chancellor *Angela Merkel*, who devoted herself to this in countless night meetings. It was by no means the case that only lowest common denominator opinions were found.

jority in the Council, called "double majority", is balanced in such a way that it is achieved (1.) if at least 55% of the Member States (currently 15 of 27 Member States, in the assumed scenario for 2050 19 of 35 Member States) are in favour, but only (2.) if these states represent together at least 65% of the total EU population, and if (3.) there is not a veto by at least four Member States, regardless of their size.[7] The double majority was invented to keep the voting weight of small and medium-sized Member States somewhat in check. At present, and probably also in 2050, all small and medium-sized Member States together, even if they represent actually 81% and then 83% of the number of Member States, in both scenarios account for only 34% of the total EU population. This means that small and medium-sized Member States alone cannot force anything, but need two or three large Member States on their side.

From the beginning, this system had in its favour that it could be maintained or easily adapted when new Member States joined. A comparison of the current figures and those expected for 2050 effectively shows that this is also the case for the presented scenario.

V. White Paper 2017 on the Future of the EU

In 2017, *Jean-Claude Juncker*, former Prime Minister of Luxembourg, who was President of the European Commission from 2014-2019, put the following ideas on the future of the EU up for discussion in a White Paper, interestingly enough as a scenario for the year 2025 – which is not far away today:

(1) Carrying on as before, (2) Nothing but the Single Market, (3) Those who want to do more can do more, (4) Doing less more efficiently, (5) Doing much more together.[8]

After 2017, there have been other initiatives, including the Conference on the Future of Europe, which mainly involved young people and various citizens' forums, producing many important proposals in its final report of 9.5.2022, a report which is well worth reading. Currently, work is underway to implement those proposals which do not require treaty changes, interestingly these are 95% of them. For the most important 5%, including the abolition of the unanimity voting requirement and the adaptation of the EU's catalogue of com-

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7 In Germany, one remembers the vote on the "combustion engine phase-out", which was steered in a different direction at the last minute by Germany, Italy, Poland and Bulgaria in March 2023. The German press had proudly reported that Germany alone was responsible for the veto, which, as explained, is not possible.

8 White Paper on the Future of Europe of 1.3.2017, COM (2017) 2025 final. The document is definitely worth reading.

petences, it is still questionable whether a treaty amendment procedure, a so-called "Convention", will be initiated in the near future. A fairly large group of Member States has already declared that at present the time is not right for this. However, it is important that tportanim this resistance can be overcome and that the voices of the concerned citizens of Europe are given the appropriate appreciation. The 2024 European elections could be the next forum for discussion of the various issues.

Irrespective of the initiatives taken in between, the five *Juncker* alternatives continue to clearly indicate directions in which a positioning of the EU and its members is necessary. It is of course possible to combine the approaches, and the greatest consensus at present seems to be for a combination, depending on the circumstances, of points 2, 3 and 4, whereby the expression "nothing" in point 2 should be understood as "to focus on", as in the German wording "Schwerpunkt".

Incidentally, *Jean-Claude Juncker*, in a personal opinion, brought up the idea of various European "orbits" into which states could fit that want to or are able to do more or less together without being slowed down or forced by others. Here it becomes apparent that the authorisation of an enhanced cooperation of individual Member States[9] (point 3 of the White Paper) would definitely have to be taken out of the unanimity vote, and it is very much to be hoped that this can succeed. Allowing enhanced cooperation between groups of Member States will be the key to keeping a EU with 35 Member States alive and able to act in a modern society. To this end, incentives would have to be created to "move up" from one orbit to the other, which could be linked to the achievement of the goals of the internal market, but also to concepts like the rule of law, successful anti-corruption efforts etc. The efficiency rightly sought in point 4 of the White Paper will entail more (serious) controls overall, although these controls would already be necessary in many situations today. It is true that on the one hand, sustainable "enforcement" ties up a lot of resources.[10] On the other hand, the law loses all its authority if it is not enforced.

