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European Integration in Times of Security Challenges

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Preface

This publication comprises the contributions presented at the 15th Network Europe Conference, held in Split, Croatia, in September 2024. The conference addressed various challenges facing the European integration process in light of current global developments, as well as aspects of the EU's enlargement perspectives.

The European Commission's *Enlargement Package* for 2023 proposed opening accession negotiations with Ukraine, Moldova, and Bosnia and Herzegovina, while also granting candidate status to Georgia. As a result, the EU now has seven candidate states and two potential candidate countries. In this context, the EU must ensure that accession requirements are met in accordance with the Copenhagen criteria. Another round of enlargement also necessitates institutional reforms, including adjustments to the composition of EU institutions and the requirement for unanimity in decision-making. The *Conference on the Future of Europe* (2022–2023) provided significant impetus for such reforms, with strong involvement from civil society.

In the realm of migration policy, notable progress has been made. The *New Pact on Migration and Asylum*, adopted in December 2023, represents a landmark initiative aimed at normalizing and managing migration in the long term. Anchored in principles of solidarity, shared responsibility, and human rights, the agreement aspires to establish a coherent and unified approach to migration and asylum across member states. Meanwhile, the EU continues to navigate the complexities of its twin digital and green transitions, with debates often reflecting the diverse interests of its members.

Another significant milestone in 2023 was the adoption of the world's first legal framework regulating artificial intelligence, underscoring the EU's ambition to set global standards. However, questions remain regarding its implementation and its implications for the digital economy, leaving room for further deliberation and adjustment.

Against this backdrop, the contributions in this publication address various crucial topics. In retrospect, the developments discussed during the conference have gained even greater significance. They highlight the dynamic inter-

play between policy-making and societal engagement and underscore the EU's ongoing efforts to balance its ambitious goals with the practical challenges of governance in a geopolitically shifting world.

Zurich, Febraury 2025

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The Process, The Policy, and The Strategy of EU Enlargement

Dorian Jano*

Abstract

The European Union's (EU) enlargement represents one of its most transformative projects, reflecting the Union's capacity to foster integration, stability, and regional development. By expanding its borders, the EU not only reshapes its internal dynamics but also reinforces its normative and geopolitical influence. This article provides a comprehensive analytical framework for understanding the dynamics of EU enlargement by discussing its three aspects: process, policy, and strategy. The interplay between these aspects offers an integrated perspective to explore the contemporary discourses on institutional mechanisms, rule-based governance, and geopolitical strategy in EU enlargement.

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I. Introduction

The European Union's (EU) enlargement, a cornerstone of European integration, represents a transformative phenomenon that transcends conventional understandings of institutional expansion. Enlargement is neither a mere procedural undertaking nor an isolated (geo)political event. It is a continuous interaction involving multifaceted institutional dynamics, national politics, and

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broader strategic imperatives, leading to multiple potential outcomes.[1] Contemporary scholarship has long moved beyond viewing enlargement as a one-time event of territorial expansion, instead recognizing it as a catalyst driving changes within the EU and the candidate countries.[2] This development signifies a fundamental shift in understanding and studying EU enlargement: emerging from an interstate bargaining process to a sophisticated policy instrument governed by EU institutions and rule-based frameworks[3] and currently (re)becoming a geopolitical strategic imperative.[4] This shift underscores a central tension in EU enlargement: balancing its normative commitments to rule-based governance and democratization with the security-based geopolitical imperative. While normative frameworks, such as the Copenhagen criteria, emphasize democratic consolidation and institutional reform, geopolitical imperatives often prioritize stability and strategic alignment over strict adherence to these norms.[5] For example, fast-tracking Ukraine and Moldova's candidate status illustrates how security concerns can override normative benchmarks.

Enlargement is not a unidirectional expansion emanating from the EU. Instead, it is an "entanglement" where both "inside" and "outside" simultaneously shape and are shaped by each other.[6] This dynamic interplay emerges from the convergence of the EU's internal dynamics, state-building challenges, and geopolitical imperatives.[7] Enlargement fundamentally shapes the EU's development as a polity, prompting member states to continuously reassess the nature, purpose, and trajectory of their collective European project.[8] Beyond its insti-

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1 Ikonomou H./Andry A./Byberg R., "Introduction: towards a new understanding of enlargement," in Ikonomou/Andry/Byberg (ed.), *European Enlargement across Rounds and Beyond Borders*, Routledge 2017.

2 Schimmelfennig F./Sedelmeier U., "The Study of EU Enlargement: Theoretical Approaches and Empirical Findings," in Cini/Bourne (ed.), *Palgrave Advances in European Union Studies*, Palgrave Macmillan 2006, 96-116.

3 Ikonomou/Andry/Byberg, 5.

4 Anghel V., "Why EU enlargement is a strategic necessity," in *EU enlargement dilemmas*, The Loop, December 20, 2024. <https://theloop.ecpr.eu/why-eu-enlargement-is-a-strategic-necessity>/<http://www.eiz.unizh.ch/agr.html>.

5 Schimmelfennig F., "Differentiated membership' would overcome the EU's enlargement dilemma," in *EU enlargement dilemmas*, The Loop. January 3, 2025. <https://theloop.ecpr.eu/differentiated-membership-would-overcome-the-eus-enlargement-dilemma/>.

6 Ikonomou/Andry/Byberg, 4.

7 Karjalainen T., "EU enlargement in wartime Europe: three dimensions and scenarios," *Contemporary Social Science*, 2023 18(5), 637-656.

8 Sjursen H., "Enlargement and identity: studying reasons," in Ikonomou/Andry/Byberg (ed.), *European Enlargement across Rounds and Beyond Borders*, Routledge 2017, 57-74.

tutional implications, enlargement has emerged as a crucial mechanism for promoting regional stability, democratic governance, and the EU's geopolitical influence in an increasingly multipolar world.[9] Recent geopolitical developments, particularly the Russia-Ukraine war, have further elevated enlargement from a policy choice to a strategic necessity.[10] The increasing importance of security-geopolitical concerns in the EU's enlargement logic underscores a shift from a primary focus on economic and democratization efforts to prioritizing (continental) security.[11]

The tension between integration and enlargement, often conceptualized as a choice between deepening and widening, has become particularly salient at critical historical junctures.[12] Events such as the end of the Cold War and the Ukraine-Russia War have brought this tension into sharp relief, raising fundamental questions about the relationship between territorial expansion and institutional cohesion. While some argue that extensive enlargement risks diluting the EU's supranational character, others contend that deepening and widening represent complementary rather than competing processes.[13] This latter perspective emphasizes their combined potential for advancing peace, stability, and prosperity across Europe. These ongoing debates illustrate the complex interplay between the EU's internal development and external engagement, highlighting enlargement's central role in shaping the Union's global position.

This analysis explores EU enlargement as a tripartite-dimensional phenomenon encompassing its procedural, normative, and strategic aspects. This approach enables a deeper understanding of enlargement as a political process, a policy instrument, and a positioning strategy.

II. The Process: Navigating the Path to Membership

Enlargement as a process refers to the series of actions, interactions, and stages through which aspiring states prepare for, negotiate, and achieve inte-

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9 Schimmelfennig/Sedelmeier 2006.

10 Anghel 2024.

11 Góra M., "It's security stupid! Politicisation of the EU's relations with its neighbours," *European Security*, 2021 30(3), 439-463.

12 Schimmelfennig F. "The Community Trap: Liberal Norms, Rhetorical Action, and the Eastern Enlargement of the European Union." *International Organization*, 2001 55(1), 47-80.

13 Kelemen R. D./Menon A./Slapin J., "Wider and Deeper? Enlargement and Integration in the European Union," in Kelemen/Menon/Slapin, *The European Union: Integration and Enlargement*, Routledge 2016, 5-21.

gration into the larger economic, political, and institutional framework of the Union. The EU Enlargement process encompasses key steps and stages, including meeting specific criteria, implementing reforms, and engaging in accession negotiations. It is structured around procedural milestones such as gaining candidate country status, opening and closing negotiation chapters, and signing and ratifying the Accession Treaty. Yet, the process extends beyond the mere act of becoming a full-fledged member state. The EU enlargement process involves gradual institutionalization and diverse interactions, allowing states to integrate economically and politically without necessarily achieving full membership.[14]

However, understanding the enlargement process solely through the lens of formal procedures and accession negotiations would be an oversimplification. A complex political, economic, and social interplay characterizes EU enlargement. It entails a profound transformation for both the aspiring candidate countries and the EU itself, shaping their respective policies, institutions, and identities.[15] EU enlargement, viewed as a process of "institutional becoming," involves continuous and iterative adaptation and changes, requiring both the candidate countries and the EU to adjust their institutions, policies, and practices to meet the integration demands.[16]

The enlargement process is deeply intertwined with political realities. Shaped by a complex interplay of domestic, regional, and international factors, it involves a web of stakeholders from the EU institutions, member states, and candidate countries. Each actor plays a crucial role in negotiating terms, assessing progress, and addressing deficiencies. The success of the enlargement process depends on the ability, willingness, and commitment of both candidate countries and the EU (member states included) to overcome a range of domestic and external challenges.[17] Within candidate countries, issues such as corruption, organized crime, and democratic backsliding can hinder reform efforts and jeopardize accession, while socio-economic disparities and political instability further complicate the path to membership. Within the EU, "ab-

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14 Schimmelfennig F./Rittberger B., "Theories of European Integration: Assumptions and Hypotheses," in Richardson J. (ed.), *European Union: Power and Policy-Making*, Routledge 2006, 73-95.

15 Schimmelfennig/Sedelmeier 2006.

16 Jano D., "The whys and when enlarging EU to the western Balkans," *European Journal of Economic and Political Studies* 2009 2(1), 61-77.

17 Jano D., "EU Enlargement Rounds and Dilemmas: The Successful, the Reluctant, the Awkward, and the Laggards," in Costa, B. F. (ed.), *Challenges and Barriers to the European Union Expansion to the Balkan Region*, IGI Global 2022, 18-38.

sorption capacity"[18] and "enlargement fatigue"[19]—characterized by the union's capacity to absorb new members and the diminishing enthusiasm among member states—pose significant challenges. This "double-sided fatigue"[20] stems from concerns about the economic and social impact of new members, scepticism regarding the ability of candidate countries to meet accession requirements, and internal EU debates on institutional reform and integration, all of which threaten to undermine the momentum necessary for continued engagement in the enlargement process. Additionally, external geopolitical factors increasingly shaped the enlargement process. The emergence of new geopolitical realities, such as the Russia-Ukraine war, has reinvigorated discussions on the need for EU enlargement, prompting calls to accelerate accession for Ukraine and other candidate countries. These dynamics demonstrate how the intersection of domestic and external actors and factors creates a complex and dynamic environment that can significantly impact the trajectory of the enlargement process.

This complexity makes EU Enlargement not linear but a dynamic and iterative process characterized by continuous negotiation, assessment, and adaptation cycles. This dynamic is particularly evident in the Western Balkans, where the path to EU membership has been marked by significant delays, setbacks, and renewed momentum due to the changing geopolitical realities.[21] Despite the formal commitment to integration expressed at the Thessaloniki Summit in 2003, progress in the region has been uneven, hampered by a confluence of factors. The lack of political consensus within candidate countries, political instability, unresolved regional conflicts, and the emergence of new geopolitical challenges have significantly impeded reforms and progress.[22] Bureaucratic hurdles, slow advancement in the accession negotiations, and a lack of clarity regarding the accession criteria and the timeline have complicated the process further. The influence of external actors, including Russia, has exerted

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18 "Absorption capacity" refers to "[t]he Union's capacity to absorb new members, while maintaining the momentum of European integration". See European Council, Conclusions of the Presidency – Copenhagen, June 21-22, 1993, SN 180/1/93 REV 1, p. 13.

19 Szołucha A., "The EU and Enlargement Fatigue: Why has the European Union not been able to counter enlargement fatigue?" *Journal of Contemporary European Research* 2010 6, 1–16.

20 The EU's 'enlargement fatigue' can led to 'accession fatigue', that is the candidates incapability in compliance with EU requirements. See O'Brennan J., "'On the Slow Train to Nowhere?' The European Union. 'Enlargement Fatigue' and the Western Balkans" *European Foreign Affairs Review* 2014 19(2), 221-241.

21 *Jano D.*, "EU–Western Balkans Relations: The Many EU Approaches," *The Journal of the International University Institute of European Studies*, 2008 2(1), 143 – 160.

22 Belloni R., "European Integration and the Western Balkans: Lessons, Prospects and Obstacles," *Journal of Balkan and Near Eastern Studies*, 2009 11 (3), 313–31.

significant pressure on the region, undermining political stability and reform efforts.[23]

III. The Policy: Anchoring Enlargement in Rule-Based Governance

Enlargement as a policy encompasses the formal principles, frameworks, and instruments employed by the EU to govern the integration of new members. At its core, the EU's enlargement policy is anchored in the Copenhagen criteria, the demands that set out the fundamental requirements for democratic stability, a functional market economy, and the capacity to effectively implement the EU acquis.[24] Initially designed for Central and Eastern European Countries, these criteria have become the standard accession conditions and the crucial reference points for any enlargement policy. They codified existing enlargement practices and constitutionalized the EU's democratic values.[25] These principles represent a norm-based and structured approach to enlargement, guiding candidate countries to align with the EU's standards and ensuring that new members share the EU's core democratic values.

The EU's enlargement policy operates through a structured framework with several key mechanisms, including annual Enlargement packages and progress assessments. The European Commission plays a central role in this policy framework. It conducts regular evaluations of candidate countries' reforms and alignment with EU standards, publishing annual reports assessing their progress and identifying areas for improvement. These tools are designed to

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23 Petrovic, M./Tzifakis, N. (2021) A geopolitical turn to EU enlargement, or another postponement? An introduction. *Journal of Contemporary European Studies*, 2021 29(2), 157-168.

24 The Copenhagen criteria, established by the Copenhagen European Council in 1993 and strengthened by the Madrid European Council in 1995, set the accession requirements for EU membership including stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities; a functioning market economy and the ability to cope with competitive pressure and market forces within the EU; the ability to take on the obligations of membership, including the capacity to effectively implement the rules, standards and policies that make up the body of EU law (the "acquis"), and adherence to the aims of political, economic and monetary union. See Accession criteria (Copenhagen criteria), EUR-Lex, Access to European Union law, available at <https://eur-lex.europa.eu/EN/legal-content/glossary/accession-criteria-copenhagen-criteria.html>; Accession criteria, European Commission – Enlargement, available at <https://neighbourhood-enlargement.ec.europa.eu/enlargement-policy/glossary/accession-criteria_en>.

25 Kochenov D., "Behind the Copenhagen façade: The meaning and structure of the Copenhagen political criterion of democracy and the rule of law," *European Integration Online Papers* 2004 8; Thomas D. C., "Constitutionalization through enlargement: the contested origins of the EU's democratic identity," *Journal of European Public Policy* 2006 13, 1190 – 1210.

enhance objectivity and transparency in measuring candidate countries' preparedness, ensuring a merit-based pathway to accession. Although the enlargement policy framework is relatively static, reflecting its principle-oriented nature, it has extended over time to include additional obligations known as the Copenhagen "Plus" Criteria.[26] Notable changes include the introduction of detailed administrative capacity criteria, emphasizing the importance of administrative and judicial structures, and the "Good Neighbourhood Conditionality,"[27] which focuses on regional cooperation and resolving border disputes. For example, Serbia's accession has been closely tied to its normalization of relations with Kosovo, a requirement under the Brussels Agreement framework. The policy represents an institutional framework based on normative principles. It operates within a (positive) conditionality mechanism, where progress toward accession is contingent on meeting specific benchmarks. This "external incentives model" establishes links between reforms in candidate countries and their advancement in the accession process.[28]

However, despite its structured approach, the policy framework has faced criticism for being overly broad, inconsistent, and open to interpretation.[29] The flexible and all-inclusive nature of criteria, coupled with continuous adjustments, has added complexities and unpredictability. These issues and perceived biases in implementation have raised concerns about fairness and equity, potentially compromising the policy's credibility as an effective framework for accession.[30] Uneven progress in cases like Turkey and the Western Balkans has fueled scepticism about the EU's commitment to fair and objective enlargement.[31] Turkey's prolonged candidacy serves as a striking example. Although it applied for EU membership in 1987 and was granted candidate status in 1999, negotiations have stalled due to concerns over democratic backsliding and human rights abuses.

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26 The Copenhagen accession criteria have evolved from broad principles to include highly detailed and specific requirements, demonstrating a shift towards a more demanding and scrutinized path to EU membership. See Jano D. "EU Accession Criteria and Procedures: Up for the Challenge?" *EuZ – Zeitschrift für Europarecht* 2024 4.

27 Basheska, E., The Good Neighbourliness Condition in the EU Enlargement, Contemporary Southeastern Europe, 2014 1(1), pp. 92 – 111, p. 99.

28 Schimmelfennig/Sedelmeier 2020.

29 Grabbe, H., European Union Conditionality and the "Acquis Communautaire", *International Political Science Review / Revue Internationale de Science Politique* 2002 23(3), 249 – 268.

30 Kochenov, D., Behind the Copenhagen façade: The meaning and structure of the Copenhagen political criterion of democracy and the rule of law, European Integration Online Papers, 2004 8.

31 *Saatçioğlu, B.*, How closely does the European Union's membership conditionality reflect the Copenhagen criteria? Insights from Turkey. Turkish Studies 2009 10(4), 559-576.

The current policy framework requires unanimous agreement among all member states for critical decisions at various stages of the accession process, such as opening or closing negotiation chapters. This stipulation has made it easier for individual member states to delay or block accession at any time through the veto power they (mis)use to push forward their national interests and resolve bilateral disputes to their advantage, impeding or slowing down the accession of specific candidate countries.[32] For example, the European Council, based on a veto, first by France and later on by Bulgaria over historical and cultural issues, has stalled and delayed the start of accession negotiations with North Macedonia (and Albania) despite the positive opinion by the Commission. This highlights the influence of bilateral disputes on the implementation of enlargement policy.[33] Moreover, the new methodology for EU accession negotiations introduces instruments for "phasing negotiations" and resolving "open issues" with member states. While intended to address challenges, these tools can introduce uncertainty and extend the accession timeline. Unlike previous rounds, it can act as a temporal device that can delay the process, making current negotiations open-ended with no guaranteed membership. Even though countries can open and close negotiations on different acquis chapters, the accession timeline remains unspecified, and other exemptions may restrict membership entitlement.[34]

Geopolitical developments like the Russia-Ukraine war have further questioned the current EU's normative policy on enlargement.[35] While granting candidate status to Ukraine and Moldova reflects a strategic shift, it exposes the limitations of the current policy framework. Fast-tracking Ukraine's accession may undermine the already established criteria followed by other candidate countries. This could create perceptions of unfairness and set a precedent that complicates future enlargement steps, making it harder to maintain

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32 See Marić, S., Let's set things straight: Accession talks do not equate EU membership promise, Euractiv, 24 June 2019, available at <https://www.euractiv.com/section/enlargement/opinion/lets-set-things-straight-accession-talks-do-not-equate-eu-membership-promise/>.

33 For a critical analysis of making EU membership conditional on the settlement of bilateral disputes with concrete examples of issues in the Western Balkans, see Basheska, E., EU Enlargement in Disregard of the Rule of Law: A Way Forward Following the Unsuccessful Dispute Settlement Between Croatia and Slovenia and the Name Change of Macedonia. Hague J Rule Law 2022 14, pp. 221 – 256.

34 Ugur M., "Open-ended membership prospect and commitment credibility: Explaining the deadlock in EU-Turkey accession negotiations," *Journal of Common Market Studies* 2010 48(4), 967–992.

35 Schimmelfennig 2025.

consistent criteria and standards. Moreover, the EU must reconcile its strategic ambitions with the practical challenges of integrating a country at war.