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9 Examples are the Euro, the Schengen Area and the Unified Patent which just entered into force on 1.6.2023.

10 See *Hakenberg*, Wege zu besserer Normbefolgung im europäischen Wirtschaftsrecht, in: ZEUS-Sonderband 70 Jahre Europa-Institut, Saarbrücken 2021, p. 129.

VI. Core issues of an EU 2050

In a vibrant EU which wants to exist in 2050 with 35 Member States as a serious economic power on the planet, to bring prosperity to its citizens and to get along well with its neighbours, the following core issues seem to be important.

1. Peace

The beginning of the European cooperation was, as everybody knows, a peace project. It is hard to believe from today's perspective that the *Schuman* Declaration was possible only five years after the end of World War II. The EU was rightly awarded the Nobel Peace Prize in 2012. According to Art. 3 para. 1 TEU, the aim of the EU is "to promote peace, its values and the well-being of its peoples", and Art. 8 TEU extends peaceful relations to its neighbours. This should definitely not be different in 2050.

2. Strong Internal Market

The focus on a strong internal market should always be one of the core issues of a united Europe, as point 2 of the 2017 White Paper underlines. An innovative European economy which can operate in a large market in all areas of modern technology is indispensable for the Union's global competitiveness. In the globalised environment which reigns today, certain dependencies on non-EU states will have to be reconsidered more strongly. An isolation of the EU is on the other hand not desirable either. For areas of public welfare, however, a stronger return to national interests would have to be allowed.

3. Stronger Common Foreign and Security Policy

The EU's common foreign and security policy, defined in the treaties only as an inter-governmental cooperation, has not been very intense in the past and is just,now getting shaped in the current conflict with Russia. With 35 Member States, common approaches will become even more difficult. Already the two large states, Germany and France, have different views on how the relationship between the EU and NATO should continue. Nevertheless, it seems unavoidable that by 2050, all EU Member States should also be NATO members. At least a consensus of the EU Member States on fundamental questions of security and military policy should be reached by then. For more detailed common approaches, the enhanced cooperation of a group of Member States can again bring fruitful results, especially if the cooperation is not slowed down by unanimity requirements or veto rights.

4. Adapted Relationships with Third Countries

The EU's relationships with third countries may become rougher by 2050. The EU is already using stronger elbows than in the past to assert itself on globalised markets. Examples are anti-dumping measures against companies from East-Asia and anti-trust measures against Big Data companies from the USA. It is also to be expected that the unspecific support of countries of the "Global South" will be replaced by funding of specific projects and, on a general basis, by trade relations which offer these countries more respect, independent responsibilities and future prospects. It might be wise for the EU to hold back on unilaterally imposing European fundamental rights standards on trading partners in other parts of the world.

5. Unanimous Actions on Asylum and Immigration

In the difficult areas of asylum and immigration, the EU's common lines of activity will have to be defined by 2050. A better coordination between the Member States is already on the horizon with the compromise reached in the summer of 2023. Given the enormous importance of migration on a planet of 8 billion people, which is also undergoing climate change, a coordinated approach not only by the EU, but by all states concerned seems essential. At some point in future crises, there may not be enough time for discussion. It would be very helpful if concrete concepts could be worked out soon.

6. Reorientation of European Agricultural Policy

European Agricultural Policy which dominated the stage especially in the first decades of the European cooperation, could be brought back from EU-competences to national competences by 2050. Its instruments, mostly direct aids, are no longer up to date, and the policy has not been able to prevent the decline of small farming structures in favour of large agricultural companies who nowadays dominate the market. Each new Member State (just think of a new Member State Ukraine) has placed undue new burdens on the EU agricultural policy by insisting to keep national prerogatives and seldomly identifying itself with new common concepts. Direct aid has led to a kind of alimentation mentality which hinders competition and many innovations. The enforcement of the European rules in this area by the Member States never worked very well.[11]

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[11] Examples of abuses and absurd situations in relation to agricultural policy are innumerable. For example, when EU subsidies for cattle farming were changed from subsidies per cattle to aids per hectares of cultivated land, Corsica farmers declared areas that in total corresponded to the size of Greenland. After checks by the EU authorities, France was obliged

It seems that by 2050, the time will be ready to expose agriculture, like other sectors of economy, to the free forces of the market. All controls could be decentralised and carried out by the national authorities, whereas the EU would continue to coordinate at the European level only basic matters such as pesticide use, genetic engineering, climate protection etc.