The limitations of the current policy framework have spurred discussions on potential reforms. Addressing the challenges of unanimity, predictability, and perceived bias is crucial for maintaining the credibility and effectiveness of the policy. The EU's policy framework necessitates recalibrations, including discussions on staged accession and differentiated membership.[36] The "staged accession" or "differentiated membership" proposal envisions a multi-tiered system where countries could gain partial membership with limited benefits and obligations, progressing towards full membership upon meeting all criteria.[37] Proponents argue that this model could incentivize reforms, restore trust in enlargement, and allow for greater flexibility in adapting to geopolitical realities. The "staged accession" could offer a path forward, allowing the EU to leverage enlargement to promote stability, democracy, and shared prosperity in its neighborhood.[38]

IV. The Strategy: Geopolitics and Beyond

Enlargement as a strategy transcends the procedural steps of the process and the policy frameworks governing accession. It encompasses the EU's long-term goals and a broader vision for the union. It recognizes enlargement as a powerful and deliberate tool to shape the geopolitical landscape, enhance regional stability, and advance economic and security interests.[39] This strategic dimension, often overlooked in discussions focused on accession criteria and negotiation processes, is crucial for understanding the long-term objectives and implications of EU enlargement on peace, security, and prosperity.[40]

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36 Delcour L./Wolczuk K., "Ukraine and the EU at the Time of War: A New Paradigm." LibMod Policy Paper 31 January 2023. <https://libmod.de/en/ukraine-and-the-eu-at-the-time-of-war-a-new-paradigm/>

37 On differentiated membership, see Schimmelfennig 2025, and on the staged accession proposal, see: Emerson, M./Lazarevic, M./Blockmans, S./Subotic, S., A Template for Staged Accession to the EU, European Policy Centre and Centre for European Policy Studies, October 2021.; and the revised version Mihajlović, M./Blockmans, S./Subotić, S./Emerson, M., Template 2.0 for Staged Accession to the EU, Revised proposal – August 2023, European Policy Center.

38 Delcour/Wolczuk 2023.

39 Anghel V./Jones E., The Geopolitics of EU Enlargement: From Club to Commons, *Survival*, 2024 66(4), 101-114, DOI: 10.1080/00396338.2024.2380203

40 EU institutions refer to the strategy of EU enlargement as a means to promote democratic and economic reforms, thereby enhancing stability and prosperity in Europe. This strategic dimension is emphasized in various documents and policies. For example, the European

At its core, the EU's enlargement strategy aims for a "transformative regionalism," wherein enlargement is leveraged to reshape political, economic, social, and security.[41] Through the prospect of membership, the EU can induce profound transformations in the neighboring regions. By aligning with EU standards in areas such as democracy, rule of law, and market economy, candidate countries are expected to undergo significant internal reforms, strengthening institutions and fostering a more stable and prosperous environment. This transformative potential is not limited to the candidate countries themselves. It also has a significant impact on the EU itself. By expanding its borders and integrating new states, the EU strengthens its internal market, enhances its geopolitical influence, and reinforces its position as a global actor. Furthermore, enlargement can contribute to resolving regional conflicts and enhancing security within the EU's broader neighborhood. The post-Cold War EU strategy of uniting the continent aimed to address any potential negative externalities of non-enlarging, such as crises and instability in East European countries, and expand the EU's zone of peace and prosperity.[42]

The strategic dimension of enlargement is inherently reactive and context-driven. Historical and contemporary examples illustrate how external shocks and geopolitical shifts significantly influence strategic decisions to enlarge.[43] The rapid inclusion of Central and Eastern European countries in the early 2000s was a response to post-Cold War dynamics, aiming to prevent the resurgence of authoritarianism and integrate these countries into the Western political and economic orbit, thereby enhancing security and stability in the region.[44] This enlargement was driven mainly by the need to consolidate democracy and market economies in Central and Eastern Europe following the

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Council among the priorities of the EU strategic agenda (2024-2029) include "a merit-based EU enlargement process with incentives, to run in parallel with necessary internal reforms." (Consilium, n.d.). EU strategic agenda 2024-2029 <https://www.consilium.europa.eu/en/european-council/strategic-agenda-2024-2029/#secure>; Additionally, the European Commission's enlargement policy underscores how the prospect of EU membership fosters democratic and economic reforms, contributing to peace and stability in neighboring regions (European Commission, n.d.). EU enlargement policy <https://commission.europa.eu/strategy-and-policy/policies/eu-enlargement_en>.

41 Börzel T. A./Schimmelfennig F. "Coming together or drifting apart? The EU's political integration capacity in Eastern Europe." *European Union Enlargement and Integration Capacity*. Routledge, 2017. 122-140.

42 Schimmelfennig 2001, 50; Anghel, V./Jones, E. Three lessons from the 2004 "Big Bang" enlargement, *Politics and Governance* 2024 12, <https://doi.org/10.17645/pag.8358>.

43 Delcour/Wolczuk 2023.

44 Zielonka J., "Europe moves eastward: Challenges of EU enlargement." *Journal of democracy* 2004 15(1), 22-35.

collapse of the Soviet Union and the vision of the "re-unification of Europe." The 2022 Russian invasion of Ukraine again shifted the geopolitical landscape. The EU's swift granting of candidate status to Ukraine and Moldova underscored a strategic pivot to counter Russian aggression and stabilize Eastern Europe. While driven by exceptional circumstances, these decisions highlight the EU's recognition of enlargement as a crucial tool for addressing geopolitical challenges and advancing its strategic interest at critical moments.

The EU's enlargement strategy operates through a comprehensive approach that integrates various integration elements, including democratic governance, economic alignment, and security cooperation. A core element is the emphasis on political conditionality, requiring candidate countries to meet stringent criteria related to democracy, the rule of law, and human rights. This focus on democratic values and fundamental freedoms is intended to ensure the long-term stability and sustainability of the enlargement process.[45] Economic alignment with the EU is another key dimension, as candidate countries are expected to adopt EU legislation in areas such as competition policy, agriculture, and environmental protection to ensure the smooth functioning of the internal market and prevent economic disruptions after accession. Enhanced security cooperation is an increasingly important aspect of the enlargement strategy. This includes cooperation on counterterrorism, organized crime, and cybersecurity. By integrating candidate countries into EU security frameworks, the EU aims to enhance regional security and address shared challenges.

Despite its strategic importance, the EU's enlargement strategy faces significant challenges. Member states often hold divergent views on strategic priorities, with huge disagreements regarding the pace and scope of enlargement. Some member states are more enthusiastic about enlargement than others, leading to internal divisions and delays in decision-making. These internal disagreements can weaken the overall impact of the strategy and potentially lead to "strategic paralysis," where competing national interests impede unified action and reduce coherence. Credibility remains a critical factor in the effectiveness of the EU's enlargement strategy. Inconsistencies, delays, and a lack of clear timelines in enlargement can erode trust among candidate countries. This can undermine the transformative potential of enlargement and discourage necessary reforms. The EU's response to the Russia-Ukraine war

[45] On a critical assessment and the limited success of the previous EU's strategy to use political conditionality to enforce both security and democracy, see Richter S., "Two at One Blow? The EU and its Quest for Security and Democracy by Political Conditionality in the Western Balkans." *Democratization* 2012 19(3), 507–534.

highlights this challenge. While candidate status was granted to Ukraine and Moldova, the lack of a clear pathway to membership and the absence of a concrete timeline for accession raise concerns about the EU's long-term commitment to these countries. The EU offers a membership perspective to the Eastern Accession Trio as a peacebuilding tool without a clear strategy or timeline, similar to its strategy in the Western Balkans during the Yugoslav wars.[46] This approach creates an "ambition-capacity dilemma," highlighting the constant tension between the EU's strategic ambitions for enlargement and its institutional capacity to absorb new members, particularly for candidate countries engaged in a war. Concerns over the EU's absorption ability to effectively integrate new members and the risk of overextension often hinder the execution of strategic enlargement plans. While the strategic enlargement approach aims to extend the EU's geopolitical influence, it must balance this ambition with institutional capacity, addressing potential social and economic disruptions and maintaining the unity and integration pace. The EU's enlargement strategy also faces significant external pressures from other geopolitical actors (e.g., Russia and China) actively seeking to influence developments in the EU's neighborhood, challenging the EU's influence and undermining its strategic objectives.[47] They utilize various tools, including economic incentives, political pressure, and disinformation campaigns, to weaken the EU's position and discourage candidate countries from pursuing closer ties with the bloc. To address these challenges and ensure the long-term success of its enlargement strategy, the EU must enhance its strategic coherence and ensure that its actions align with its stated commitments, fostering trust and stability in its neighborhood.

The EU Enlargement strategy is more than just a political will; it is a powerful tool for shaping the geopolitical landscape, promoting stability, and advancing the EU's economic and security interests. However, achieving these goals requires a comprehensive and strategic approach that addresses the challenges of internal divisions, institutional capacity, and external pressures. By maintaining credibility, enhancing strategic coherence, and ensuring that its actions align with its stated commitments, the EU can effectively leverage enlargement to promote peace, prosperity, and democracy in its neighborhood and reinforce its position as a global actor.

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46 Anghel V./Džankić J., "Wartime EU: Consequences of the Russia – Ukraine War on the Enlargement Process." *Journal of European Integration* 2023 45(3), 487–501.

47 Petrovic/Tzifakis 2021.

V. The "Dimensional Triad" of EU Enlargement

The European Union's enlargement represents one of its most ambitious and transformative endeavors, encompassing various institutional, (geo)political, and normative challenges. To understand this complex phenomenon, we propose an analytical framework that conceptualizes enlargement as a "Dimensional Triad" encompassing process, policy, and strategy. Each dimension offers distinct yet interconnected aspects of the Union's enlargement efforts, differing in focus, scope, nature, temporality, actors, and challenges faced.

The **process** dimension emphasizes the "how" of enlargement[48] through a multi-layered temporal approach. It encompasses the step-by-step actions and negotiations required for aspiring states to achieve membership. It operates across specific negotiations (micro-temporal level), phase-specific preparations (meso-temporal level), and an overall accession trajectory (macro-temporal level). It is dynamic and iterative, characterized by its procedural milestones, such as the opening and closing of negotiation chapters. The process dimension is action-oriented, involving various actors, from technical working groups and civil servants to national governments and civil society organizations, each playing crucial roles in different temporal phases. The complex accession trajectories of Western Balkan countries, including delays and postponements, illustrate the procedural fragmentation and bottlenecks of the multi-layered temporal approach in enlargement.

The **policy** dimension addresses the "what" of enlargement, providing the normative and institutional framework governing EU accession. Anchored in established principles such as the Copenhagen criteria—consolidation of democracy, rule of law, and market economy—this dimension ensures that candidate countries align with EU norms. The structured, rule-based nature of this dimension ensures continuity but also reveals significant rigidity. The EU's inconsistent application of the Copenhagen criteria has led to a credibility gap, particularly in the face of uneven application and stalled progress. The credibility gap stems from the divergence between normative expectations and actual outcomes. The 2020 New Enlargement Methodology aimed to address these shortcomings by introducing greater flexibility.[49]

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48 Jano 2009.

49 European Commission, Enhancing the accession process – A credible EU perspective for the Western Balkans. COM (2020) 57 final. Brussels, 5 February 2020. <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/enlargement-methodology_en.pdf>.

The **strategic** dimension focuses on the "whys" of enlargement[50] and the EU's long-term objectives of stability, geopolitical influence, and normative commitments. Unlike the structured nature of the policy dimension, the strategy is inherently adaptive, responding to external shocks such as Russia's 2022 invasion of Ukraine. It involves high-level (geo)political actors setting broader and strategic objectives. For example, among the priorities of the EU strategic agenda (2024-2029), the European Council has set a merit-based EU enlargement process with incentives, which will run alongside necessary internal reforms.[51] However, the "ambition-capacity dilemma" and internal divisions among member states often impede the realization of strategic objectives.

Aspect	**Process**	**Policy**	**Strategy**
Focus	How (Multi-Temporal Layers)	What (Normative, Institutional Framework)	Why (Long-Term Objectives)
Nature	Multi-layered, Iterative (Action-Oriented)	Structured (Principle- and Rules-based)	Adaptive, Flexible (Goal-Oriented)
Scope	Procedural Milestones	Governance Frameworks	Long-term Positioning
Temporalities	Short- to Medium-term	Medium-term	Long-term
Actors	Wide Range	EU institutions	High-level, Geopolitical
Challenges	Procedural Fragmentation	Inconsistency, Credibility	Ambition-Capacity dilemma

Table 1: Key Aspects of the Process, the Policy and the Strategy of EU enlargement.
Note: This table summarizes the analytical key characteristics of the EU Enlargement process, policy, and strategy.

The interplay between process, policy, and strategy creates a dynamic "triad," where each dimension influences and is influenced by the others. This interaction can be observed in the procedural milestones of the enlargement process (e.g., negotiations) being shaped by the policy framework (e.g., the Copenhagen

[50] For a more theoretical understanding of the "whys" behind enlargement, including security-geopolitical concerns, economic incentives, and normative-identity claims as explanatory factors see Jano 2022.

[51] Consilium, n.d.

criteria) and at specific times and cases being guided by the strategic imperatives (e.g., security and stability). For example, the strategic imperatives of post-Cold War European reunification shaped enlargement procedural and policy frameworks during the Central and Eastern Enlargement (2004-2007). The swift granting of candidate status to Ukraine and Moldova amid geopolitical tensions in 2022 also demonstrates how strategic imperatives can successfully drive process acceleration. However, challenges emerge when dimensions misalign, as evidenced in the Western Balkans, where strategic commitments have not always aligned with policy implementation and procedural realities (e.g., Serbia-Kosovo negotiations or North Macedonia's stalled process). Misalignment between the dimensional triad (process, policy, strategy) can generate tensions and lead to inconsistencies, delays, and a loss of trust—both within the EU and among candidate countries. This enhanced understanding of the dimensional triad of EU enlargement suggests several implications. First, it highlights the need for more harmonized coordination between dimensions. Second, it emphasizes the importance of maintaining strategic flexibility while ensuring normative and procedural integrity. Third, prioritizing only one dimension may outpace the others, weakening the overall enlargement efforts.

Looking ahead, the EU's enlargement approach must remain a dynamic "work-in-progress," capable of adapting to new challenges and opportunities while steadfastly adhering to core principles and procedural milestones. Achieving success requires maintaining alignment across the EU Enlargement process, policy, and strategy while allowing for necessary adaptations and systemic learning, where experiences at one level inform adjustments across other dimensions. Ensuring balanced alignment across these three dimensions is crucial for the effectiveness, coherence, and sustainability of the EU's enlargement agenda. The EU is currently employing a "strategic layering" approach, which balances its geopolitical ambitions with a step-by-step integration process that begins with geopolitically motivated negotiations and (should) advance to a transformative accession phase, aligning candidate countries with EU standards and policies.[52] However, the effectiveness of this approach hinges on the continued refinement of cross-dimensional coordination mechanisms and the development of tools for managing temporal alignment.

In conclusion, the "Dimensional Triad" analytical framework offers a more nuanced understanding of the multifaceted nature of EU enlargement. By acknowledging the complex temporal, actor-based, and interactive aspects of each dimension (process, policy and strategy), it provides enhanced analytical tools for comprehending and managing contemporary EU enlargement.

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[52] Schimmelfennig 2025.

Impact of the Russian Invasion of Ukraine on the Accession of Ukraine to the EU

Roman Petrov

The Russian invasion of Ukraine on 24 February 2022 posed an existential challenge for Ukraine and the EU. On one hand, it tested the EU's resilience and political autonomy. On the other hand, it questioned the existence and territorial sovereignty of Ukraine – a country deeply committed to integrating into the EU that has already sacrificed part of its territory and the lives of thousands of Ukrainians for the right to sign the EU-Ukraine Association Agreement in 2014. Nevertheless, the EU and its Member States remained reluctant to even acknowledge the perspective of Ukraine's membership in the EU for the indefinite future.

Suddenly, this ambiguous *status quo* was shattered when on 28 February 2022, President Zelensky triggered Article 49 TEU by Ukraine. Very few people expected President Zelensky and his government to even think about EU membership amidst the avalanching invasion of the Russian army on a scale comparable to the operation "Barbarossa" in 1941. President Zelensky proudly signed the formal application to the EU while Russian army troops were staying just about 20 kilometres from his office in Kyiv. The long-cherished dream of the Ukrainian nation to apply for EU membership suddenly took place in the most critical and mortal moment of its history.

The EU institutions quickly realised that the momentum of a mortal danger for the Ukrainian state required immediate and resolute actions. It only took a week for the EU Council to activate the procedure of Article 49 TEU and invite the European Commission to issue its Opinion on Ukraine's application bid. The European Commission acted swiftly, too, and assessed Ukraine's ability to join the EU by 17 June 2022.[1]

Finding that "Ukraine is a European State that has given ample proof of its adherence to the values on which the European Union is founded", it recommended to the Council that the country "should be given the perspective to become a member of the European Union", and to the European Council that it should be granted the (much sought after) "candidate status" – a label that

[1] "So we will accelerate this process as much as we can, while ensuring that all conditions are respected." Statement by President von der Leyen with Ukrainian President Zelenskyy at the occasion of the President's visit to Kyiv.

is not formally envisaged by the procedure of Article 49 TEU, but which has de facto become a milestone in the accession process. While confirming that Ukraine's accession would be based on "established criteria and conditions", including the so-called "Copenhagen criteria", the Commission also requested urgent reforms in Ukraine's most critical sectors.[2]

In the meantime, the accession process of Ukraine is in standby mode, which implies that the accession negotiations will be triggered in 2023, once Ukraine would be able to show the progress in providing reforms in the sectors specified by the European Commission.

In parallel with the accelerating speed of Ukraine's accession, the EU was searching for new forms of political cooperation to strengthen its resilience and ensure mutual solidarity in times of intimidating security and economic crises in Europe. Eventually, it encapsulated those ideas in the European Political Community (EPC) initiative proposed by French President Macron in May 2022 at the time of its presidency of the EU Council. The French government outlined its vision of the EPC as a new political platform that would be "open to European States that share a common set of democratic values, whether or not they are members of the Union and regardless of the nature of their current relationship with the European Union" with the overall purpose to "strengthen the political, economic, cultural, and security links between its members". It may cover the cooperation within "foreign and security policy issues, climate change and the supply of energy and other raw materials, food security, infrastructure development and interconnection, mobility, migration, the fight against organized crime, relations with other geopolitical actors". Overall, the EPC would "provide a forum for coordination, decision-making and cooperative projects to respond in a concrete way to the challenges facing all countries on the European Continent".

The European Council supported the French initiative at its June 2022 summit. Straight away, the blurring purpose of the EPC initiative was perceived with a degree of suspicion by some third countries. Some candidate countries feared that the EPC could undermine or even implicitly serve as an alternative to their ultimate EU membership, like the European Neighbourhood Policy and Eastern Partnership did before. However, the French government importantly underlined that "[t]he European Political Community would not be an alternative to EU membership and would not be a substitute to the enlargement process.

[2] Namely: the judiciary, the rule of law, the fight against corruption, national minorities, anti-money laundering legislation, anti-oligarch legislation, media legislation. It also committed itself to monitoring Ukraine's progress in those fields, and to issuing an assessment of the situation by the end of 2022.

For European States wishing to join the European Union, it would, on the contrary, allow for the strengthening of links with EU Member States prior to accession".

Against the background of these controversial anticipations, the kick-off EPC meeting took place on 6 October 2022 in Prague, at the time of the Czech presidency of the EU Council. This meeting can be hailed as successful for several straightforward reasons. First, it exceeded most expectations since there were not many expectations from it. Second, the meeting was attended by an impressive number of the European countries with different and even sometimes conflicting political interests and objectives. For instance, it was attended by not only all EU Member States but also the UK, Turkey and the Eastern Partnership countries.[3]

EU High Representative in CFSP J. Borrell concluded in the aftermath of the EPC kick-off meeting that the EPC may be seen as: 1) a community of shared principles through an alignment on principles that guarantee peace and stability on the continent; 2) a community of resilience to reduce the exposure and vulnerability of European countries to risks and threats of an increasingly hybrid nature; 3) a community of cooperation aimed at strengthening economic cooperation, interconnectedness, and cross-border sectorial cooperation; 4) a community that adds value to the existing institutions and formats since the EPC is complementary to the EU policies and other regional frameworks.

What is the practical value of these optimistic conclusions? What could the results of the first kick-off meeting of the EPC mean for the accession of Ukraine to the EU?

1) The EPC kick-off meeting was attended by almost all countries of the European continent with heterogeneous European integration aspirations and with sometimes conflicting geopolitical interests and objectives. On one hand, it may turn future EPC meetings into a chaotic political "bazaar". On the other hand, it may serve as a unique and valuable testing laboratory to elaborate and to discuss current and future European crises and challenges, like finishing the war in Ukraine and ensuring the energy independence of the European countries. The Black Sea Grain Initiative between the UN and Russia and between the UN and Ukraine mediated by Turkey in 2022 is a good example of a deal that could have been developed and exercised under the EPC framework. Participation of Ukraine in further EPC initiatives could be a valuable tool to stimulate "parallel" in-

[3] 44 countries of the European continent participated but not attended by Andorra, Monaco, San Marino and Vatican City and not invited Belarus, Russia and Kazakhstan.

tegration of Ukraine into selected pan-European projects while being engaged in the meticulous EU accession process.

2) The EPC could contribute to the eventual return of some European pariah states back to the "European concert". For instance, representatives of Russia and Belarus may be invited to participate in the forthcoming EPC meetings and activities. Surely, officials of the current Russian and Belarusian regimes cannot be welcomed to any of the EPC's meetings. However, representatives of the Russian and Belorussian internationally recognised opposition may be invited to attend the EPC's meetings to discuss possible formats of the EU policies with post-war Russia and Belarus. The ongoing war in Ukraine should not hinder the important task of unifying and consolidating opposition movements in Russia and Belarus. Furthermore, people of these countries must be given a chance to know about possible alternatives to today's stalemate *status quo* in EU-Russia and EU-Belarus relations. Engagement of Russian and Belarusian opposition leaders in the activities of the EPC could contribute considerably to this course.
3) The EPC can become a platform for future Peace Talks between Ukraine and Russia. In the meantime, it is impossible to envisage the participation of representatives of the current regimes in Russia and Belarus in Ukraine-Russia peace talks under the aegis of the EPC. It simply contradicts the idea of the EPC as a community of shared democratic values and principles. Nevertheless, the EPC participants, jointly with the Russian and Belarusian opposition leaders, may contribute to the elaboration of guiding principles of a potential Ukraine-Russia Peace Deal, of course, in close engagement with Ukraine. It is important to make public how a future Peace Deal may affect post-war Russia and Belarus. Transparent and consistent positions of the EPC on this issue will counterbalance intrusive Russian propaganda and will send a clear signal of support of the change of the current regimes in these countries. It is important to send a strong message that a post-war comeback of Russia and Belarus to Europe is possible.
4) When the Ukraine-Russia Peace Deal is reached, the EPC could play an important role in discussing and shaping the modalities of the post-war economic recovery of Ukraine. The scale of current economic and infrastructural damage caused to the Ukraine economy due to the Russian invasion amounts to at least 600 billion euros. The continuing destruction of the Ukraine's critical infrastructure by Russia may raise this figure even higher. The EPC's members could set up an *ad hoc* common financial instrument to contribute to the economic recovery of Ukraine. Such a fi-

nancial instrument could be set up outside the EU framework with the active participation of the EPC's "heavy-weights" like the UK and Turkey. This approach could enhance "informal" influence of non-EU Member States within the EPC and within the entire European geopolitical space.

The EPC contains several important advantages to be considered by Ukraine against the backdrop of its accession process to the EU. The first advantage is the fact that the EPC platform hosts almost all countries of the European continent with different policies and geopolitical preferences and, therefore, could bring a real chance to develop a truly "pan-European" solution to global crises like the war in Ukraine and energy security on the European continent. The second advantage is that the EPC could serve as a transition platform for change agents from ousted European states to ensure their gradual comeback to the concert of European nations. The third advantage is that the EPC's meetings and statements could offer pragmatic alternatives to the refined and predicted EU foreign policy recipes and, consequently, test unorthodox solutions to European crises.

Key Elements of the Republic of Moldova – European Union Relations

Viorel Cibotaru

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I. Moldova's Resilience in the Face of Regional Turmoil

1. Regional Context

Two years have passed since Russia's full-scale invasion of Ukraine, yet its effects continue to ripple across Europe. Moldova, among the most affected nations after Ukraine, has endured significant repercussions from Russia's hybrid aggression. These challenges have tested Moldova's resilience and commitment to securing its future as part of the European Union (EU).

Amid these difficulties, Moldova has demonstrated an unwavering spirit and a firm determination to fortify its defences, safeguard its sovereignty, and accelerate its EU accession efforts. As President Maia Sandu outlined, Moldova aspires to be fully prepared for EU membership by 2030.

2. Strengthening National Security

In April 2023, the EU launched the EU Partnership Mission (EUPM) to support Moldova in strengthening its crisis management capacities and countering hybrid threats, including cyber warfare and foreign information manipulation. This collaboration underscores Moldova's determination to protect its sovereignty and deepen ties with European allies.

The adoption of Moldova's National Security Strategy in December 2023 marked a pivotal step in enhancing its security sector. President Sandu's vision emphasizes strengthening democracy, fostering prosperity, and ensuring the protection of all citizens through:

- Modernizing Moldova's armed forces and civil security sector;
- building resilience against hybrid threats;
- advancing a comprehensive security agenda that spans economic, energy, cyber, and environmental dimensions.

In 2023, Russia escalated hybrid aggression, including attempts to disrupt Moldova's democratic processes, such as interference in local elections. However, Moldova's swift and decisive response preserved the integrity of its democratic institutions, highlighting its commitment to sovereignty and democratic values.

II. Priorities in Moldova-EU Relations

1. EU Accession and Strategic Objectives

Moldova welcomed the launch of EU accession negotiations in June 2024 and aims to open discussions on the Fundamentals, Internal Market, and External Relations clusters in early 2025.

President Sandu's call for a constitutional referendum in 2024 reinforced Moldova's strategic objective of EU accession, solidifying public support for European integration. The referendum, held alongside presidential elections, symbolized a pivotal moment in aligning Moldova's future with the Western democratic fold.

Moldova's progress has been met with strong EU support, reflected in the December 2024 Council of the EU Conclusions on Enlargement and the European Commission's 2024 Enlargement Package.

2. EU Moldova Growth Plan

The EU Moldova Growth Plan (2025–2027) represents a critical mechanism for Moldova's economic transformation. The Reform and Growth Facility, part of this plan, will finance key reforms and foster sustainable development, ensuring Moldova's progress towards convergence with EU standards.

III. Macroeconomic Context and Challenges

1. Economic Impact of Regional Crises

The ongoing war in Ukraine and associated hybrid aggression from Russia have severely impacted Moldova:

- The economy contracted by 4.6% in 2022 and registered minimal growth (0.7%) in 2023;
- GDP per capita in PPP terms declined to 28.7% of the EU average, reversing years of progress;
- hybrid threats, such as energy supply disruptions and misinformation campaigns, have compounded economic vulnerabilities.

Despite these challenges, Moldova has taken decisive steps to reduce dependency on Russian gas and diversify energy sources. These measures, supported by the EU and Western allies, have advanced Moldova's energy independence and integration into European networks.

2. Recovery Indicators and Long-Term Outlook

Moldova showed signs of recovery in Q1 2024, with 1.9% GDP growth and a gradual return of investor confidence.

Public investment in infrastructure has been prioritized, but fiscal constraints remain due to increased social spending and limited revenues.

Long-term growth will require a dual strategy of short-term recovery measures and sustained reforms, with targeted public investment in infrastructure, energy efficiency, and SME growth.

IV. Development Priorities and Financing Needs

1. Strategic Investment Areas

To achieve sustainable development and EU convergence, Moldova requires financial support in the following areas:

- Infrastructure: Enhance connectivity with the EU and stimulate growth.
- Financing Gap: €250M (2025), €300M (2026), €350M annually (2027–2030).
- Energy Efficiency: Reduce long-term energy costs and vulnerabilities.
- Financing Gap: €60M (2025), €75M (2026), €100M (2027), €120M annually (2028–2030).
- SME Growth: Stimulate economic growth and expand the tax base.
- Financing Gap: €125M (2025), €120M (2026), €110M annually (2027–2030).

2. Funding Instruments

Moldova's constrained fiscal space necessitates reliance on grants, direct budget support, and established national funds, including:

- The National Fund for Regional and Local Development;
- the Road Fund;
- the Fund for Entrepreneurship and Economic Growth of Moldova.

V. Security and Defence Cooperation

The EU Moldova Security and Defence Partnership (2024) has bolstered Moldova's capacity to counter hybrid threats and manage crises. Moldova seeks an extension of the EUPM mandate beyond 2025 with additional resources.

The adoption of the National Security Strategy (2023) underlines Moldova's focus on:

- Resilience to hybrid threats.
- Modernization of armed forces and civil security sectors.
- Strengthening cooperation with the EU on economic, energy, cyber, and environmental security.

VI. Conclusions

Moldova's resilience in the face of regional crises, including hybrid aggression from Russia, underscores its commitment to sovereignty, democracy, and European integration.

The strategic partnership with the EU is vital for advancing Moldova's security, economic transformation, and institutional reform.

EU financial and technical assistance through the EU Moldova Growth Plan and established national funds will be crucial for closing development gaps and achieving convergence with EU standards.

Moldova's aspiration to join the EU by 2030 reflects the nation's determination to secure a prosperous, stable, and democratic future within the European family of nations.

The CFSP and Nuclear Weapons Policy

Clara Portela

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Introduction

Over the years, the EU has developed a policy on nuclear weapons as part of its Common Foreign and Security Policy (CFSP).[1] However, due to the gradual nature of this development and given the low profile enjoyed by the type of actions activated, it went unrecognised as a field of the CFSP until the EU released its 'Strategy against the proliferation of Weapons of Mass Destruction' in 2003,[2] in the aftermath of the war in Iraq. The adoption of this strategy took place in conjunction with that of the European Security Strategy.[3] Jointly, they signified the acknowledgment of the EU as a security actor, as well as its aspiration to be active even in 'hard' security issues.

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1 *Blavoukos*, S., *Bourantonis*, *D. and Portela*, C., The EU and the Non-proliferation of Nuclear Weapons. Strategies, Policies, Actions, Palgrave, 2015, Basingstoke.

2 Council of the EU, Strategy against the proliferation of Weapons of Mass Destruction, Brussels, 12 December 2003.

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

The present chapter reviews the EU's framing of a policy of nuclear weapons in the context of its CFSP. The first section offers an overview of the origins and evolution over time, distinguishing the different strands it activated to develop a role in the field. The second section examines the extent to which coherence has come about. A third section reviews the latest developments in the nuclear weapons field and analyses how they are affecting Europe and the EU's action. To conclude, a final section summarises the findings, complementing them with some final reflections.

I. Nuclear weapons issues as part of the CFSP

1. The origins of a role in nuclear weapons pre-CFSP

The origins of the EU's role in nuclear energy affairs go back to EURATOM, one of the original communities created by the Treaty of Rome in 1957, which was tasked with managing the internal market for uranium[4]. EURATOM was designed to prevent proliferation and develop civilian nuclear energy primarily among the member states of the then European Economic Community (ECC), the EU's predecessor. Yet, it could act externally as it was endowed with legal personality. To this end, it aided the activities of the International Atomic Energy Agency (IAEA) in the field of nuclear safeguards[5]. The external role of the European Community (EC) in non-proliferation originated in 1981, when the Council set up a working group on nuclear questions in the context of the European Political Cooperation (EPC). In this working group, member states started to coordinate national positions at international forums, preparing some common statements at UN fora and at the Nuclear Suppliers Group (NSG) dealing with safeguards and nuclear technology transfers.

In the early 1990s, the institutional setting and the international environment facilitated an upgrade in this role. Institutionally, the Treaty on European Union (TEU) signed at Maastricht in 1991 enhanced foreign policy coordination, creating the dedicated framework of the CFSP, which endowed the EU with a mandate to articulate positions and fund actions in the security domain. Concurrently, France's 1992 accession to the Nuclear Non-Proliferation Treaty (NPT), the main

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4 *Müller, H. and Van Dassen, L.*, From Cacophony to Joint Action: Successes and shortcomings of European nuclear non-proliferation policy, in *M. Holland* (ed.), Common Foreign and Security Policy: The Record and Reforms, Pinter, London, 1997, pp. 52-72.

5 *Grip, L.*, The performance of the EU in external nuclear Non-proliferation assistance, in Blavuokos, S., Bourantonis, D. and Portela, C. (eds), The EU and the Non-Proliferation of Nuclear Weapons, Palgrave MacMillan, Basingstoke, 2015, pp. 117-140.

multilateral treaty governing nuclear weapons, allowed the EU to become active in this forum[6]. As the European Council singled out arms control, non-proliferation, and disarmament as priority areas for the CFSP, member states began tabling joint proposals at international venues, such as the 1992 joint initiative to the IAEA Board of Governors Conference on the strengthening of safeguards. The culmination of this trend was the campaign for the indefinite extension of the NPT in 1995, an initiative in which the EU cooperated closely with Washington[7]. But it was mostly the international security environment that stimulated the activation of EU initiatives as a non-proliferation actor: The aftermath of the Cold War prompted the negotiation of new disarmament treaties and brought about drastic cuts of nuclear warheads in both nuclear-armed superpowers. At the time, the EU focused on threat reduction activities, following the Nunn-Lugar initiatives launched by the United States, funding activities devoted to ensuring the safety of nuclear materials and technology to prevent illegal transfers to proliferation networks. Political and economic instability caused concerns about the safety of nuclear materials in the countries that succeeded the Soviet Union, in particular after the Chernobyl accident. The 9/11 attacks in New York and Washington sharpened suspicions that terrorist groups could be seeking to obtain nuclear weapons or other WMD. In addition to expanding its aid programs in support of nuclear safety in third countries, the EU promoted the adoption of UN Security Council Resolution 1540 in 2004. This resolution requires states to prevent the proliferation of WMD and their means of delivery to non-state actors in an effort to avert their transfer to terrorist networks[8]. In order to support the implementation of UNRes 1540, Brussels established capacity-building projects to aid third countries, often in partnership with the UN Office for Disarmament Affairs[9].

2. The character of EU action on nuclear weapons

From its inception, the role of the EU in nuclear weapons was overwhelmingly technical in nature, and followed initiatives launched by the US. However,

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6 *Portela*, C., The EU's arms control challenge: Bridging nuclear divides, Chaillot Paper 166, European Union Institute for Security Studies, Paris, 2021.

7 *Onderco*, M., Networked Non-proliferation: Making the NPT Permanent, Stanford University Press, Stanford, 2021.

8 S/RES/1540 (2004), 28 April 2004, at <https://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1540> (2004).

9 Council Decision (CFSP) 2017/809 of 11 May 2017 in support of the implementation of United Nations Security Council Resolution 1540 (2004) on the non-proliferation of weapons of mass destruction and their means of delivery, at <https://eur-lex.europa.eu/eli/dec/2017/809/oj>.

these actions were accompanied by a systematic effort to coordinate positions at international venues, in implementation of the mandate adopted in Chapter V of the Treaty of Maastricht, which governed the CFSP. This modest political realm of EU policy on nuclear weapons issues was obstructed by the diversity of nuclear statuses and attitudes towards nuclear deterrence and disarmament prevailing among member states. This diverse picture has been described as a 'patchwork'[10]. Virtually the only common denominator is that all EU members are state parties to the NPT. After the UK withdrew from the organization in January 2020, France is currently the only nuclear-armed state. After the accession of both Finland and Sweden in 2023 and 2024, respectively, 23 out of the 27 EU member states are allies of the North Atlantic Treaty Organization (NATO), among which Belgium, Germany, Italy and the Netherlands host US nuclear weapons on their territory, while the remaining 17 are covered by its extended deterrence arrangement. Of the four EU partners that remain outside the Alliance, which include Cyprus and Malta, only two, Austria and Ireland, are active advocates of nuclear disarmament. The enlargement rounds of the last two decades consolidated the predominance of members covered by NATO's nuclear umbrella: while the EU counted 11 NATO members when it adopted its WMD Strategy in 2003; this number had more than doubled by 2014. By 2025, it has reached 85 percent.

In its initial years, the EU took its first steps in the field of nuclear weapons policy in partnership with the United States. However, the EU increased its role in championing the multilateral regime as Washington's leadership in arms control declined and the US administrations started to rely increasingly on unilateral options such as the use of military force.[11] The war launched on Iraq, based on allegedly meant to dismantle a clandestine WMD arsenal, encouraged the EU to rethink its own approach to proliferation. The framing of a novel approach became acutely necessary in view of the polarizing impact that the intervention had not only on transatlantic relations but also on the CFSP, with deep divisions between advocates and opponents of the intervention.[12] The resulting strategy against the proliferation of WMD, inspired by a Swedish proposal, intended to restore consensus by acknowledging this challenge as a

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10 *Lafont*, M., *Varma*, T. *and Witney*, N., Eyes tight shut. European attitudes toward nuclear deterrence, ECFR, Paris, 2018.

11 *Murauskaite*, E., Dynamics of the EU non-proliferation discourse in global context in Tonra, B. et al. (eds.), SAGE Handbook of European Foreign Policy, SAGE, London, 2015, pp. 952-66.

12 *Keukeleire*, S. *and Delreux*, T., The Foreign Policy of the European Union, Palgrave Macmillan, Houndmills, 2014, p. 149.

central threat to the security of the EU as a whole while emphasizing reliance on multilateral solutions.[13]

II. The EU as crisis manager of the Iran nuclear proliferation episode

While the EU had participated in the management of various proliferation crises in the 1990s, always collaborating closely with Washington,[14] it was the Iran nuclear crisis that boosted its profile in the nuclear proliferation domain.[15] This entailed the use of one of the foreign policy tools that the EU has been employing most prolifically since the establishment of the CFSP: economic sanctions.[16] When revelations about covert proliferation activities in Iran marked the beginning of the Iranian nuclear crisis in 2002, three EU members, France, Germany and at the time the United Kingdom, launched talks with Tehran over its enrichment activities. The EU High Representative for Foreign Affairs and Security (HR) Javier Solana took the lead, offering incentives such as support for a civilian nuclear program, stronger economic ties and support for Iran's accession to the World Trade Organization. This culminated in the Tehran Declaration in October 2003 and, most importantly, the signing of the Paris Agreement in November 2004, under which Tehran agreed to suspend enrichment and reprocessing activities and sign and implement the IAEA Additional Protocol for enhanced safeguards in exchange for trade and technology benefits from the European interlocutors.

However, the election of Mahmoud Ahmadinejad and his decision to resume enrichment brought about the collapse of the agreement in 2005. In consequence, Europeans sponsored the adoption of an IAEA Resolution reporting the case to the UNSC, which in 2006 adopted sanctions designed to stop Iran's nuclear enrichment and reprocessing activities. Talks with Iran continued, but participants now encompassed the non-European UNSC members: the US, China, and Russia. Under this format, several rounds of sanctions

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13 *Meier, O. and Neuneck, G.*, In der Defensive: Europas Politik der Nichtverbreitung von Massenvernichtungswaffen, Friedensgutachten 2006, pp. 198-207.

14 *Portela, C.*, The EU's evolving responses to nuclear proliferation crises, Non-Proliferation Papers No 46, SIPRI, Stockholm, 2015.

15 *Portela, C.*, EU Strategies to Tackle the Iranian and North Korean Nuclear Issues, in S. Blavoukos, D. Bourantonis and C. Portela (eds) *The EU and the Non-Proliferation of Nuclear Weapons*, Palgrave, Basingstoke, 2015, pp. 188-204.

16 *Portela, C.*, 'The changing nature of targeted sanctions: Evolution and assessment', in A. Kellerhals, T. Baumgartner and C. Reber (eds) European Integration Perspectives in Times of Global Crises, Europa Institut, Zurich, 2023, pp. 73-87.

were adopted under Chapter VII of the UN Charter in order to compel Iran to comply with UNSC demands. Resolution 1737 (2006) restricted trade in goods and proliferation-sensitive technology; Resolution 1737 (2007) banned Iranian weapons exports, and Resolution 1803 (2008) expanded trade restrictions on dual-use technology. After Iran started to enrich uranium to 20 percent, bringing it closer to weapons-grade, the UNSC extended the arms embargo, prohibited Iranian development of nuclear weapon-capable ballistic missiles, and allowed states to conduct cargo and vessel inspections. Brussels adopted additional sanctions to those imposed by the Security Council in its resolutions.[17] The EU added stricter restrictions when it transposed UN sanctions into EU law, using the same legal instruments employed when the EU agrees to unilateral measures, namely CFSP Common Positions (renamed Decisions after 2009 under the Lisbon Treaty); at the same time, Brussels strengthened the UN by enlarging the list of designees subject to UNSC bans.[18] In total, the EU designated 326 persons and 171 entities, while the UNSC respectively targeted 45 and 76.[19] These additional designations closed the loopholes in the UN sanctions regime related to the reluctance of China and Russia to tighten sanctions but also to the slow designation of actors that violated UN sanctions. It also strengthened the inspections regime for aircraft and vessels to and from Iran.

While UNSC measures remained limited to the nuclear domain, sanctions imposed by the US and the EU targeted key sectors of Iran's economy in an effort to deny Tehran the financial resources to carry out banned activities. By 2012, the EU had agreed on additional measures targeting first the energy sector, which accounted for 60% of government revenues: a ban on imports of oil, petroleum, petrochemical products, and gas; a ban on the export of equipment used for the production of oil and natural gas and for the petrochemical industry; an investment ban; a prohibition of insurance and reinsurance for vessels carrying Iranian oil; a ban on supplying key naval equipment for shipbuilding and maintenance. The EU also adopted a prohibition to sell or purchase public bonds issued by Iran, a freeze on the Central Bank of Iran's assets and a prohibition of transactions involving Iranian banks and the exclusion of Iranian banks from the Belgian-based SWIFT.

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17 *Portela, C.*, European and Chinese Perspectives on the Handling of the Iranian Nuclear Question, in J. Wouters, J. C. Defraigne and M. Burnay (eds) China, the European Union and the Developing World Chentelham: Edward Elgar, 2015, pp. 325-344.