7. Environment and Climate Protection

Unlike agricultural policy, environmental and climate policy should be regarded as core European issues in 2050. The current Commission under the leadership of *Ursula von der Leyen* is already assigning a paramount importance to climate protection with its much praised "Green Deal". In 2050, the first results of the EU's efforts to halt climate change will be known, and it is likely that severe new targets will have to be set, for which there will not always be a consensus among the population. It is to be expected that the friendly alimentation of Member States who intend to have conversion measures financed from EU funds, which is still practised today, will be abandoned and that there will be a switch to self-responsibility and efficient controls. In other words, a harsher tone will have to be applied in this field, too. But it should also not be forgotten that the pioneering position which the EU wants to achieve in the field of CO2-reduction will not be sufficient in the long run if countries in other parts of the world do not participate in the project. In this respect, great negotiating skills will be required at the international level.

8. Application of the Euro in all Member States

By 2050, the Euro should be effective in all Member States, "whatever it takes".[12] The Euro is the EU's greatest identification project, which has set it apart on the world stage from groupings of state cooperation of a lesser intense nature. Ideally, the application of the Euro should go hand in hand with a genuine economic and monetary policy operating with efficient controls in order to better avert crises in advance. This is still a long way to go. At least, the course has already been set for the European Stability Mechanism ESM to play an independent role alongside the International Monetary Fund IMF.

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to repay 700 million Euro to the EU treasury. As the French authorities were unable to precisely trace the declared areas for individual farmers due to the lack of a cadastre on the island of Corsica, the payment had to be made from the general budget at the expense of the "normal" taxpayers.

12 At the height of the financial crisis in 2012, then ECB President *Mario Draghi* gave a famous speech in which he announced that "within our mandate, the ECB is ready to do whatever it takes to preserve the Euro, and believe me, it will be enough".

9. Reorientation of European Antitrust Law

Antitrust law, which has occupied a large space in European politics since the 1980s is, as it turned out, actually only necessary for large Member States and plays a minor role for most of the Member States existing now and also in 2050. The control of antitrust-situations has already been shifted back to the national level since 2000 as far as matters of lesser importance across Europe are concerned. This could become even more pronounced by 2050. The few really "big" issues affecting the European market as a whole, like e.g. the activities of the American Big Data companies, would remain under EU jurisdiction and could be fined severely by the European administration, as is the case today. For instance, the Digital Market Act,[13] which has just entered into force and which applies only to globally dominant gatekeepers, already clearly shows such an orientation.

10. Legal Harmonisation not too Detailed

For many areas of legal harmonisation in which European legislative initiatives took place in the latest years, a return from too many details to general principles would be beneficial by 2050. Good legislation is not characterised by a quick reaction to every new invention of the economy, which moreover constantly has to be legally re-recorded, i.e. amended. And it is necessary to keep in mind that legal harmonisation concerns transnational as well as purely national situations. With too detailed legislation, European law has manoeuvred itself into a certain trap in a number of areas from which it cannot easily find its way out. An example is European consumer law which has become a jungle that hardly anyone can see through, especially not the concerned consumers. It is apparent that regulation can also be done in an excellent way by the market itself. For instance, the general terms and conditions of some online providers are superior to many legal regulations in terms of simplicity and comprehensibility. By 2050, therefore, the EU should agree on general principles in this area and give preference to projects with important influence on the international stage. The best example of this is the internationally extraordinarily respected General Data Protection Regulation of 2016, which is setting standards worldwide, and this could also be the case for the European law on artificial intelligence which is currently in the legislative process.