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

19 *Portela, C. and Jeantil, M.*, The EU's use of sanctions in nuclear non-proliferation and arms control in A. Bekaj and P. Wallensteen (eds) Sanctions for Nuclear Disarmament and Non-Proliferation, Routledge, Abingdon, 2024, pp. 61-80.

UN sanctions constrained Iran's purchases of items related to prohibited nuclear and ballistic activities, slowing the development of these programs. However, sanctions by the EU and the US targeted Iran's ability to finance proliferation activities, which had a major impact on the Iranian economy. Sanctions on the energy sector were particularly harmful to the Iranian economy: due to its shortage of refining capacity, Iran had to rely on costlier small-scale overland shipments for the import of gasoline. Western sanctions compelled most international traders in petroleum products to stop dealing with Iran. Until the EU oil embargo in January 2012, the decline in Iranian oil exports was limited by sanctions exemptions granted by the US authorities to major customers that had voluntarily and significantly reduced their imports, notably Japan, China, India, and South Korea. However, the EU's ban on insurance for oil shipments obstructed Iran's crude exports.[20] The impact of US financial sanctions was amplified by the cooperation of some European banks and companies, which restricted their activities with Iranian entities and refrained from conducting US$ transactions with Iran, beyond the restrictions decided by the EU. European sanctions were instrumental in pressuring the Iranian regime over nuclear concerns and thus in incentivizing the Iranian leadership to conclude an agreement that limited uranium enrichment in exchange for the lifting of most sanctions, the Joint Comprehensive Plan of Action (JCPOA). Facilitating the signature of that text, which is considered the most sophisticated and successful example of an arms control agreement,[21] represents a major achievement for EU diplomacy.

III. The CFSP's aspiration of convergence and nuclear weapons

Since the inception of the EPC, and especially with the creation of the CFSP, the EU has entertained the aspiration that coordination of member states foreign policy will eventually increase their convergence. This was the hope particularly of those actors which were unsuccessful in promoting the full integration of foreign policy in the EC framework, which included the European Commission and some of the most integration-friendly member states.[22] While CFSP coordination

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20 *Portela, C.*, EU Strategies to Tackle the Iranian and North Korean Nuclear Issues, in S. Blavoukos, D. Bourantonis and C. Portela (eds) *The EU and the Non-Proliferation of Nuclear Weapons*, Palgrave, Basingstoke, 2015, pp. 188-204.

21 *Gärtner, H.*, The Fate of the JCPOA, in Gärtner, H. and Shahmoradi, M. (eds.), Iran in the International System, Routledge, Abingdon, 2019, pp. 56-76.

22 *Forster, A. and Wallace, W.*, Common Foreign and Security Policy, in A. Forster and W. Wallace (eds.), Policy-Making in the European Union, Oxford University Press, Oxford, 1996, pp. 411-438.

remained intergovernmental according to the Maastricht Treaty, it was designed to foster convergence among member states positions. Arrangements for mutual consultation had been put in place even before the formalisation of the CFSP. The Single European Act signed in 1986 provided that member states should consult reciprocally 'to ensure that their combined influence is exercised as effectively as possible through coordination, the convergence of their positions, and the implementation of joint action' (Art. 30.2a). The arrangements designed at Maastricht refined the mechanism: it specified that CFSP objectives were to be pursued through 'systematic' cooperation between member states. It exhorted member states to act in a 'spirit of loyalty and mutual solidarity', refraining from actions 'contrary to the interest of the Union or likely to impair its effectiveness as a cohesive force in international relations' (Art. J.3). Lastly, the Lisbon revision of 2007 included a Declaration (No. 13) that indicated that its provisions covering the CFSP did 'not affect responsibilities of member states (…) for the formulation and conduct of its foreign policy', representing a certain drawback compared with the incremental dynamics observed since the Maastricht Treaty. Nevertheless, the arrangements requiring member states to consult with each other prior to voting at international venues and encouraging them to align their positions have never been relinquished.

1. CFSP Coordination at Nuclear Weapons Fora

In the multilateral regime governing nuclear weapons, the most important fora are the United Nations General Assembly (UNGA), which holds yearly sessions, and NPT, which convenes Review conferences (RevCons) every five years, with Preparatory sessions scheduled the three previous years. The EU coordinates its role at the NPT Review Conferences as well as at the annual sessions of UNGA, whose First Committee deals with 'Disarmament and International Security'. Coordination in the NPT framework started in the run-up to the 1995 review once France joined the NPT.[23] Ahead of the RevCon, the Council Working Party on Nuclear Proliferation (CONOP) routinely agrees on statements and priorities, invariably pledging to 'help build a consensus' and to 'strengthen the international nuclear non-proliferation regime by promoting the successful outcome of the conference'.[24] At NPT RevCons, the EU submits

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23 *Pouponneau, F. and Mérand, F.*, Diplomatic Practices, Domestic Fields, and the International System: Explaining France's Shift on Nuclear Nonproliferation. International Studies Quarterly, 61(1), 2017, pp. 123-135.

24 Council of the European Union, Council Common Position 2005/329/CFSP relating to the Review Conference on the Treaty on the Non-Proliferation of Nuclear Weapons of 2005, Retrieved from <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32005E0329&qid=1647643335086>.

common working papers as a block. In addition to acting as the EU block, the modus operandi of the EU in the NPT forum combines member states' individual activity with participation in various groupings.[25] By contrast, coordination at the UNGA is geared towards the framing of a common stance on the resolutions that are voted upon at the end of each yearly session.

The expectation that coordination would increase convergence over time was confirmed by the early success of the EU's campaign in support of the 1995 NPT extension.[26] The EU's internal diversity was described as a 'laboratory of consensus' that could help foster agreement in the NPT framework.[27] In parallel, EU members coordinate with groups. Multiple groupings operate in the NPT context: traditional clusters like the 120-strong NAM or the Nuclear Weapon States (NWS) assembled in the P-5 format, or regional groups like the Arab League. Traditional blocs coexist with yet other like-minded formations, mostly of a cross-regional or cross-factional character. Previous review cycles saw the action of the Netherlands and Germany under 'NATO-5', a coalition of 'umbrella' countries, a term designating allies covered by extended nuclear deterrence provided by the United States. After this group dissolved, these countries formed the Non-Proliferation and Disarmament Initiative alongside Poland. Meanwhile, the pro-disarmament 'New Agenda Coalition' (NAC) was launched with Ireland, Slovenia, and Sweden, out of which only Ireland remains.

Scholars argued that the EU's position at the NPT shifted from a 'cooperation of European states' to 'European cooperation'.[28] Successive CFSP acts adopted in preparation for the sessions illustrate an incremental evolution: they grew longer practically at every RevCon.[29] Notwithstanding this quantitative increment, a substantive analysis of EU coordination identifies the opposite trend:

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25 *Dee*, M., The European Union and its performance in NPT negotiations: Consistency, change and challenges, in S. Blavoukos, D. Bourantonis and C. Portela (eds) *The EU and the Non-Proliferation of Nuclear Weapons*, Palgrave, Basingstoke, 2015, pp. 77-94.

26 *Müller*, H., The EU: RevCon Redeemer? Working paper prepared for the CNS Working Group on New Approaches to Disarmament, James Martin Centre for Non-Proliferation Studies, Monterrey, CA., 2020, retrieved from <https://nonproliferation.org/wp-content/uploads/2020/09/EU-As-RevCon-Redeemer.pdf>.

27 *Grand*, C., The European Union and the Non-Proliferation of Nuclear Weapons, European Union Institute for Security Studies, Paris, 2000.

28 *Dee*, M., Standing together or Doing the Splits: Evaluating European Union Performance in the Nuclear Non-proliferation Treaty review Negotiations. European Foreign Affairs Review, 17(2), 2012, pp. 189-212.

29 *Onderco*, M. *and Portela*, C., External drivers of EU differentiated cooperation: How change in the nuclear nonproliferation regime affects member states alignment, Contemporary Security Policy, 44(1), 2023, pp. 150–175.

consensus peaked in 1995 and 2000. While 2010 saw an unprecedented volume of EU-sponsored working papers, the EU Common Position remained the lowest common denominator. At UNGA, an overall trend towards greater convergence in the voting patterns of member states is marred by the persistent division over nuclear weapons issues.[30] It is consistently identified as one of the most controversial fields in the CFSP.[31] Nevertheless, certain resolutions on nuclear weapons attracted support from the whole of the EU consistently.[32]

A major setback in EU alignment occurred with the emergence of a series of state-convened conferences on the humanitarian impact of nuclear weapons, which culminated in the adoption of the Treaty on the Prohibition of Nuclear Weapons (TPNW) in 2017. By the entry into force of the new treaty in 2021, three EU members were full parties: Austria, Malta, and Ireland.[33] This divide cut across EU membership, as nuclear-armed France and – at the time – the UK found themselves at the opposite side of the spectrum. The 'umbrella' countries, comprising the vast majority of EU members, opposed the TPNW as incompatible with NATO's extended deterrent. Finally, non-NATO members like Finland and Sweden feared that TPNW accession would limit their ability to cooperate with the Alliance. NATO's official position decries the TPNW as an attempt to stigmatize nuclear weapons possession rather than contribute to nuclear disarmament.[34] While the emergence of the TPNW can be seen as contributing to the nuclear non-proliferation and disarmament regime, it also increases the complexity of the regime and the competitiveness within it by establishing an alternative forum.[35] Predictably, EU-internal polarisation hindered coordination at

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30 *Burmester, N. and Jankowski, M.*, One voice or different choice? Vote defection of European Union member states in the United Nations General Assembly. British Journal of Politics and International Relations, 20(3), 2018, pp. 652-673.

31 *Luif, P.*, Der Konsens der Staaten der Europäischen Union in der Aussen- und Sicherheitspolitik. In J. F. a. W. Matyas (ed.), Strategie und Sicherheit 2014, Böhlau Verlag, Vienna, pp. 289-303.

32 *Panke, D.*, Regional Power Revisited: How to Explain Differences in Coherency and Success of Regional Organizations in the United Nations General Assembly. International Negotiation, 18(2), 2013, pp. 265-291.

33 UNODA. Treaty on the Prohibition of Nuclear Weapons (Status of the Treaty). Retrieved from <https://treaties.unoda.org/t/tpnw>.

34 *Gibbons, R. D.*, The Humanitarian Turn in Nuclear Disarmament and the Treaty on the Prohibition of Nuclear Weapons. The Nonproliferation Review, 25(1-2), 2018, pp. 11-36; *Ritchie, N.*, A hegemonic nuclear order: Understanding the Ban Treaty and the power politics of nuclear weapons. Contemporary Security Policy, 40(4), 2019, pp. 409-434.

35 *Baldus, J., Müller, H., and Wunderlich, C.*, The global nuclear order and the crisis of the nuclear non-proliferation regime: Taking stock and moving forward. Zeitschrift für Friedens- und Konfliktforschung, 10, 2021, pp. 195–218.

the 2015 NPT.[36] Council conclusions agreed in anticipation of the conference evidenced disagreement, oddly noting "ongoing discussions on the consequences of nuclear weapons, *in the course of which different views are being expressed*, including at an international conference organised by Austria, *in which not all EU member states participated*".[37] With the EU now split over the TPNW, the idea that the EU can be a laboratory of consensus has lost validity.

The table below confirms this impression but also provides some interesting nuance. It compares national ideal points over time. We use ideal points because they are better at discriminating between divisive and consensual resolutions, outperforming other measures of similarity of state preferences in UNGA.[38] Ideal points are scale-free and estimate a position of a country in a policy space on one dimension. We therefore use these issue-specific (nuclear) ideal points as the first source.

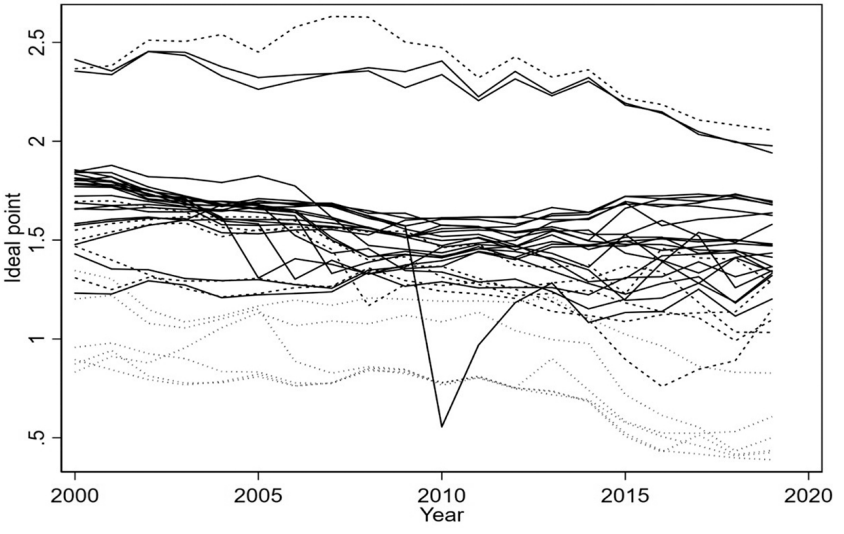

Figure 1: Evolution of EU member states voting on nuclear resolutions at UNGA, 2000–2020
Source: Onderco and Portela 2023, own elaboration
Legend: solid line represents members of EU and NATO, dotted line represents EU members outside NATO, dashed line are not EU members

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36 *Smetana*, M., Stuck on disarmament: the European Union and the 2015 NPT Review Conference. International Affairs, 92(1), 2016, pp. 137-152.

37 Council of the European Union, Council conclusions on the Ninth Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons (8079/15), 2015, p. 4. Retrieved from <https://www.consilium.europa.eu/media/24525/st08079-en15.pdf>.

38 *Bailey*, M. A., *Strezhnev*, A., *and Voeten*, E., Estimating Dynamic State Preferences from United Nations Voting Data. Journal of Conflict Resolution, 61(2), 2017, pp. 430-456.

The image shows that, while polarisation subsides, two stable groups of states with different preferences emerge: A large group encompasses the NATO umbrella countries and the nuclear possessors. Both groups have been approximating themselves, so that they converge into one large group. They are visible on the middle and upper levels of the display.

However, while the mainstream on EU members which are also NATO allies, has maintained rather stable attitudes, both nuclear possessors visible on the upper half and disarmament-minded members in the lower half have developed increasingly friendly attitudes towards disarmament. This has had the effect of virtually merging the nuclear-armed group with the umbrella group, while the disarmament group has become more distant from the mainstream. Thus, out of three departing positions, two groups emerged: a large group accepting nuclear deterrence and a small group advocating nuclear deterrence. Despite continued efforts to frame a common EU stance on nuclear issues since the release of the WMD Strategy, intra-European disagreements over the role of nuclear deterrence have prevented a shift from NATO to the EU. The EU has traditionally been divided into two camps. One of them is composed of NATO members that accept nuclear deterrence, and that notably includes nuclear weapons states France and, until 2019, also the UK. The second camp is composed of disarmament advocates, typically neutral states. The cleavage has not narrowed much over time; instead, the cleavage deepens between EU members that are concurrently NATO allies, on the one hand, and disarmament advocates, on the other.

The picture that emerges is one that resembles differentiation. The consolidation of two separate groups with opposing views on disarmament and unprepared to follow the lead of the other group corresponds to the notion of differentiation, which lacks the teleological dynamism of differentiated integration. Instead, it expects the persistence of neatly delineated groups of permanent membership intent on maintaining their position. Remarkably, every EU member is part of a group within the EU – none of them is isolated or fluctuates considerably. In the post-2015 era, the delineation of group membership, in the absence of defectors, excellently fits the notion of differentiation.[39] The crystallisation of two fairly cohesive groups among EU member states evidences the sort of convergence that CFSP mechanisms aspire to; however, rather than a single homogeneous group, two of them came about.

[39] *Amadio Viceré, M. G., and Sus, M.*, Differentiated cooperation in EU foreign and security policy – Towards a conceptual framework, Contemporary Security Policy, 44(1), 4–34.

2. Evaluation and Prospects

The recent Scandinavian accessions to NATO raise questions about Swedish and Finnish prospective attitudes towards disarmament. Finland and Sweden are the only countries traditionally occupying a middle position between both groups, as displayed in the graph below. The graph displays ideal points, which estimate the distance between stances of different countries in a policy area based on their voting behaviour on resolutions about nuclear weapons at the UNGA. The evolution of the Nordics, with Finland coloured in blue and Sweden in yellow, is noteworthy. Sweden used to be among the most vocal disarmament supporters, but in recent years it has moved slightly closer to the NATO mainstream while other disarmament advocates moved further away from them. Finland, originally close to NATO members, gradually became more favourable to disarmament. By 2020, it had become the only country halfway through between the NATO mainstream and pro-disarmament members, positioned between the bulk of NATO countries and the nuclear advocates.

In view of this past evolution, two scenarios are possible. One of them is that these countries fall into line with the remaining states in NATO's mainstream, relinquishing their criticism of nuclear weapons and their condemnation of nuclear possession. A second option is that they do maintain an attitude critical of nuclear deterrence and form a disarmament-friendly caucus with fellow Scandinavian Norway, traditionally more inclined to support the banning of these weapons than most umbrella countries.[40]

IV. Nuclear weapons after the Russian invasion of Ukraine

Following a long period of relative low-key for nuclear weapons in Europe, the more or less explicit threats of nuclear weapons use issued repeatedly throughout 2022 by Russia's leaders – notably President Vladimir Putin himself –commanded great attention from media and policy circles. No less than 165 "*interactions with a nuclear dimension*" were observed in the course of barely one year.[41] What impact are such actions having on European security? How will the transformed environment emerging after the invasion of Ukraine, in turn, affect prospects for nuclear deterrence, arms control, and disarmament in Europe?

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40 *Onderco, M. and Portela, C.*, NATO's Nordic Enlargement and Nuclear Disarmament: The end of bridge building?, War on the Rocks, 2023, <https://warontherocks.com/2023/02/natos-nordic-enlargement-and-nuclear-disarmament-the-end-of-bridge-building/>.

41 *Horovitz, L. and Arndt*, A., Nuclear signalling in Russia's war against Ukraine, Brussels School of Governance Policy Brief No 5, 2023.

1. Russian nuclear sabre-rattling

Since the start of the Russian invasion of Ukraine, Russian officials have repeatedly alluded to a possible use of nuclear weapons in Ukraine. The key purpose of such allusions was to prevent direct Western military intervention in Ukraine. Russian officials warned that a direct clash between NATO and Russian forces threatened to prompt a nuclear escalation. The fact that such statements were particularly frequent at the outset of the war underlines the preeminence of this purpose. Secondly, such nuclear posturing was intended to limit Western support for Ukraine. Russian officials occasionally highlighted the fact that the provision of certain types of assistance to Kyiv would transform NATO into a direct party to the conflict, which entailed the risk of a direct nuclear clash. However, the language of such statements tended to be vague – and the government frequently retracted them, blaming Western misinterpretation.

The effectiveness of such nuclear sabre-rattling remains contentious. Some posit that it compelled the US to show restraint, as reflected in the White House's insistence that it would not intervene directly in the Russia-Ukraine war, as well as other Western officials' public rejection of intervention, citing nuclear escalation concerns. In spring 2022, the White House announced that it would not interfere directly in the Russia-Ukraine war, and when Russia declared it had put its nuclear forces on alert, plans to supply Ukraine with aircraft were cancelled.[42] In autumn 2022, US President Joe Biden declared that, for the first time since the Cuban Missile Crisis, the world was facing "a direct threat to the use of nuclear weapons, if in fact things continue down the path they'd been going".[43] However, alternative explanations hold equally well: Western decision-makers might have refrained from intervention out of sheer risk averseness. Western actors have, after all, not been characterised by an eagerness to get involved in extensive military operations after the costly and largely inconclusive interventions in Iraq, Afghanistan, or Libya. Indeed, US presidents from Barack Obama to Joe Biden have been openly reticent about interventionism. The debacle of the US withdrawal from Afghanistan in summer 2021 epitomises the US reluctance over any overseas force deployment. From that vantage point, a Western intervention in Ukraine would be unlikely – particularly in the absence of an Article 5-type security guarantee that could

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42 *Borger, J. and Wintour, P.*, US dismisses polish plan to provide fighter jets to be sent to Ukraine, The Guardian, 8 March 2022.

43 *Torralba, C., Sahuquillo, M. and Vidal, M.*, Putin's nuclear threats: Should the West take them seriously?, El Pais, 9 October 2022, <https://english.elpais.com/international/2022-10-09/putins-nuclear-threats-should-the-west-take-them-seriously.html>.

compromise the credibility of the Atlantic Alliance.[44] In fact, the absence of NATO membership does not preclude the unilateral offering of nuclear security guarantees to Ukraine; yet this has not been on the cards either. Instead, Western countries support Ukraine via weapons transfers, intelligence gathering and military training. The US has reacted to Russia's hints that this kind of support could elicit use of nuclear weapons. For instance, former US general David Petraeus warned in October 2022 that the likely response to Russian nuclear escalation would be a sweeping attack which would destroy Russia's troops and equipment in Ukraine as well as sinking its Black Sea fleet: "*we would respond by leading a* NATO *– a collective – effort that would take out every Russian conventional force that we can see and identify on the battlefield in Ukraine and also in Crimea and every ship in the Black Sea*".[45] While senior officials like National Security Adviser Jake Sullivan and CIA Director Bill Burns are known to have warned Moscow that any move involving nuclear weapons would have very serious consequences for Russia, it is impossible to know whether the incoming Trump administration will follow that line, especially in view of their manifest affinity with the Kremlin leadership.

In any case, consensus exists around the idea that nuclear sabre-rattling has seemingly undermined the 'taboo' on the use of nuclear weapons. Nuclear posturing dovetails with the introduction in the Russian nuclear doctrine of the undefined notion of "existential threat", as a possible justification for nuclear use.[46] The most recent doctrinal document, the "Basic Principles of State Policy of the Russian Federation on Nuclear Deterrence" of 2020, spells out that nuclear use is geared at "*preventing the escalation of military actions and their termination in terms favourable to Russia*". Furthermore, it accommodates two scenarios for nuclear-weapons use: a "*launch on warning*" posture based on credible information about the launching of ballistic missiles towards Russian territory and an attack by an adversary against critical governmental or military sites "*whose disruption would undermine nuclear force response actions*". Thus, conventional attacks with potential impact on nuclear weapons systems are covered under the scenarios that may give rise to a nuclear response.

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44 *Portela*, C., The EU and the Transformed Nuclear Context since the War in Ukraine, IAI Papers no 23, Istituto di Affari Internazionali, Rome, 2023.

45 *Hellmore*, E., 'Petraeus: US would destroy Russia's troops if Putin uses nuclear weapons in Ukraine', The Guardian, 2 October 2022.

46 Military doctrine of the Russian Federation, The Kremlin Office of the President, 5 February 2010.

Interestingly, Russian warnings about nuclear use have also been accompanied by simultaneous accusations of nuclear threats allegedly directed against Moscow. Highlighting the fact that Ukraine retains "the nuclear technologies created back in the Soviet times", the presidential address of February 2022 claimed that "[i]f Ukraine acquires weapons of mass destruction, the situation (…) will drastically change, especially for us, for Russia. We cannot but react to this real danger, all the more so since (…) Ukraine's Western patrons may help it acquire these weapons to create yet another threat to our country".[47]

V. Conclusions

This brief overview has provided a sobering picture of EU action on nuclear weapons. The role of the EU has been gradually evolving from a modest role in providing technical aid and financial support with a nuclear safety goal in mind to a diplomatic role, having successfully reached milestones in the negotiations to resolve a major proliferation crisis in Iran. However, as scholars constantly stress, action by the EU privileges the non-proliferation and nuclear safety domains over disarmament goals, rendering a structurally unbalanced picture.

In terms of fostering convergence, the initial goal of CFSP architects has been at least partially achieved: on the one hand, member states overall positions remain stable, and every country belongs to one of two subgroups whose bifurcation suggests a differentiated scenario. On the other hand, continued polarisation between EU members remains the most likely future scenario. The identified pattern of differentiated cooperation is likely to persist, even if the already acute unbalance in the strength of both groups has deepened.

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[47] *Hellmore, E.*, 'Petraeus: US would destroy Russia's troops if Putin uses nuclear weapons in Ukraine', The Guardian, 2 October 2022.

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The Dark Side of Free Movement: When Individual and Social Interests Clash

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Abstract

Free movement rights have been some of the most positive achievements of EU integration. However, this paper would like to point to the contradictory effects of these rights, especially since the accession of Central and Eastern European countries. Free movement rights create numerous benefits for the emigrating population and for the EU as a whole as they enable free circulation of labour from places with high unemployment to places where there is a need for labour. However, the social, economic and political downsides for the sending Member States should not be underestimated. This paper aims to explore what has been done so far and which new EU-level measures need to be introduced to mitigate the negative effects of free movement, without restricting it. The text reflects on existing and potential new EU funds, the reconceptualisation of EU citizenship, and the full implementation of the European Pillar of Social Rights.

Keywords: free movement of workers, negative effects, EU funds, EU citizenship, European Pillar of Social Rights

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I. Introduction

Free movement rights and EU citizenship have been among the most positive achievements of EU integration. The right to free movement of workers creates a number of benefits not only for the emigrating population, but also for the receiving Member State and for the EU as a whole as it enables free circulation of labour from places with high unemployment to places where labour is most needed. However, the social, economic and political downsides for the sending Member States – and especially for less developed regions – should not be underestimated, as free movement erodes their production and the tax base, and increases disparities between the more and less developed Member States and regions in the EU.

The aim of this chapter is to discuss this contradiction that is manifest in the opposing interests of the EU as a whole, and of individuals who exercise their free movement rights, on the one hand, and the interests of the sending Member States and their least developed regions, on the other hand. Although it acknowledges this problem, the chapter starts from the premise that free movement is an important and positive achievement of EU integration, whose downsides should not be utilised or politicised to argue in favour of limiting free movement rights. On the contrary, the answer is not to restrict free movement rights, but to reflect on further EU integration that would aim to reduce regional disparities in the EU by facilitating the development of EU regions that are lagging behind.

The chapter is structured in four sections. The second section concentrates on recent trends, and on the triggers and effects of intra-EU mobility. The third section explores what initiatives, studies and measures have been employed so far – both at the EU and national levels – to diminish the negative effects of free movement. The concluding section explains why a combination of national and EU measures would be optimal to respond to the downsides of free movement of labour. This section also puts forward various policy proposals that could be employed in the future, such as the reconceptualisation of EU citizenship and the full implementation of the European Pillar of Social Rights,

and/or the introduction of new EU-level financial measures that could mitigate the negative effects of free movement, without restricting it.

II. Intra-EU Mobility: Trends, Causes and Effects

Free movement of workers has numerous benefits. On top of ensuring a better allocation of workers throughout the continent, it is a positive force which contributes to stronger European integration. It promotes inter-cultural dialogue by enabling people to learn about other nations, and strengthens European identity. In addition, the movement of workers is an important channel for dealing with the effects of asymmetric shocks within the monetary union. For all these reasons, an increase in EU labour mobility has always been encouraged as a positive development for the EU.

So, what has changed? In order to understand the critiques of the free movement of workers, it is important to examine recent trends. As intra-EU mobility has increased over the last decade and become concentrated in some regions, some distributional and negative effects have occurred for some countries and have started to appear in social and political discussions. In order to understand the changing narrative about the free movement of workers and address its negative effects, it is important to understand both what triggers it and the trends involved, and to analyse its effects at different levels. A proper diagnosis and an understanding of the situation are necessary in order to be able to discuss the recent and missing policy choices that could effectively deal with this problem. The following section will aim to shed light on the current state of affairs by first explaining the basic statistical data, then by considering the causes of intra-EU mobility, and finally by reflecting on its positive and negative effects. Special focus will be placed on the impact of mobility for individuals on the move, for the EU as a whole, and for the destination and origin Member States of the movers.

1. Recent Trends in Intra-EU Mobility

Intra-EU mobility has increased in recent years. The number of working-age (20-64) EU citizens residing in an EU Member State other than that of their nationality increased from 2.7% in 2008 to 3.9% in 2018.[1] This trend has fol-

[1] Data on the intra-EU migration presented in this sub-section is from Eurostat, 2019. EU citizens living in another Member State – statistical overview, *Statistics Explained*, updated 17 July 2019.

lowed a similar increase over the previous decade, marked with the accession of new Member States to the EU.[2]

The recent increase in intra-EU mobility has been taking place through three main migratory channels. The first and most important migratory channel is the one from poorer Central and Eastern European Member States, which intensified upon their EU accession and the withdrawal of temporary restrictions to free movement of workers in transitional periods.[3] The acquired right to free movement has enabled nationals from new Member States to seek work opportunities in the richer and more developed parts of the EU. The second migratory channel is from the European South to its North. This direction of the flow of workers has been present and traditional for a long time. It increased during and after the global financial crisis and the European debt crisis, which affected certain Southern Member States disproportionately (Greece and Portugal) and which slowed growth and increased unemployment in other Southern economies. This process took place in parallel with the high demand for labour in certain richer Member States, most notably Germany, which amplified the traditional migration route from the European South to its North. Intra-EU mobility of highly educated EU citizens, looking for the best career placements within the single market – as the third migratory channel – has not contributed much to the recent increase.

In 2018, there were 12.9 million EU migrant workers. Most EU migrant workers come from large Eastern or Southern Member States: Romania (2.5 m), Poland (1.8 m), Italy (1.3 m) and Portugal (1.0 m). However, the countries most impacted by emigration, measured as the share of mobile citizens relative to the population in the country of origin were the poorest Member States: Romania (21.3%), Croatia (15.0%), Lithuania (14.5%), Portugal (13.6%), Bulgaria (13.3%) and Latvia (11.8%). At the same time, large, old and prosperous Member States did not experience much outflow. In 2018, only 1.0% of working-age Germans and 1.1% of British lived in another Member State.[4]

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2 The number of EU mobile citizens has increased by roughly 4 million or slightly above 1% of the population over each of the last two decades.

3 Draženović, Kunovac and Pripužić estimate that the accession and removal of transitional provisions, have increased migration from new Member States (origin countries) to the core EU (destination countries) by 40% (Draženović, I., Kunovac, M. and Pripužić, D. (2018). Dynamics and determinants of emigration: the case of Croatia and the experience of new EU member states. *Public Sector Economics*, 42 (4), 415-447. <https://doi.org/10.3326/pse.42.4.3>).

4 Ibid footnote 2.

Although the sending Member States have a long migrant tradition, the large share of their mobile workers is due to recent emigration. Over the last decade, the proportion of Romanian mobile citizens increased by 11.8 percentage points (hereinafter: pp), Lithuanians by 7.9 pp, Latvians by 7.8 pp, and Bulgarians by 7.7 pp. The newly acquired free movement rights were used by many who decided to move to other more prosperous Member States in search of jobs or better working and life conditions. As a result, the share of mobile EU citizens has increased in all new Member States over the last decade, although the number remains small in the case of the Czech Republic and Slovenia. However, this trend seems to have slowed down in many new Member States as the prosperity and job opportunities have increased and the pool of potential migrants has decreased – since most of those interested in relocating have already left. Consequently, over the last few years, most new Member States have experienced a peak and some – most notably Poland – have started recording a return of their nationals. Three countries continuing to experience a significant outflow of their population are the youngest and poorest Member States: Romania, Croatia and Bulgaria.[5]

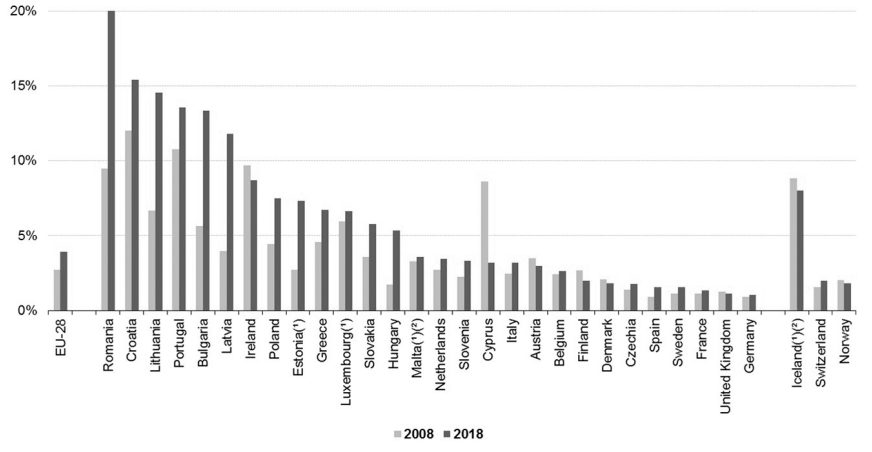

Figure 1: EU Mobile Citizens of Working Age (20-64) by Country of Citizenship, % of their home-country resident population
(1) Figure of low reliability for 2008; (2) Figure of low reliability for 2018
Source: Eurostat, 2019. EU citizens living in another Member State – statistical overview, Statistics Explained.

Greece and Portugal, two Member States most strongly affected by the recent economic crisis, also experienced a significant outflow of workers due to high

5 Ibid footnote 2.

unemployment. Italy and Spain, which were also somewhat affected by recent economic events, experienced relatively minor outflows. At the same time, they were a popular destination for francophone Romanians due to language similarities. The most popular destination countries for EU workers are the prosperous old Member States with tight labour markets and the need for foreign workers. Initially, the favourite destination was the UK, which did not introduce transitional period for free movement of workers and which was later surpassed by Germany.[6]

2. Causes of Intra-EU Mobility

Migration literature recognises push and pull factors to explain why people migrate. Push factors are related to the situation in the country of origin that motivates its citizens to emigrate. These include conditions related to physical danger – such as political or religious persecution, wars and natural disasters – as well as economic circumstances, where individuals are unable to achieve the desired life standard due to the situation on the labour market resulting in low wages and job scarcity. On the other hand, pull factors relate to the attractiveness of the destination country. Pull factors determine whether relocating to a new country would provide the most benefit. These factors attract individuals to a new place largely because of what the destination country provides that was not available to them in their country of origin.

Sometimes, some factors have both pull and push characteristics. This applies to the situation on the labour markets, especially to wage differentials and employment possibilities. This also applies to life satisfaction, which is related to the standard of life, as measured by the quality of private and public spending and services. In addition, individual choices might also be affected by other aspects of life not directly related to the standard of life, such as the social and political climate and corruption.[7]

Cross-country wage differentials are an important pull/push factor in explaining both skilled and unskilled migration. Relocation entails costs and risks. Financial costs of relocation can be covered by higher income, while there are also other administrative barriers and risks related to the integration in another country. Within the EU, enlargement and the removal of barriers to free movement of workers have prompted many from the poorer Member States

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6 Ibid footnote 2.

7 For findings on the relevance of emigrants' dissatisfaction with the social and political situation, as the most frequent reason why people emigrate from Croatia, see below in subsection II.2.

to seize the opportunity and seek higher wages in richer Member States. This was especially important for countries with a strong and long history of emigration, in which case networks of earlier migrants facilitated further emigration. Based on recent data, Alcidi and Gross suggest that migration from the new Member States decreases when local real net wages[8] reach 60% of those in the destination countries.[9] Consequently, the convergence process, especially in the area of wages, slows down emigration. In addition to increases in productivity, faster wage growth in the sending Member States is also propelled by increased labour demand and labour shortages caused by emigration. The link between the wage level and emigration is confirmed by recent developments in certain origin Member States, most notably in Poland, which has started to experience the return of its emigrants.[10]

Unemployment differentials are another pull/push factor. On the one hand, high levels of unemployment in the origin Member States can encourage the unemployed who are unable to find work at home to look for work abroad. This factor is especially important for younger and more unemployable groups of the population. Often, more educated people in Member States of origin are more likely to find jobs, which diminishes the chances of the uneducated. Unlike intra-EU mobility within Western and richer Member States – where usually the most educated people migrate to find better work opportunities – or the immigration of third-country national workers, where special skills or income are required for immigration – the removal of obstacles to free movement for the less developed Member States enabled many unskilled and unemployed individuals from new Member States and from the Member States most affected by the European debt crisis to move.

On the other hand, a number of richer EU Member States lacked workers to sustain economic growth and an aging population. Some of these economies, led by Germany, traditionally rely on foreign, mostly low-skilled "guest workers". Strong growth and the demand for workers in these countries during the time of high unemployment in the Member States affected by the crisis encouraged recent migration.

The third factor explaining large intra-EU mobility is related to the quality of institutions and the political climate. Often, people decide to emigrate from

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8 Net wages (gross wages minus tax and contributions), adjusted for purchasing power.

9 Alcidi, C. and Gros, D. 2019. *EU Mobile Workers: A challenge to public finances?, Contribution for informal ECOFIN, Bucharest, 5-6 April, 2019*, CEPS.

10 Chaffin, J., 2017. Young Poles leave UK to return home as economy booms, *Financial Times*, 27 October 2017. Available at: <https://www.ft.com/content/2329a046-ba6f-11e7-8c12-5661783e5589> (last accessed on 20 July 2019).

their country of origin in search of a better life both for themselves and their children. Emigrants, particularly those with skills, move from countries with weak institutions to those with stronger institutions. Generally speaking, the quality of institutions matters more for skilled migrants, whereas unskilled migrants appear to be attracted more by the social benefits of the receiving countries.[11]

In addition, life satisfaction appears to be an important driver of migration. This includes several dimensions, such as satisfaction with the life standard, opportunities for children, satisfaction with household income, and confidence in national elections and institutions. The European Commission Joint Research Centre's Annual Report 2018 on intentions to migrate finds that being dissatisfied with one's standard of living is associated with a higher probability to desire and to plan to move abroad.[12]

The relevance of life satisfaction as an important driver of migration has been confirmed in a number of Member States, such as Croatia. The study of new emigrants from Croatia to Germany finds that the main motives for emigration are not economic, but social and political.[13] The results of the study point to the connectedness of political ethics, weak institutions and emigration. According to the study, the main driver of migration is that in Croatia work ethics and honesty are not valued. The study further finds that the population of migrants are mostly younger people who were previously employed in Croatia and who most often move with their entire families (spouse, children). According to the study, the majority of new emigrants are very satisfied with their decision and do not regret migrating abroad.

A recent study of the Croatian Employers' Association, conducted on a sample of 661 Croatian emigrants, published on 7 June 2018, confirms these findings.[14]

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11 Atoyan, R., Christiansen, L., Dizioli, A., Ebeke, C., Ilahi, N., Ilyina, A., Mehrez, G., Qu, H., Raei, F., Rhee, A. and Zakharova, D. 2016. Emigration and Its Economic Impact on Eastern Europe, *IMF Staff Discussion Notes 16/7*, International Monetary Fund.

12 The European Commission JRC Annual Report 2018.

13 Jurić, T. 2018. Suvremeno iseljavanje Hrvata u Njemačku: karakteristike i motivi (Contemporary Emigration of Croats to Germany: Motives and Characteristics), Migracijske i etničke teme, 33 (2018), 3 (2017); 337-371 doi:10.11567/met.33.3.4.Jurić, 2018.

14 The study of the Croatian Employers' Association, Novi hrvatski iseljenici: Privremeni rad ili trajno iseljenje, Istraživanje među hrvatskim državljanima koji su iselili iz zemlje nakon ulaska u EU (01.07.2013. do 28.02.2018) [New Croatian emigrants: Temporary Work or permanent emigration, A study among Croatian nationals who have emigrated from the country upon the EU accession (1 July 2013 until 28 February 2018)], June 2018. Available at: <https://www.hup.hr/hup-predstavio-rezultate-istrazivanja-medju-iseljenicima-o-razlozima-odlaska.aspx> (last accessed on 20 July 2019).

The study shows that there are three groups of reasons why Croatian citizens emigrate. It is striking that the first group of reasons, linked to the emigrant's dissatisfaction with the social and political situation in Croatia, constitutes 65.5% of the grounds for emigration. The most common reasons in this group are: a disorganised state and the lack of political vision; nepotism; corruption; religious intolerance and nationalism and the lack of structural reforms. The second group of reasons – linked to the labour conditions – and the third group of reasons – linked to one's personal situation – constitute the remaining 35%. Here, the most frequent reasons are: the feeling that an individual's work and abilities are not valued; and the low or irregular payment of salaries.