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[13] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector (Digital Markets Act), OJ 2022 L 265, p. 1.

11. Europe of the people

Now it is time to think about the "ordinary" people in Europe. Protest movements of various kinds show that not all EU citizens are happy with the current situation, and some even question democracy as the best way of life. Does Europe need to take better care of its people? Definitely yes. The economy doesn't interest everyone, Erasmus programmes don't reach every student, European culture takes place mainly in museums and for insiders, European media still do not exist (not even social media), crises depress young and old, the fun of participating in shaping Europe's future is hardly felt even in well-functioning families, schools and social groups. To change this, all actors in the political and social landscapes at European and national levels are called upon to involve people of all ages in decisions, to prevent uncertainty and to promote new ideas, but also to foster the responsibility and civil courage of each individual. Even if a European football team will probably not have replaced the national teams in 2050 – true subsidiarity prevails in this area! – there are many approaches which make people feel at home in a big Europe and not just within their own four walls.

VII. Structures of an EU 2050

1. Single Leadership

In the EU, the office of the President of the European Council has existed since 2009.[14] Better known than this person is usually the President of the European Commission, currently *Ursula von der Leyen*, or possibly the Representative for Foreign Affairs, currently *Josep Borrell Fontelles*. This should have changed by 2050, ideally through a single person who represents all institutions and thus the EU as a whole to the outside world and also appears visibly on the international stage in this important office.[15]

2. Efficient Institutions

The EU institutions could be downsized by 2050 and devote themselves to more efficiently designed projects. In addition, a need for more interaction with Member State parliaments, authorities and courts has emerged for some

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14 Not everyone remembers former presidents *Herman van Rompuy* and *Donald Tusk*, and the current president *Charles Michel* is not outstandingly well known either.

15 Former US Secretary of State *Henry Kissinger* has been known to ask: "Who do I call when I want to reach Europe on the phone?"

time. Institutions staffed with "one person from each member state" like the Commission, the European Court of Justice or the Court of Auditors can no longer exist with 35 Member States. Approaches to a more balanced distribution could include staggering, drawing lots or having several Member States work together for one position. A better linking of the work of the EU level with the national ones could also defuse a competitive situation that has led over the past decades to the fact that the national media report mainly the success of national politicians in reaching results on the European level, forgetting that it was in reality the work of the EU institutions which should be praised. Thus, it can be hoped that in 2050, more efficient cooperation can also get a better shared publicity.

3. Changes in the Budget Orientation

Today, 73% of the EU's finances are transfer payments coming from the gross national income of the Member States. "Being paid by the Member States" has always been considered as not satisfactory for the EU. By 2050, the EU should finally have gained its own fiscal sovereignty and the control of its budget, approximately 186 billion Euro in 2023. If agriculture were to be transferred back to national competence, as proposed above, the 37% currently budgeted by the EU for this policy would already be eliminated. Also the 33% so-called structural expenses, which are supposed to harmonize economies and societies of structurally weak Member States by means of direct payments, can probably be reduced or at least oriented more to individual projects than to general alimentation, which is also much more difficult to control.

A major issue is whether or not to go ahead with borrowing on the financial market for such projects. For the first time in its history, the EU has taken on in 2020 a debt of 750 billion Euro with the financial package called "Next Generation EU" which is aimed at combatting the consequences of the Corona pandemic. This has led to strong criticism, firstly because a deficit (the disadvantages of which are mainly at the expense of the economically strong Member States) is not provided for in the treaties, and secondly because internal control of the use of the funds is much more difficult in such a situation. Nevertheless, the model of taking on debts has many supporters, especially for crisis situations, situations which will probably be unavoidable in the future.