3. Effects of Intra-EU Mobility

Strong emigration and a considerable loss of human capital in the sending Member States generated a major outcry and motivated many analyses of its short and long-term effects.[15] The following sub-section discusses the positive and negative effects of free movement of workers for the individuals on the move, for the EU as a whole, and for the destination and origin Member States. The findings point to the generally positive effects on the individuals who move, on the EU and on the destination Member States. However, negative effects prevail for the origin Member States.

a) Individuals

The decision to move is based on individual choices described in the previous section. People move in search of better work opportunities and flee negative factors in their home countries. Even though migrants often face costs and difficulties adjusting to a new environment, which often includes settling in a new country, learning the language and customs and having to restart their careers often below the level of their educational attainments, many EU movers manage to adjust to the host Member State and enjoy higher wages and standards than in their home countries. Expanding ethnic networks help migrants in this adjustment, while their children, attending schools there, are mostly able to quickly acclimate to the new environment. Some people who experience difficulties in adapting to the new environment have the option to return to their country of origin, especially with the increasing demand for labour and rising life standards in the new Member States. This, however,

[15] For example, the International Monetary Fund requested a study by Atoyan et al. (ibid, footnote 10); the European Bank for Reconstruction and Development's analysed it in its *Transition Report 2018-2019: Work in Transition*, and, the EU's Romanian Presidency's requested a study by Alcidi and Gros (ibid, footnote 8).

makes working abroad less attractive for many economic migrants. The pattern of return of previous migrants (circular migration) has become visible in several new Member States since 2017.[16] Sometimes, workers can gain new experience, knowledge, networks and capital while working abroad, which can be brought back to their countries of origin and which can help them start a business or achieve higher productivity and income upon their return.

b) The European Union

The efficient allocation of resources assumes that resources are utilised in ways where they are most productive. From this perspective, it makes sense to encourage the movement of workers across the EU to places that allow existing EU-wide labour to be put into the most productive use. From this perspective, it is beneficial for workers from new Member States to emigrate to high value-added industries in developed old Member States like Germany. This effect, however, has benefited mostly destination countries where migrants contributed both to short-term growth and medium-term prosperity in the destination societies.

Free movement of workers is also important for the functioning of the monetary union. In the event of an asymmetric shock, problems related to increased unemployment in the affected part can be lessened by the movement of workers to unaffected regions.[17]

In addition, free movement of people across the EU strengthens European identity and inter-cultural dialogue, as many destination Member States become multicultural. However, this can also have negative effects, as the native population can feel threatened by immigrants whom they can perceive as foreign in language and customs and as a competition on the labour market and in the provision of public services.[18]

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16 Chaffin, ibid. footnote 9.

17 While the literature on the optimal currency area focuses on the internal migration within the monetary union, recent developments suggest a similar role of immigration from non-eurozone Member States. Recent immigration of non-EMU workers has dampened the wage and price pressures in Germany (see Deutsche Bundesbank, 2018. "Wage growth in Germany: assessment and determinants of recent developments", Monthly Report, April, pp. 13-27.), possibly allowing for more relaxed monetary policy stance by the ECB.

18 A strong inflow of workers from new Member States after accession led to the term "Polish plumber" in the United Kingdom, depicting the competition of foreign workers in areas previously occupied by the lower and middle classes, pushing down their wages.

c) Destination Member States

Destination Member States benefit from migration. New workers enable growth in economies faced with labour shortages. This in turn creates additional demand for goods and services by the incoming workers, further increasing labour demand. A larger tax base eases demographic transition and the costs of the existing pay-as-you-go pension systems faced with an increasing number of pensioners and the provision of public goods and services. In addition, immigrants bring to the destination Member States significant capital, both in terms of physical funds to finance their relocation costs, and human capital generated by public and private investments in the Member State of origin. The arrival of a large number of educated workers, especially vocational workers such as nurses, diminishes the need for the public education of such workers in the destination Member States, leading to lower public expenses in this area.[19]

d) Origin Member States

Emigration can be beneficial for the countries of origin and the remaining population. The departure of workers increases job opportunities and wages of the remaining workers. It is often accompanied by significant remittances, both in term of transfers to relatives (parents, children) back home and investments in home countries. Returning workers can also bring skills, networks and capital enabling faster economic growth.[20]

However, strong emigration has significant negative effects, especially in a case of negative demographic outlook. In their study of the impact of recent emigration from the Central and Eastern Europe, Atoyan et al. focus on the effects on economic growth and convergence, competitiveness, and fiscal outcomes.[21]

Emigration decreases potential output in the sending Member States through the reduction of available labour. This is especially the case for the emigration

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19 Some evidence indicates that, over the last few years, Germany has been investing less in the education of nurses, due to the strong inflow of nurses from the new Member States.

20 Bahar at al. (2019) show the positive effect of returning Bosnian refugees on export performances in industries where they worked during their stay in Germany. Bahar, D., Özgüzel, C., Hauptmann, A., and Rapoport, H. 2019. "Migration and Post-Conflict Reconstruction: The Effect of Returning Refugees on Export Performance in the Former Yugoslavia," IZA *Discussion Papers* 12412, Institute of Labour Economics (IZA).

21 Ibid. footnote 10.

of highly skilled labour, which is already scarce in many new Member States.[22] After years of high unemployment in Central and Eastern European countries, caused by transition and recent crisis, the lack of (skilled) workers is becoming a significant constraint for growth. It is estimated that emigration decreased the annual growth rate by more than 1 percentage point in the most affected Member States.[23] They are also losing the so-called agglomeration contribution, where large educated population enables the development of higher value-added activities.[24] The lower potential growth and the focus on lower value-added activities endanger the economic convergence of those countries.

Strong emigration can also reduce competitiveness.[25] The scarcity of skilled workers results in wages increasing faster than productivity. The remittances to the remaining family members can discourage them from working and reduce the labour supply. Remittances can also lead to exchange rate appreciation affecting the tradable sector. Recent wage increases and significant remittances in the new Member States suggest decreasing competitiveness.[26]

Emigration can also have important implications for fiscal outcome. Reduced activity decreases tax revenue while remittances increase it. Atoyan et al conclude that, so far, emigration has only had a small and temporary impact on the overall fiscal position in the new Member States. However, it has also led to a larger government relative to the size of their economies and has increased the share of aging-related expenditures.

Member States invest a lot in the education of their nationals (both public and private resources), so the relocation of skilled labour constitutes a significant transfer among Member States. Human capital is moving from poorer to richer Member States, the direction opposite to the intention of the EU cohesion policy. This is especially a problem in the areas of vocational and skilled labour, such as nurses and doctors, where entire generations of professionals left for richer Member States.

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22 The traditional literature of migration is mostly concerned with the issue of brain drain – movement of the most educated people from less to more developed countries. However, Alcidi and Gros (ibid. footnote 8) argue that migrants from the most affected Member States are of similar or below the education average, compared to the total population of their Member State of origin.

23 Ibid. footnote 10.

24 Ibid. footnote 8.

25 Ibid. footnote 14.

26 D'Adamo, G., Hesse, N., Hartley, J., and Bîea, N. 2019. "Wage Dynamics in Romania", Economic Brief 044. European Economy, April.

Weak demographic outlook has also worsened. New Member States already face negative population growth due to low fertility inherited from the past and aging population. Loss of young citizens further accelerates the population aging. In addition to another economic impact of losing a vital segment of population (educated, more entrepreneurial, reproductive), this increases the medium term ageing costs, imposing further pressure on taxation of decreasing active population.

III. National and EU Responses to the Negative Effects of Intra-EU Mobility

The most frequent drivers of intra-EU labour mobility show that national decision-makers in the sending Member States can do a great deal internally to lower emigration. In other words, by eliminating dissatisfaction with the economic, social and political situation in the respective Member State, fewer domestic nationals would have an incentive to emigrate. However, fiscal incentives are only some of the measures that can stimulate domestic nationals to stay in/return to their country of origin. An individual feeling of prosperity for oneself and one's children cannot be triggered by higher wages and other financial incentives unless they are accompanied by structural reforms encouraging economic and social prosperity. For this reason, finding ways to stimulate citizens to stay in their home Member State – at least for the time being – remains primarily the task of individual Member States at the national level. Ensuring adequate healthcare, housing, education and other public services, as well as a business and public environment devoid of corruption and red tape, remains primarily the responsibility of national, regional and local authorities. Equally, local and regional policy-makers are those who are in the best position to identify and initiate activities to trigger regional cohesion.

However, there is great potential at the EU level, too, to contribute to stronger cohesion and, consequently, to reduce the negative effects of the free movement of labour. The following section first aims to outline the proposals and efforts that have been made so far at the national and EU levels. The section continues by proposing future national and EU policy choices that could diminish the negative effects of intra-EU mobility.

1. National Initiatives

The gravity and scope of the negative effects of the free movement of labour for the sending Member States have been recognised by a number of researchers, professionals and decision-makers at the national and EU level. So

far, Romania has been the loudest in speaking about the downsides of free movement faced by the sending Member States.[27] This is not surprising considering that, as explained in section II, this Member State has the highest rate of emigration to other parts of the EU: 21.3% or 2.5 million of its working-age population were living outside Romania in 2018, which is a huge hampering factor for its economic growth and social well-being.

In November 2018, while speaking in parliament, the Romanian finance minister, Mr. Teodorovici, suggested a time limit for the free movement of workers, by proposing that a person should be allowed to work in another Member State for a maximum of five years, upon which time he/she would have to return to his/her home Member State.[28] After being severely criticised for this statement, Mr Teodorovici tried to clarify that he did not intend to question EU fundamental freedoms or limit Romanian citizens' rights, but to open up the problems of the diminished economic growth and development Romania faced as a result of emigration.[29] Mr Teodorovici is not alone in his fears and controversial ideas. According to a poll by the European Council of Foreign Relations (ECFR), in Romania, Poland, Hungary, Italy, Spain and Greece people fear emigration more than immigration.[30] More than 50% of voters in Italy, Spain and Greece think that citizens should be prevented from leaving the country for long periods of time.[31]

EU Member States which face high emigration rates are resorting to different methods of dealing with labour shortages and other negative effects of free movement. Some have introduced tax relief and other fiscal and non-fiscal incentives aimed at reducing the negative effects of free movement. For example, over the last few years, Croatia decided to reduce the tax burden on natural and legal persons, and additional tax benefits for young workers are proposed to discourage emigration.

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27 For more details on Romania's activities in this context, see sub-section III.2.

28 "Romanian Minister suggests EU Work Permits", BBC News, 28 November 2018. Available at: <https://www.bbc.com/news/world-europe-46371207> (last accessed on 20 July 2019).

29 Ibid. footnote 23.

30 Zerka, P., 2019, Europe's emigration paradox, *European Council on Foreign Relations*, 9 July 2019. Available at: <https://www.ecfr.eu/article/commentary_europes_emigration_paradox#> (last accessed on 20 July 2019).

31 Rice-Oxley, M. and Rankin, J., 2019. Europe's south and east worry more about emigration than immigration – poll, *The Guardian*, 1 April 2019. Available at: <https://www.theguardian.com/world/2019/apr/01/europe-south-and-east-worry-more-about-emigration-than-immigration-poll> (last accessed on 20 July 2019).

Better utilisation of the remaining workforce can somewhat compensate for the missing workers. Raising the retirement age and encouraging part-time work for retirees can increase the labour supply. In addition, many Central and Eastern countries face low participation rates of working age population, especially women, so there is a large number of potential workers to be activated.[32]

Many Central and Eastern European Member States increased the number of work permits for third-country national workers. For example, in Croatia, a record quota of work permits for hiring third-country national workers has been approved for 2019: 50,100 new work permits in addition to 15,000 extensions.[33] The Croatian government plans to completely abolish quotas for 2020 and adopt new rules that would make it easier for businesses to hire third-country nationals.[34] In addition, since its independence in 1991, the Croatian policy has been to grant Croatian nationality to ethnic Croats living abroad, mostly in Bosnia and Herzegovina. This way, Croatia has enabled large immigration from Bosnia and other former Yugoslav republics, consequently increasing its population and automatically enabling all ethnic Croats to have access to the EU internal market.

Poland has already resorted to filling its vacancies with immigrants by opening its doors to Ukrainians who are replacing domestic nationals who left for Germany and other EU countries. The numbers of Ukrainians in Poland vary from several hundred thousand to two million.[35] The general aversion towards immigrants predominant in a number of Central and Eastern European countries

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32 European Commission DG for Economic and Financial Affairs, «The 2018 Ageing Report: Economic and Budgetary Projections for the EU Member States (2016-2070)», Institutional Paper 079, 2018. Available at: <https://ec.europa.eu/info/publications/economy-finance/2018-ageing-report-economic-and-budgetary-projections-eu-member-states-2016-2070_en> (last accessed on 20 August 2019).

33 Decision on the Establishment of the Annual Quota of Permits for the Employment of Aliens for the Calendar Year 2019, Official Gazette 116/2018, 21 December 2018.

34 Miličić, K. 2019. Croatia plans to scrap foreign worker quotas amid labour shortage, HRT, *The Voice of Croatia*, 19 May 2019. Available at: <https://glashrvatske.hrt.hr/en/news/economy/croatia-plans-to-scrap-foreign-worker-quotas-amid-labor-shortage/> (last accessed on 20 July 2019).

35 Walker, S., 2019., A whole generation has gone: Ukrainians seek a better life in Poland, *The Guardian*, 18, April 2019. Available at: <https://www.theguardian.com/world/2019/apr/18/whole-generation-has-gone-ukrainian-seek-better-life-poland-elect-president> (last accessed on 20 July 2019); Strzałkowski, M., 2019.Poland seeks to protect its Ukrainian connection, *Euractiv*, 22 February 2019. Available at: <https://www.euractiv.com/section/europe-s-east/news/poland-seeks-to-protect-its-ukrainian-connection/> (last accessed on 20 July 2019).

was less important in this case, due to the Ukrainians' cultural, religious and physical similarities to the Poles.

On the other hand, decision-makers' aversion to immigrants was the driving factor of the measures taken in countries like Hungary. In February 2019, the Hungarian Prime Minister Victor Orban presented a seven-point programme, with the primary demographic goal of increasing the native Hungarian population. The programme includes a loan of 10 million forint (approximately EUR 30,680) for women under 40 who marry for the first time. A third of the loan would be waived after the second child and the entire sum would be waived after the third child, whereas women with four or more children would not have to pay income tax for life.[36] In addition, Mr Orban's programme intends to reduce mortgage and car payments for parents, introduce new loans for families, allow grandparents to share maternity leave, and increase day care places.[37]

These examples show that the majority of national measures taken so far have been of a fiscal nature. However, past experience and the studies presented below indicate that fiscal incentives by themselves – without deeper structural reforms aimed at encouraging economic and social prosperity – are not sufficient to dissuade domestic nationals from leaving their Member State.[38] It is true, though, that some of the people who have left their home Member States might be returning in the future. This is partly due to dissatisfaction with the living conditions in the recipient Member State experienced by some of those who left, and partly due to the fact that the difference in wages between the sending and receiving Member States is diminishing over time. However, the phenomenon of circular migration is beginning to loom, with Poles starting to return from Western European countries, predominantly the

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36 "Hungary gives tax breaks to boost population, stop immigration", Deutsche Welle, 10 February 2019. Available at: <https://www.dw.com/en/hungary-gives-tax-breaks-to-boost-population-stop-immigration/a-47449980-0> (last accessed on 20 July 2019).

37 Kingsley, P., 2019. Orban Encourages Mothers in Hungary to Have 4 or More Babies, *The New York Times*, 11 February 2019. Available at: <https://www.nytimes.com/2019/02/11/world/europe/orban-hungary-babies-mothers-population-immigration.html> (last accessed on 20 July 2019).

38 See the CEPS study, discussed below (Alcidi C. and Gros, D., 2019. EU Mobile Workers: A challenge to public finances? Contribution for informal ECOFIN, Bucharest, 5-6 April, 2019, *CEPS Special Report*, p. 29.). See also the EBRD Transition Report 2018-2019: Work in Transition, which suggests that "improving the business environment and the quality of public services may significantly reduce people's desire to emigrate" (p. 67). Available at: <https://www.ebrd.com/transition-report> (last accessed on 20 July 2019).

UK, partly prompted by Brexit and partly by Polish economic growth and new opportunities.[39]

2. EU-Level Initiatives and Studies

Romania – as one of the EU Member States most affected by high emigration rates – decided to make use of its presidency of the Council of Ministers in the first half of 2019 by highlighting the negative effects of the free movement of workers at the informal Ecofin held on 6 April 2019 in Bucharest. Here, Mr Teodorovici warned about the negative effects of labour mobility by explaining that "this is the case when mobility is selective, leading to brain drain and hampering potential growth". He concluded by suggesting that "in the near future, our [EU] priority should be finding a common solution at the European level and implementing an instrument to help us tackling this issue".[40]

For the purpose of the informal Ecofin meeting, the Romanian Presidency also ordered a study by CEPS to analyse recent trends in labour mobility in the EU and the fiscal challenges it creates in sending Member States. The study suggested that Member States which are having most trouble with effective public spending and with the provision of high quality public goods are likely to experience the largest outflow of workers.[41] Even though the CEPS study does not provide any explicit recommendations, the above statement and its conclusion, that "with ongoing reduction in wage gaps, in the future, differences in structural factors may be more important than (after-tax) income in the decision to emigrate",[42] suggest that structural improvements and the quality of public goods are major factors that could reduce emigration from the sending Member States.

Another study commissioned by the SEDEC Commission of the European Committee of the Regions used the examples of 30 successful initiatives in 22 EU Member States to create recommendations on measures local and regional authorities could employ to retain and gain highly educated workers.[43] The

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39 Chaffin, J., ibid. footnote 9.

40 Press release from the informal Ecofin in Bucharest on 6 April 2019. Available at: <https://www.consilium.europa.eu/media/39010/190406-informal-ecofin-press-release.pdf?utm_source=DSMS&utm_medium=email&utm_campaign=Informal+Ecofin+2&utm_term=952.56706.30826.0.56706&utm_content=Press+material> (last accessed on 20 July 2019).

41 Alcidi C. and Gros, D., 2019. EU Mobile Workers: A challenge to public finances? Contribution for informal ECOFIN, Bucharest, 5-6 April, 2019, *CEPS Special Report*, p. 29.

42 Ibid, footnote 35, p. 8.

43 Commission for Social Policy, Education, Employment, Research and Culture (SEDEC), European Committee of the Regions, "Addressing Brain Drain: The Local and Regional Dimen-

fact that the recommendations are addressed to local and regional authorities emphasises the important role they play and the effects of intra-EU mobility at the local and regional level. The recommendations are broad in nature in order to be transferrable to different regions and circumstances, and they concentrate on improving regional policies which are reflected in the attraction of the region for a young and talented workforce. The SEDEC recommendations suggest that regions and cities should: better identify the needs of talent, for example by establishing a dialogue with young people; improve coordination with relevant players benefiting from the presence of talent in the territory; identify and support key driving sectors for retaining/attracting talent; stimulate the recruitment of outside talent; mitigate/remove structural impediments/barriers to attracting international talents; and cooperate with other authorities facing the same challenges with regard to highly skilled workers.[44]

3. EU Measures: The Reach of Funds and the European Pillar of Social Rights

The EU-level measures which are indirectly connected to reducing the negative effects of intra-EU mobility are twofold. First and foremost, European structural and investment funds – primarily the Cohesion Fund and the European Regional Development Fund – are aimed at economic and social cohesion by promoting the development of poorer regions. One of the effects of such regional support and development is to lessen the incentive to emigrate to more developed Member States. However, the convergence process has been slowing down, particularly after the financial crisis. Additionally, the amounts available under the Cohesion Fund and the European Regional Development Fund are not sufficient to enable stronger convergence.

On top of this, some poorer Member States have not been too successful in absorbing resources from EU funds. Croatia, as the youngest and least experienced Member State, has so far not been particularly successful in using the available resources. This experience is not novel, as many new Member States struggled with absorption in the first few years after their accession. For the period from 2014 until 2020, Croatia has been allocated EUR 10.7 billion from the European structural and investment funds.[45] Out of this amount, EUR 8.43

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sion", 2018. Available at: <https://cor.europa.eu/en/engage/studies/Documents/addressing-brain-drain/addressing-brain-drain.pdf> (last accessed on 20 July 2019).

44 Ibid. footnote 37, pp. 71-78.

45 Information available at the web page of the Croatian Ministry of Regional Development and EU Funds: <https://razvoj.gov.hr/hrvatskoj-na-raspolaganju-10-7-milijardi-eura-iz-eu-fondova/1917> (last accessed on 20 July 2019).

billion is aimed at cohesion policy measures in Croatia.[46] However, up until the end of October 2017, Croatia contracted only about 30% of this amount, whereas only 7% has been paid to end users.[47] Recent data from 2018 show an increase in Croatia's absorption capacity.[48] It is likely that the positive trend will continue as the knowledge and experience of national actors involved in the absorption procedure grows and matures.

However, the Commission's proposal of the reform of the Cohesion Fund for the next budgetary period is likely to lead to the reduction of the Cohesion Fund resources and to adding new criteria for its allocation, such as the reception and integration of migrants.[49] The future EU Cohesion Fund framework for the new budgetary period will also probably lower the EU contribution from 85% to 70% and add additional factors to the calculation of cohesion allocations, such as the reception of migrants – which does not favour a number of sending Member States, including Croatia.[50] It can be expected that the EU's decision to cut down its Cohesion Fund – instead of increasing it – and to add additional conditions for its allocation will considerably undermine national and regional efforts to reduce negative effects of intra-EU mobility.