4. Efficient Sanctions for Violations of the EU's Values

The sensitive issue of Member States' violations of the EU's set of values as defined in Art. 2 TEU, especially the rule of law, has already been addressed. Art. 7 TEU, which provides for a complicated multi-stage procedure to remedy

such situations, has proved unsuitable in the current constellation with Poland and Hungary, if only through the banality that in cases where several Member States violate the values at the same time, a unanimous decision by "all except the state concerned" is impossible. Until a new mode is defined in the Treaties, which will hopefully be possible by the year 2050, remedies can be found through the so-called compatibility mode,[16] which is currently practised against Poland and Hungary. The mode is set out in a regulation in the area of budgetary law, which could at the time be adopted by qualified majority, and which provides for withholding payments from the EU budget to Member States who undermine value standards. In other words, money is paid only to those respecting European values.

Many find this unworthy. A real success against Poland and Hungary has yet to be achieved, and the fronts are hardening instead of softening.[17] Keeping its own members on board, whom one should actually be able to trust, at the moment requires disproportionate efforts on the part of the EU and ties up manpower that would be needed elsewhere. Added to this is indignation. It is obvious that Europe's image is being damaged by the situation that two Member States openly refuse to follow its rules. More radical solutions are being advocated, ranging from a more rapid suspension of voting rights than provided for in Article 7 para. 3 TEU to a complete exclusion mechanism.[18] The EU has so far refrained from formulating a member-exclusion mechanism. This will probably have to change by 2050 -– unfortunately, but probably rightly so.

5. Limiting the Use of all Official Languages

A relatively innocent topic in the EU in comparison with the violation of the rule of law is the topic of limiting the use of all official languages in all situations. Not all EU citizens will like the idea, but a limitation will be inevitable in 2050 with 35 Member States. At that time, the population everywhere should speak English at least in addition to their mother tongue. Anyone who is still

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16 Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general conditionality regime for the protection of the Union budget, OJ 2020 L 433, p. 1.

17 Both countries have already openly declared that they will refuse to follow the rulings of the European Court of Justice. See i.e. from the great number of recent judgments on the unlawfulness of the Polish judicial reform, ECJ, Judgment of 5.6.2023, Commission v Poland, C-204/21, ECLI:EU:C:2023:442.

18 In the summer of 2023, it was proposed to suspend or postpone Hungary's Council Presidency planned for the second half of 2024. Although an "equal rotation" applies to the six-month Council Presidencies according to Art. 16 para. 9 TEU, the order in which the States take the presidency can be determined by qualified majority, Art. 236 b) TFEU.

proud of the fact that all relevant documents in the EU are translated into 24 official languages, including Maltese and Gaelic, and that 552 language combinations can be represented in the interpretation booths of the European Court of Justice, may be accused of backward-looking thinking. Adding eight new official languages (and thus arriving at 992 combinations!), which are treated with equal rank, would lead to absurdity. Today, a country's identity can no longer be determined by equal respect for its language. Moreover, modern technologies offer translation possibilities at breathtaking speed, so that the large translation staff of the European institutions can at least partly be employed in other uses with more interesting projects.

6. Bodies for the Evaluation of Results and the Elaboration of new Projects and Strategies

In 2050, there should be (more) bodies in the EU, governmental ones and from civil societies, which deal with the constant evaluation of the results of the work done, propose new projects and develop strategies. So far it is mainly the French government who has made an effort to come up with new ideas and to propose different formats for the EU. Germany is a member country that prefers to react to situations rather than anticipating them and shaping the future, and only in a few other countries have government bodies, think tanks, private initiatives and the media come up with interesting proposals in recent years. Thus, most of the input to the development of the EU comes from the business community, which demands quick responses to its ideas. Even the great eastern enlargement of 2004 to 2013, which affected 13 new countries, led to little new creativity. This may be because of a feeling of being second-class members which did not really disappear among the new Member States.[19] If, as planned, eight more Member States join by 2050, all groupings at all levels will inevitably have to contribute to constantly breathe new life into the "European family" so that the economy and people of all generations can identify with it.