The second category of EU-level measures is grouped around the European Pillar of Social Rights. The Pillar is a soft-law instrument proclaimed by the European Parliament, the Council and the Commission at the EU Social Summit

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46 Brkljača, I., 2017. Hrvatska na dnu Europe: Doprinos korištenja EU fondova gospodarskom rastu do sada je bio gotovo ravan nuli [Croatia at the bottom of Europe: The contribution of EU funds to economic growth has so far been almost zero], *Jutarnji list*, 15 December 2017. Available at: <https://www.jutarnji.hr/biznis/financije-i-trzista/hrvatska-na-dnu-europe-doprinos-koristenja-eu-fondova-gospodarskom-rastu-do-sada-je-bio-gotovo-ravan-nuli/6847263/> (last accessed on 20 July 2019).

47 Ibid footnote 40.

48 The information has been collected from the study of the Croatian Ministry or Regional Development and EU Funds on the results of the use of EU funds in 2018. Available at: <https://razvoj.gov.hr/vijesti/snazan-rast-iskoristivosti-fondova-europske-unije-u-2018-godini/3943> (last accessed on 20 July 2019).

49 European Commission Press release: "EU budget: Commission proposes a modern budget for a Union that protects, empowers and defends", 2 May 2018. Available at: <http://europa.eu/rapid/press-release_IP-18-3570_en.htm?_cldee=cGllcmx1aWdpLmJvZGFAY29yLmV1cm9wYS5ldQ==&recipientid=contact-283cf63f5cf2e4118a29005056a05119-90013127b9714ccfbf5a71d64fc4c264&esid=4e459cc2-1d4e-e811-8113-005056a043ea&urlid=0> (last accessed on 20 July 2019).

50 Rios, B., Commission, 2018. Commission sheds some light on cohesion policy reform. *Euractiv*, 22 June 2018. Available at: <https://www.euractiv.com/section/economy-jobs/news/commission-sheds-some-light-on-cohesion-policy-reform/> (last accessed on 20 June 2019).

in Gothenburg on 17 November 2017.[51] It contains 20 principles aimed at supporting a well-functioning labour market and welfare systems.[52] The 20 principles are structured under three categories: equal opportunities and access to the labour market, fair working conditions, and social protection and inclusion.[53] Some of the principles proclaimed by the Pillar are already present in EU law, and the Pillar aims to make them more visible, but it also adds new principles and rights.[54] The idea behind the establishment of the Pillar is to achieve "a highly competitive social market economy, aiming at full employment and social progress", as stipulated by Article 3(3) TEU. Consequently, the promotion of social Europe and social cohesion is the backbone of the Pillar.

The link between the European Pillar of Social Rights and the reduction of the negative effects of free movement is twofold. First and foremost, a stronger implementation of the Pillar has the potential to reduce the incentive to emigrate from poorer Member States and regions by diminishing some of the most frequent reasons for emigration. On the other hand, the Pillar could reduce the negative effects of free movement by ensuring a minimum level of social rights across the EU, regardless of the emergence of economic, demographic or social challenges/crises.

However, it is questionable to what extent the European Pillar of Social Rights has, at least so far, actually improved social rights and contributed to social

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51 The European Pillar of Social Rights was first proposed by the then Commission President Juncker in his State of the Union speech in 2015. The Commission presented a first outline of the Pillar in March 2016 and launched a public discussion, which ended with a concluding conference in January 2017.

52 See point 14 of the Preamble to the European Pillar of Social Rights booklet available at: <https://ec.europa.eu/commission/sites/beta-political/files/social-summit-european-pillar-social-rights-booklet_en.pdf> (last accessed on 20 July 2019). See also the statement by President Juncker, Vice-President Dombrovskis and Commissioner Thyssen one year following the proclamation of the European Pillar of Social Rights, 13 November 2018. Available at: <http://europa.eu/rapid/press-release_STATEMENT-18-6390_en.htm> (last accessed on 20 July 2019).

53 The 20 principles are: education, training and lifelong learning; gender equality; equal opportunities; active support to employment; secure and adaptable employment; wages; information about employment conditions and protection in the case of dismissal; social dialogue and involvement of workers; work-life balance; a healthy, safe and well-adapted work environment and data protection; childcare and support to children; social protection; unemployment benefits; minimum income; old-age income and pensions; healthcare; inclusion of people with disabilities; long-term care; housing and assistance for the homeless; access to essential services (see the European Pillar of Social Rights booklet).

54 See point 14 of the Preamble to the European Pillar of Social Rights.

convergence in the EU.[55] Due to the division of competences in the EU, the enforcement of most of the principles stated in the Pillar depends on Member States and their regional and local authorities, while social partners also play an important role.[56] The soft-law status of the Pillar and its heavy reliance on national, regional and local authorities render its enforcement dependent on Member States' willingness, capabilities and financial means.[57] Considering the huge primarily financial, but also social and political, differences among EU Member States, an EU-wide agreement on minimum wage would be difficult to achieve.

Interestingly, the full implementation of the European Pillar of Social Rights, which would involve a framework for an EU-wide fair minimum wage, was set as one of the priorities in Ursula von der Leyen's candidacy programme, presented in her opening statement to the European Parliament on 16 July 2019, just before being elected.[58] Even though Ms. von der Leyen has not specified how she intends to achieve this aim, it appears that she is not considering an EU-level hard-law measure, but a general EU-level agreement (she refers to it as a "framework"[59]) on national legislative measures or collective agree-

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55 For an analysis of the potentials of the European Pillar of Social Rights, see Vanhercke, B., Sabato S. and Ghailani D., 2018. The European Pillar of Social Rights as a game changer, *Social Policy in the European Union: State of Play*, ETUI and OSE Report. For the suggestions on how to upgrade the EU social acquis, see Garben, S. Kilpatrick C. and Muir, E., 2017. Towards a European Pillar of Social Rights: upgrading the EU social acquis, *College of Europe Policy Brief* N1/2017.

56 To this effect see point 17 of the Preamble to the European Pillar of Social Rights, which states that the Pillar "should be implemented at both Union level and Member State level within their respective competences", and point 19 of the Preamble stating that the Pillar "respects the diversity of the cultures and traditions of the peoples of Europe, as well as the national identities of the Member States and the organisation of their public authorities at national, regional and local levels. In particular, the establishment of the European Pillar of Social Rights does not affect the right of Member States to define the fundamental principles of their social security systems and manage their public finances, and must not significantly affect the financial equilibrium thereof".

57 For the recommendations on how to effectively implement the Pillar, see "Implementing the European Pillar of Social Rights – Study", European Economic and Social Committee, 30 March 2018. Available at: <https://www.eesc.europa.eu/sites/default/files/files/qe-01-18-612-en-n.pdf> (last accessed on 20 July 2019).

58 Von der Leyen, U., 2019 A Union that Strives for More: My Agenda for Europe, Political guidelines for the next European Commission 2019-2024. Available at: <https://ec.europa.eu/commission/sites/beta-political/files/political-guidelines-next-commission_en.pdf> (last accessed on 20 July 2019).

59 See the "Opening Statement in the European Parliament Plenary Session by Ursula von der Leyen, Candidate for President of the European Commission", 16 July 2019. Available

ments set "according to national traditions" through social dialogue between employers and unions.[60] This is not surprising considering the Union's limited competence in social policy, including the Treaty exclusion of pay from the EU's social policy.[61] Instead, it is likely that the Commission will set a framework for Member States' actions by issuing guidelines and other soft-law measures, thus diffusing the responsibility onto national, regional and local authorities, as well as social partners.[62]

Another initiative embraced by the newly elected Commission President is the establishment of a European Unemployment Benefit Reinsurance Scheme, which would provide better protection for those who lose their jobs in times of external shocks. Ms. von der Leyen is again not clear on what the parameters of this Scheme would be. At first sight, an unemployment scheme looks like an important mechanism for strengthening the EU social dimension and contributing to labour market convergence. Such a scheme could enhance the protection of the unemployed and prevent people from falling into poverty.[63] This would be particularly important for poorer Member States in their struggle against the negative effects of free movement. However, according to the most recent news on the scheme from January 2019, the idea behind it is not to establish a new financial system, but to include the unemployment scheme as part of the EUR 30 billion budget for the stabilisation function programme, which has been conceived by the Commission for the euro area Member States (but also open to other Member States) in its proposal for a new multiannual financial framework.[64] It is very unlikely that the newly elected Commission President will depart from the modest approach taken by Juncker's Commis-

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at: <https://ec.europa.eu/commission/presscorner/detail/en/speech_19_4230> (last accessed on 20 July 2019).

60 Ibid. footnote 44.

61 See Art. 153 TFEU, in particular Art. 153(5) TFEU stating that the provisions of Art. 153 TFEU on the EU social policy "shall not apply to pay".

62 For criticism of the diffusion of responsibility, see Rasnača, Z., 2019. Who is in charge of the European Pillar of Social Rights?, *Green European Journal*, 29 March 2019. Available at: <https://www.greeneuropeanjournal.eu/who-is-in-charge-of-the-european-pillar-of-social-rights/> (last accessed on 20 July 2019).

63 Beblavý M. and Lenaerts K., CEPS, 2017. Feasibility and Added Value of a European Unemployment Benefit Scheme: Main findings from a comprehensive research project, p. 62, footnote 44. Availabe at: <https://www.ceps.eu/ceps-publications/feasibility-and-added-value-european-unemployment-benefits-scheme/>(last accessed on 20 July 2019).

64 European Commission Press release IP/19/141: "Clarification regarding press reports on President Juncker's comments on European unemployment insurance", 5 January 2019. Available at: <http://europa.eu/rapid/press-release_IP-19-141_en.htm> (last accessed on 20 July 2019).

sion. Besides, considering the fact that Ms. von der Leyen was elected with a very tight majority, it is not likely that she will put forward any bold new proposals and it is questionable to what degree she will manage to keep her initial promises.

Even if the unemployment insurance scheme is established, it is questionable whether it would be accessible to all EU Member States under the same conditions, and not only to the eurozone members. On top of this, the minimum wage and the unemployment insurance scheme cannot by themselves reduce the negative effects of free movement in the most severely hit Member States. Structural reforms and an increase of national budgets allocated to public services – no matter whether from EU funds or otherwise – need to be added to the equation in order to make a true change.[65]

IV. Concluding Remarks on Future Policy Choices

The above discussion and the situation on the ground testify that the national and EU initiatives and measures employed so far do not suffice to reduce the negative effects of free movement in the most severely hit Member States. New instruments need to be contemplated with the aim of both softening the emigration triggers and compensating the sending Member States, without restricting fundamental freedoms. As already emphasised, free movement is one of the most positive achievements of European integration – with a multitude of positive effects for the individuals on the move, for the receiving Member States, and for the EU as a whole. Any shrinking of free movement rights would jeopardise EU integration, EU values and economic prosperity, and should not be attempted. However, the negative effects of free movement are also detrimental and should be addressed, as they lead to divergence and economic, social and political disintegration.

This leaves us with two questions. We should reflect on what could be done to address the negative effects of free movement. However, before that we need to consider whether solutions should be sought exclusively at the national/regional/local level, or at the EU level, or both. The authors would like to suggest that a combination of national/regional/local and EU measures would be the

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[65] On top of this, Trudie Knijn suggests that for the European Pillar of Social Rights to be taken seriously, solidarity with those who cannot participate in the labour market has to be restored and this has to be done by taking back political control and increasing budgets for public services (Knijn, T., 2019., A European Social Union for all: a chance to rethink and redo justice and solidarity, *EuVisions*, 6 February 2019. Available at: <http://www.euvisions.eu/esu-rethink-justice-solidarity-knijn/> (last accessed on 20 July 2019).)

best solution. There are three reasons for this. First, despite the fact that national, regional and local authorities play a crucial role in making changes, past experience has shown that national/regional/local authorities often do not have sufficient resources, competence and/or ability to act. Here, a parallel could be drawn with the ability of local and regional levels to address the problem of emigration to other more developed regions within the same Member State. Their experience shows that they are not capable of dealing with this problem on their own, without help from the national level. The same interconnectedness and dependence between the local/regional and national efforts applies to the relations between national and EU-level policies. The sending Member States will achieve much better results if supported by the EU as a whole. Nevertheless, national, regional and local authorities, as well as social partners and civil society, continue to play an important role in addressing the negative effects of free movement. For this reason, any EU measure can only work provided it is accompanied and backed by national and local actions and a willingness to cooperate.

Second, there are pragmatic reasons why the EU as a whole should participate in the struggle against the negative effects of free movement. Poorer Member States and regions are more liable to high emigration, which in effect leads to their further economic and social impoverishment and to the concentration of a highly qualified workforce in richer Member States. This process conflicts with the idea of EU cohesion. In addition, too much emigration from poorer to richer Member States can have negative effects or can create the social perception of negative effects in the receiving Member States as well. It can lead to social dumping and the fear of abuse of social benefits. It can also create problems with the integration of immigrants and lead to rising animosity towards them. These processes, happening simultaneously in poorer and richer Member States, could create a climate prone to nationalistic and anti-EU emotions susceptible to increasing violations of the rule of law and other EU values. For this reason, all EU Member States and EU institutions should have an interest in reducing the negative effects of free movement.

Finally, an EU-level approach that would reduce the negative effects of free movement can be legitimised by the principle of solidarity and the fair sharing of responsibility. Solidarity is a complex term which embraces a number of different motives or facets.[66] One of these facets is "fairness" (or "equity" or "justice"), which is based on the underlying premise that the Union is a whole and

[66] Goldner Lang, I. (2018). The EU Financial and Migration Crises: Two Crises – Many Facets of Solidarity. *Solidarity in EU Law: Legal Principle in the Making* A. Biondi, E. Dagilyte and E. Küçük (Eds.), pp. 133-160, Edward Elgar Publishing

that the burdens experienced by one Member State should be shared by other Member States.[67] Fairness is a subjective concept: what might be considered fair by one might not be viewed as fair by another. However, given that the principle of EU free movement of workers simultaneously produces negative effects in one Member State and positive effects in another or, in other words, given that EU free movement rules result in the gain of some Member States at the expense of others, it seems fair that the Member States which are reaping the benefits of free movement share the burden of those that are taking the burden.

The authors would like to suggest that – due to the existence of a link between the benefits and costs of free movement, which are not evenly shared by Member States – there is an obligation to act at the EU level. This obligation is based on the principle of solidarity and fair sharing of responsibility, as its constituent part. The link between the benefits and costs of free movement exists due to the process of the transfer of human capital from poorer to richer Member States. This is so because the emigration of members of the workforce from one Member State to another simultaneously constitutes a cross-border transfer of human capital. Emigrants take away their knowledge, skills and experience, previously obtained in one Member State, and use them in another, thus contributing to the well-being of its society. In this way, the investment in people by poorer Member States is being transferred, and the benefits are being reaped by richer Member States, as the former pay for the education of the workforce which is used by the latter. Instead of a process of convergence, partly enabled by capital transfers from less to more developed Member States, emigration from poorer to richer Member States can be viewed as a process of reverse transfers or subsidies from the poorer to the richer. Consequently, this process runs counter to the objectives of the EU cohesion policy and should be tackled at the EU level. This problem persists despite the fact that part of the capital is being returned to the migrants' Member States of origin in the process of their investments in and remittances to their home countries.

For all the above reasons, there is an obligation on the side of the EU as a whole to act and help the Member States which are bearing the negative consequences of free movement, instead of leaving them stranded. This leaves us with the second question related to what could be done by the EU to address this problem. Here, there are three groups of instruments which could be employed or further developed and which would work best if combined with each other. The most obvious and probably the most controversial solu-

67 Ibid. footnote, 60.

tion would be for the EU and its Member States to relax their rules on the immigration of third-country nationals, thus filling vacancies and improving the demographic structure. For the time being, third-country nationals who are not covered by the rules on international protection are granted only a limited set of EU rights on their own. Their status remains subject to their host Member State's national rules, which are very diverse. Instead of a cross-cutting, harmonising Union act, encompassing the rights of all third-country nationals in the EU, the Union has opted for a sectoral approach by regulating only those narrow and "desirable" categories of third-country nationals and their rights as deemed acceptable by the Member States.[68] Most importantly, Member States preserve exclusive competence to determine the volume of third-county nationals admitted to their territories for employment and self-employment purposes.[69] Despite the fact that some Member States have decided to relax national rules on the admission of certain categories of third-country nationals – as Poland has done for Ukrainians[70] – social attitudes towards immigration of third-country nationals in most Member States do not allow for a serious shift towards large-scale immigration in national or EU-level migration policies.

The second approach would be to strengthen fiscal transfers to the Member States most severely hit by the negative effects of free movement. This could be done by increasing transfers from the existing funds and/or by the establishment of new funds – such as an EU-wide unemployment benefit fund.[71] However, the current negotiations on the next multiannual financial framework do not give much hope in this direction. Instead of an increase of the budget for the European structural and investment funds, the Commission's proposal on the reform of the Cohesion Fund would reduce its resources and add additional factors to the calculation of cohesion allocations, such as the

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68 Goldner Lang, I. 2018. The European Union and Migration: An Interplay of National, Regional and International Law, *American Journal of International Law (AJIL) Unbound* 111, p. 509-513.The rights of third-country nationals are codified in a number of sectoral directives, e.g. on family members of EU citizens (Directive 2004/38), on family members of legally resident third-country nationals (Directive 2003/86), on long-term residents (Directive 2003/109), on highly qualified employees (2009/50 Blue Card Directive), on third-country national workers legally residing in a Member State (Directive 2011/98 EU Single Permit Directive), on students, pupils, researchers and au pairing (Directive 2016/801), on seasonal workers (Directive 2014/36), on intra-corporate non-EU skilled transferees (Directive 2014/66).

69 Article 79(5) TFEU.

70 See section III.1 on this.

71 For a discussion of the European Unemployment Benefit Reinsurance Scheme, see section III.3.

reception and integration of migrants.[72] It is also expected that the EU contribution will be reduced from 85% to 70%.[73] EU Member States are not willing to raise their contributions to the already insufficient EU budget, while EU political priorities concentrate on other policy areas, such as security and border controls. All this does not work in favour of national and regional efforts to reduce the negative effects of free movement.

In addition, inadequate absorption and possible misuse of EU funds, due to corruption and poor administration in some Member States, is another argument against investing more money into cohesion funds. Such behaviour is also having detrimental effects on the public perception of the political and social climate in the respective Member State and it is contributing to individual decisions to emigrate. It remains an open question what the EU can do to reduce such practice. Its attempts to force EU Member States to respect the rule of law – including its most recent legislative initiative in this area, which establishes a link between a Member State's violation of the rule of law and the suspension of EU payments, by making payments from EU funds conditional upon Member States' respect of the rule of law – can be viewed as part of its efforts to improve the situation.[74]

Even if, surprisingly, the EU decided to invest more money into cohesion funds, there would be a number of open questions. First, it is not clear how compensation for the transfer of human capital would be calculated. One would have to come up with a fair and jointly acceptable calculation that would encompass the costs of education and other investments in the person who has emigrated. Second, one should reflect on who should be the best recipi-

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72 Ibid. footnote 43.
By linking the EU's cohesion and migration policies, the EU and some of its Member States are trying to compel those Member States that are dependent on the recourses acquired from the EU budget to contribute more to the EU migration policy by increasing the number of asylum seekers they receive and integrate. They are legitimising this position by the logic of a comprehensive approach to solidarity, based on which all Member States should evenly participate and contribute to the all EU policies and not be able to pick and choose just the ones they like. In this light, see the recent statement by the French president Emmanuel Macron, who stated that "Europe can't be a la carte when it comes down to solidarity" and continued that the EU cannot have states "which say 'We don't want any of your Europe when it's about sharing the burden but we do when it's about structural funds'." (see Zalan, E. 2019. Macron: 14 EU states agree on a migration 'mechanism'. EUobserver, 23 July 2019. Available at: <https://euobserver.com/political/145514?utm_source=euobs&utm_medium=email> (last accessed on 23 July 2019).

73 Ibid. footnote 44.

74 Proposal for a Regulation on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States, COM(2018) 324 final, 2 May 2018.

ents of the compensation. Should the money be invested into financing public services, such as education, healthcare, public safety and housing, or should it be used to raise salaries, in order to reduce the pay gap among the poorer and richer Member States? Most importantly, fiscal transfers could never fully compensate for the loss of human capital. For example – to vividly demonstrate the problem – there could be no full compensation for a nurse who has left a Croatian hospital and is now working in Germany until the Croatian hospital finds a replacement. Otherwise, the hospital will continue to lack a nurse, which would be reflected in the general quality of healthcare in Croatia.