[19] This is the origin of the cooperation between the so-called Visegrád states of Poland, Slovakia, the Czech Republic and Hungary, which has since lost importance, and probably also of the 16+1 group, which has existed since 2012 and in which 12 eastern Member States and some countries of the Balkans maintain a China-led cooperation with this country.

VIII. EU Scenario 2050 – International Stage

1. New Orbit EPC

The so-called European Political Community EPC, an idea of the French President *Emmanuel Macron*, was founded in Prague in October 2022 by 44 European states and states bordering Europe. At its second meeting on 1 June 2023 in Moldova, 47 states were already official participants.[20] It is still unclear what the future of this body, which is under the aegis of the "good neighbourliness" of Art. 8 TEU, might look like. At present, the new body is concerned with getting to know each other and with debating the situation in Ukraine. The aim is that at some point in time, the European internal market will extend to all these countries, then for a total of 700 million inhabitants, continuing the idea in point 2 of the 2017 White Paper. The next step could then be to consider how Schengen, the other major integration project in which states other than just the EU Member States already participate, e.g. Switzerland, could be expanded.

Even if it is clear that a regular contact with all the countries participating in the EPC will not be easy, especially with Turkey, whose president did already not attend the second meeting in Moldova, the idea of such a format is compelling. Everyone knows that a constant dialogue on issues keeps them alive, regardless of achieving immediate results. At the moment, two meetings a year are planned, one in the country holding the EU presidency,[21] one in a non-EU country.

2. EEA into the EPC

The EPC could, if it develops as planned, be expanded in many respects. For example, the European Economic Area EEA, which has existed since 1994 between the EU on the one hand and Norway, Iceland and Liechtenstein on the other, and which with the time being seems somewhat anachronistic, could be

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20 The EPC of 47 countries with a population of around 700 million is currently composed of the 27 EU Member States (448 million inhabitants), the three EEA Member States Norway, Iceland and Liechtenstein (6 million in total), the three small states Andorra, Monaco and San Marino (150,000), the eight candidate countries Ukraine, Moldova and the rest of the Balkans (64 million), two unrealistic candidate countries Turkey (85 million) and Georgia (4 million), two countries with special status, namely Switzerland (9 million) and the United Kingdom (67 million), as well as the two Asian countries Armenia (3 million) and Azerbaijan (10 million).

21 The next meeting will be hosted by the Spanish government at the *Alhambra*.

merged into it at some point. Apart from access to the European internal market, which has to be paid for, the EEA does not offer extremely much, and the structures providing for a minimal coordination with the EU are very cumbersome. As a role model, it has therefore not been used again in the 30 years of its existence, especially not when a new type of cooperation was sought for the UK when it was in the process of leaving the EU.

3. Council of Europe into the EPC

The idea of incorporating the Council of Europe into the EPC or vice versa, or transforming one or the other body accordingly, goes even further, although it would probably be conceivable for 2050. The Council of Europe, founded in 1949, from which the EU later "copied" both the flag and the anthem of Ode to Joy, currently has 46 Member States. Since the exclusion or withdrawal of Russia in 2022 and Belarus having never been a member of the Council of Europe anyway, the Member States are practically identical to those of the EPC, the only difference being the Kosovo which some states recognize and others do not.

In a 2050 scenario, the Council of Europe could be merged into a modern EPC, which would link economy and society, and which would take over the most important content of the Council of Europe which are the European Charter on Human Rights and the Court of Human Rights in Strasbourg. The Charter and the Court have proved their worth and have always maintained their independence alongside the Charter of Fundamental Rights of the EU and the European Court of Justice in Luxembourg. The fact that a body like the EPC is equipped with a foundation in fundamental rights is certainly not a disadvantage, nor is the fact that the EU fundamental rights continue to exist alongside it.

IX. Conclusion

This study presented ideas how the EU and its environment could look like in 2050. Reality will always be different from imagination. Nevertheless, reflexions are allowed. Perhaps a digital twin of the EU already exists on another planet in 2050, which will have perfect solutions for all problems ready in a parallel world. Let us be open!

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