Finally, the third option could be to reconceptualise EU citizenship. A push towards the creation of a true European Pillar of Social Rights would be an important step in this direction. If we define Union citizenship in the broader sense, then all EU citizens, including those who do not move, should be ensured a minimum standard of social rights by having access to adequate housing, food, healthcare, education and social security. This would mean that the EU should be granted more competences in relation to the social rights of EU citizens and that the enforcement of social rights would have to be partly secured from the EU budget. A combination of a system where the EU would have more powers to regulate social rights and where the EU budget would be enhanced in order to enable the enforcement of these rights would help poorer Member States, as their investments into public services would be boosted by the more developed Member States through a joint EU fund. Increasing EU competences in the area of social policy without a simultaneous increase in the EU budget in this area would not be so effective, as higher social standards are not likely to be accomplished without investments.

The 2024 reform of the economic governance framework*

Christos V. Gortsos

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* The cut-off date for information included in this article is 9 November 2024.

I. Introductory remarks

1. Historical development of the economic union in the EU

(1) The formation of the Economic and Monetary Union ('EMU') in the European Union ('EU') was based on the Maastricht Treaty,[1] which led to the repeal of the founding Treaty of Rome of 1957 and its replacement by the Treaty on European Union (1992)[2] and the Treaty establishing the European Community ('TEC').[3] According to the TEC, EMU was formed in three stages: the *first stage* began on 1 July 1990, the date of application of Council Directive 88/361/EEC on the liberalisation of capital movements;[4] the *second stage* lasted from 1 January 1994 to 31 December 1998, during which time all the necessary steps were taken to make EMU work effectively from 1 January 1999, when the *third stage* began.

In the current context, of course, in which applicable are the "Treaty on European Union" ('TEU')[5] and the "Treaty on the Functioning of the European Union" ('TFEU')[6] (jointly here-

1 OJ C 191, 29.7.1992, pp. 1-112.
2 OJ C 321, 29.12.2006, pp. 1-35 (consolidated version).
3 OJ C 321, 29.12.2006, pp. 37-186 (consolidated version).
4 OJ L 178, 8.7.1988, pp. 5-18.
5 OJ C 202, 7.6.2016, pp. 13-45 (consolidated version).
6 OJ C 202, 7.6.2016, pp. 47-200 (consolidated version).

inafter "the Treaties"), which entered into force on 1 December 2009, the reference to "stages of EMU" has only historical significance, since after 1 January 1999 the term "third stage of EMU" is now synonymous with the term "EMU". This is, moreover, the reason why the word "stages" has been abolished under primary EU law.[7]

(2) The institutional and regulatory framework of EMU[8] is currently found, in principle, in the provisions of the two EU Treaties. The fundamental provisions of the TFEU regarding the EMU – which also identify the asymmetry that exists between the "E" (which constitutes incomplete integration) and the "M" (which is literal and complete integration, based also on the principle of conferral of powers (Articles 4-5 TEU), are found in the following articles: Article 3, point (c) includes monetary policy (which is the core of monetary integration[9]) among the exclusive competences of the EU, whereas in the field of other economic policies of the Member States it is, according to Article 5(1), merely a coordinating competence of the EU. This asymmetry is also evident from the wording of Article 119(1), which defines economic union, and Article 119(2), which defines monetary union.

From these definitions, unlike in the monetary union, the economic policies of the Member States (or, more precisely, the other dimensions of their economic policies apart from monetary and exchange rate policy) were not "unified". The formation of a single economic policy, along the lines of the monetary one, if achieved, would mean that the Member States would no longer have, in effect, any degrees of freedom in the conduct of their fiscal policy and, as a result, of all their macroeconomic policies. Consequently, the decision for an economic integration of this kind would have been the most decisive step towards European political integration.[10]

The term "economic policy" is not defined in the Treaties. It is used in the TFEU in a broad sense, encompassing all the policies to which Member States have recourse to influence the economic situation, such as fiscal policy,[11] employment policy, and structural policies. Ex-

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7 On the transition to the EMU, see by means of mere indication Louis (1992), Mestmäcker (1994), Padoa-Schioppa (1994), Goodhart (1997) and Lastra and Louis (2013).

8 On the institutional architecture of the economic union, see Slot (1994), Smits (2005) (in relation to the European Constitution), De Gregorio Merino (2019) and Dermine (2022). See also Eijffinger and de Haan (2000).

9 Related is the exchange rate policy, which, although not mentioned in Article 3, has also become an exclusive EU competence (TFEU, Article 119(2) and Article 127(2), second indent in conjunction with Article 219).

10 For a detailed presentation of this asymmetry and the evolution of EMU law, see Drossos (2020), Chapter 1. On the separation of the economic policy of Member States whose currency is the euro from (single) monetary policy, see for example Taylor (1997) and De Grauwe (2020), pp. 218-244.

11 For the meaning of the term fiscal policy, see for example Auerbach (2019).

cluded, of course – although these are also economic policies, and indeed also macro-economic policies – are monetary and exchange rate policies, which, for the Member States that have adopted the euro, have been "unified" since 1 January 1999 in the context of macro-economic integration (and which are also not defined in the Treaties).

(3) The critical mass of provisions of the TFEU is contained in Articles 119-144, which are placed in Title VIII (Economic and Monetary Policy) of Part Three of the TFEU (on "The Union's internal policies and activities"). Chapter 1 (Economic Policy, Articles 120-126) contains the basic provisions on economic union, which reproduce without major modifications those of Articles 98-104 TEC.[12] In line with the above, with the start of the third stage of EMU, no Member State, whether it has adopted the single currency or not, has lost autonomy in the conduct of its budgetary policy.

The principle of fiscal autonomy has, however, been substantially limited by the institutional framework governing the functioning of economic union, which is composed of the provisions of the TFEU referred to the following: the purpose of Member States' economic policies and the framework within which they should be conducted; the process of coordinating Member States' economic policies; the budgetary discipline process; and European solidarity measures in the economic field (Article 122 TFEU).[13] In contrast, the institutional framework that ran through the economic union until the euro area's fiscal crisis in 2010 did not contain provisions for the management of fiscal crises.[14]

(4) The Stability and Growth Pact ('SGP') further specifies the rules set out in Articles 121 and 126 TFEU on the coordination and monitoring of national fiscal and economic policies. It constitutes EU secondary legislation and consists of Council Regulation (EC) No 1466/97 of 7 July 1997 "on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies"[15] (and since April 2024 of the legislative act which repealed

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12 The other main provisions are found in Article 219 on the conduct of exchange rate policy within the Eurosystem (Articles 111(1)-(3) and 111(5) TEC) and Articles 282-284 on the institutional provisions of the ECB (Articles 112-113 TEC – Article 282 is new). This latter choice was the result of the fact that the ECB is now part of EU institutions, which is perhaps the most important institutional development in EMU law brought about by the Lisbon Treaty. Provisions applicable to the ECB are also found in other articles of the TFEU.

13 On this Article, see Chamon (2023).

14 On the enhancement of the economic union in terms of introducing sovereign crisis mechanisms, see details in Gortsos (2024), pp. 47-60 and the literature cited therein; see also in particular Tuominen (2019). On the legality of responses to the crisis, see in particular Hinarejos (2020).

15 OJ L 209, 2.8.1997, pp. 1-5. This Regulation was adopted on the basis of Article 99(5) TEC (now Article 121(6) TFEU). It is noted that, under this TFEU Article, Regulations amending Regulation (EC) No 1466/97 after 2009 are adopted jointly by the European Parliament and

it, as discussed below), which contains the preventive rules; Council Regulation (EC) No 1467/97 of 7 July 1997 "on speeding up and clarifying the implementation of the excessive deficit procedure ['EDP']",[16] which contains the corrective rules; and a related Resolution of the European Council of 17 June 1997.[17] Even though it applies to all Member States, the sanctions imposed under the corrective part only apply to those whose currency is the euro. The amendment of its provisions (the need for which has been frequently invoked, not at least even recently) cannot, under any circumstances, entail the amendment of the provisions of the TFEU that form the legal basis of the Regulations that make up the Pact, nor of the relevant Protocols annexed to the Treaties.[18]

2. Towards reforming the economic governance framework

a) The Commission Communications during the period 2021-2023

(1) The system of institutions and procedures established under the TFEU, the SGP, and other legislative acts of secondary legislation to achieve its objectives in the context of the economic union, has recently been labelled the "economic governance framework". The need for further institutional initiatives and even transformations in relation to this framework has become a key policy priority in order to facilitate appropriate structural changes and support the transition to a "green economy", an aspect that has by now become of primary importance. These concerns were raised, *inter alia*, in the Commission Communication of 19 October 2021 "The EU economy after COVID-19: implications for economic governance".[19] This was a relaunch of the public consultation on the Union's economic governance framework, launched in February 2020[20] and suspended to focus on the pandemic crisis.

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the Council (jointly hereinafter "the co-legislators") under the ordinary legislative procedure set out in Article 289(1).

16 OJ L 209, 2.8.1997, pp. 6-11. This Regulation was adopted on the basis of Article 104(14) TEC (now Article 126(14) TFEU). The EDP is also governed by Protocol (No 12) annexed to the Treaties.

17 OJ C 236, 2.8.1997, pp. 1-2.

18 On the SGP and evolution until 2020, see by means of mere indication Hahn (1998) and Keppenne (2020).

19 COM/2021/662 final. For several interesting positions (before the outbreak of the pandemic crisis) on the future of EU economic governance in the field of fiscal policy, see, for example, Buti (2019), Fabbrini (2019), Schlosser (2019), Drossos (2020), Chapter 6, and Craig and Markakis (2020), pp. 1406-1428.

20 Commission Communication of 5 February 2020 "Economic governance review", COM/2020/55 final.

(2) This Communication assessed the implications of changed circumstances for economic governance after the crisis *and* raises additional issues/questions for the public debate on the framework that (should) govern economic governance based on weaknesses already identified and the new challenges highlighted by the crisis.[21] The political debate on the reform of the economic governance framework, the main objectives of which were to ensure sound and sustainable public finances, while promoting sustainable and inclusive growth in all Member States through reforms and investment,[22] was then based on the follow-up Commission Communication of 9 November 2022,[23] which contained related "orientations".

(3) In the context of the wider debate, the Commission Communication of 21 November 2023 "Temporary Crisis and Transition Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia"[24] is also of relevance. This new, particularly flexible, soft law instrument, which succeeded the Temporary Frameworks in relation to the pandemic crisis and for Ukraine, undoubtedly influences discussions on fiscal prudence at national and EU levels.

b) The Commission's legislative proposals of April 2023 and their adoption in April 2024

(1) In the meantime, on 26 April 2023, the Commission put forward three legislative proposals to reorganise the EU economic governance framework after all the lessons learnt during the consecutive crises in the financial system and in public health, in order to ensure sound and sustainable public finances, while promoting sustainable and inclusive growth through reforms and investment.[25] In particular, these proposals aimed at replacing the "preventive part" of the SGP, as well as amending its "corrective part", respectively, and at amending Directive 2011/85/EU.[26]

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21 See European Commission (2021): *Questions and Answers: Commission relaunches its economic governance review*, 19 October (at: <https://ec.europa.eu/commission/presscorner/detail/en/qanda_21_5322>). See also Verley and Monks (2021).

22 See Feld et al. (2023).

23 COM/2022/583 final.

24 C/2023/8045, OJ C, C/2023/1188, 21.11.2023.

25 At: <https://www.consilium.europa.eu/en/press/press-releases/2024/02/10/economic-governance-review-council-and-parliament-strike-deal-on-reform-of-fiscal-rules>. On the potential macroeconomic implications for the euro area, see Bouabdallah et al. (2024).

26 On a critical discussion of these proposals, see by means of mere indication European Court of Auditors (2023). The European Court of Auditors may, in accordance with the sec-

(2) The **reform's overall objective**, as presented by the Council[27] was to reduce debt ratios and deficits in a gradual, realistic, sustained and growth-friendly manner, while protecting reforms and investments in strategic areas such as digital, green or defence. Attention has also been paid to forming a framework that will provide appropriate room for counter-cyclical policies and help address existing macroeconomic imbalances. More specifically, the new framework should focus on the need for "Member State ownership" over the efforts towards fiscal consolidation and take into account the fact (which has been suppressed for many years and had serious consequences in the coordination of economic policies) that the fiscal position of each Member States differs. At the same time, it provides Member States with incentives to invest in areas of common interest, such as climate change, digital and green transitions, and national defence. Finally, it attempts to simplify the design and the supervision system of fiscal consolidation measures with the aim to making them more credible and transparent.

(3) The new framework was completed in April 2024 and its rules have been included in three legislative acts of 29 April, which entered into force immediately and as a matter of urgency (upon their publication in the OJ) as of 30 April:[28] **Regulation (EU) 2024/1263** of the co-legislators "on the effective coordination of economic policies and on multilateral budgetary surveillance and repealing Council Regulation (EC) No 1466/97"; **Council Regulation (EU) 2024/1264** "amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the [EDP]"; and **Council Directive (EU) 2024/1265** "amending Directive 2011/85/EU[29] on requirements for budgetary frameworks of the Member States".[30]

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ond sub-paragraph of Article 287(4) TFEU, issue reports in discharge of its duties. See on this Stephenson (2015) and Lienbacher (2019), pp. 3008-3009.

27 Council of the EU, Press Release 350/29.4.2024, at: <https://www.consilium.europa.eu/en/press/press-releases/2024/04/29/economic-governance-review-council-adopts-reform-of-fiscal-rules/?utm_source=brevo&utm_campaign=AUTOMATED – Alert – Newsletter&utm_medium=email&utm_id=320>.

28 OJ L, 2024/1263, 2024/1264 and 2024/1265, respectively, 30.4.2024.

29 Council Directive 2011/85/EU of 8 November 2011 "laying down requirements for the budgetary frameworks of the Member States", OJ L 306, 23.11.2011, pp. 41-47. This legislative act was adopted on the basis of the third sub-paragraph of Article 126(14) TFEU.

30 Member States are required to bring into force the laws, regulations and administrative provisions necessary to comply with this legislative act by 31 December 2025 (Council Directive (EU) 2024/1265, Article 2(1)).

These legislative acts are jointly referred to as the "economic governance framework reform".[31] As accurately noted,[32] they essentially have become the central circle in a system of multiple concentric circles ensuring the sustainability of government finances. Another, complementary system as a wider circle is the 2012 Fiscal Compact.[33] Thus, as also accurately observed,[34] the new framework is not just about fiscal policy but also about the direction of macroeconomic policy coordination in general terms.

II. The key amendments to the preventive part of the SGP: Regulation (EU) 2024/1263 on the effective coordination of economic policies and on multilateral budgetary surveillance

1. Introductory remarks

Regulation (EU) 2024/1263, which has been adopted by the co-legislators on the legal basis of Article 121(6) TFEU, repealed Council Regulation (EC) No 1466/97 as of 30 April 2024[35] and established the new, totally replaced the preventive part of the SGP, which allows for a **"tailor-made approach"** for each Member State, taking account of different fiscal positions, public debt levels and economic challenges across the EU. In particular, and *inter alia*, while Council Regulation (EC) No 1466/97 set out, as noted, rules covering the content, submission, examination and monitoring of "stability and convergence programmes" as part of multilateral surveillance by the Council, the detailed rules of the new Regulation govern the same aspects in relation to the newly-introduced "national medium-term fiscal-structural plans" as part of the multilateral *budgetary* surveillance by the Council *and the Commission*. The aim is to ensure the effective coordination of sound economic policies of the Member States, thereby promoting sound and sustainable public finances, the EU's objectives of sustainable and inclusive growth and employment, as well as resilience through reforms and investments and preventing excessive government deficits.[36]

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31 See, e.g., Council Regulation (EU) 2024/1264, recital (21).

32 See Gortsos and Perakis (2024).

33 See Craig (2012) and Hadjiemmanuil (2020), pp. 1294-1298.

34 See Jones (2024), p. 8.

35 Regulation (EU) 2024/1263, Article 37.

36 *Ibid*., Article 1(1)-(2).

2. The European Semester

(1) Multilateral surveillance in the context of the European Semester (in accordance with the objectives and requirements set out in the TFEU) will be conducted by the Council and the Commission, with the European Parliament's involvement in accordance with Article 27 of Regulation (EU) 2024/1263. The aim remains to ensure closer coordination of economic policies and sustained convergence of the economic and social performance of the Member States. It shall rely on high-quality and independent statistics, produced pursuant to the principles set out in Regulation (EC) No 223/2009 of the co-legislators of 11 March 2009 "on European Statistics (...)[37]".[38]

(2) In relation to the European Semester's implementation, Regulation (EU) 2024/1263 provides, *inter alia*, that before taking key decisions in the development of their economic, social, employment, structural, and budgetary policies, Member States shall take, under the monitoring of the Commission, due account of the broad Guidelines for their economic policies (pursuant to Article 121(2) TFEU, which, as already noted, does not apply to the Member States with a derogation) and of the Recommendations and employment Guidelines (in accordance with Article 148(2) TFEU) referred to, respectively, in Article 3(3), points (a) and (b). A Member State's failure to act upon these Guidelines and Recommendations may result in further Recommendations; a Commission Warning or a Council Recommendation pursuant to Article 121(4) TFEU; *or* other measures under this legislative act, Regulation (EC) No 1467/97 (as in force) or Regulation (EU) No 1176/2011 (as in force as well).[39]

3. The reference trajectory

a) Introductory remarks

In the epicentre of the economic governance framework are two concepts: the *first*, that of "reference trajectory", is defined[40] as the multiannual "net expenditure trajectory" transmitted by the Commission to frame the dialogue with Member States where government debt and/or government deficit exceed the ref-

37 OJ L 87, 31.3.2009, pp. 164-173.

38 Regulation (EU) 2024/1263, Article 3(1)-(2). The content of the European Semester is specified in Article 3(3), points (a)-(d); see also just below.

39 *Ibid*., Article 4(2)-(3).

40 *Ibid*., Article 2, point (3). In accordance with the new Article 1(3) of Regulation (EC) No 1467/97, introduced by Regulation (EU) 2024/1264, the definitions in these two legislative acts are aligned.

erence values (i.e., 60% and 3%, respectively, of GDP) when drawing up their national medium-term fiscal-structural plans.[41] The *second*, that of "net expenditure", means[42] the government expenditure net of interest expenditure, discretionary revenue measures, expenditure on EU programs fully matched by revenue from EU funds, national expenditure on co-financing of programs funded by the EU, cyclical elements of unemployment benefit expenditure, and one-offs and other temporary measures. This constitutes a change of focus of the criteria of the economic policy coordination's surveillance. Net expenditure becomes, thus in effect, the main concept with regard to which Member States' compliance with the economic Guidelines and the fiscal rules will be monitored, marking a major shift in the economic policy assessment doctrine.

b) Key parameters of reference trajectories

aa) The adjustment period and its extension (under Article 14)

If the general government debt or deficit of a Member State exceeds the reference values, the Commission shall transmit to it and to the EFC a "reference trajectory" for the net expenditure covering an "adjustment period" of – in principle – 4 years.[43] However, the newly established framework facilitates and encourages public investment in important sectors, allowing Member States to implement the measures needed to secure the green and digital transitions, strengthen economic and social resilience, and bolster EU security capacity.

Towards that end, the standard 4-year adjustment period may be extended by up to 3 years, upon the condition that a Member State commits to a set of reforms or investments that will improve growth and resilience potential and support fiscal sustainability; address common EU priorities (as referred to in Article 13, point (c)) and the Council's "country-specific Recommendations";[44] and result in the overall *same or higher level* of nationally financed public investment in comparison to the previous period, considering the scope and scale of the country-specific challenges.[45] Apparently, such an extension low-

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41 These reference values were not amended by the reform; their modification would have required an amendment of Article 2 of Protocol (No 12).

42 Regulation (EU) 2024/1263, Article 2, point (2).

43 *Ibid.*, Article 5.

44 This term means (*ibid.*, Article 2, point (1)) the guidance annually addressed by the Council to a Member State on economic, budgetary, employment and structural policies in accordance with Articles 121 and 148 TFEU.

45 *Ibid.*, Article 14(1)-(2) (see also Article 2, point (8) on the definition of the term 'adjustment period'). The set of reform and investment commitments underpinning the extension of the

ers the average annual fiscal adjustment and, thus, aims to create incentives for governments, *on one hand*, to avoid excessive cutting of public investment as part of their consolidation efforts, and *on the other hand*, to spend more in common objectives.

bb) Risk-based surveillance and differentiation by Member State

Regulation (EU) 2024/1263 has introduced risk-based surveillance, tailored to each Member State, taking account of "different fiscal challenges" based on individual fiscal situations. The reference trajectory and the Commission's suggested plan for fiscal consolidation will be "risk-based" and differentiated for each Member State, ensuring specific targets.[46] This risk-based and differentiated planning is paramount, taking into account the central role assigned to the Commission in conducting a debt-sustainability analysis before addressing a Recommendation concerning the trajectory that Member States should follow in the evolution of their net expenditure when their debt and deficit ratios exceed the reference values.

cc) Safeguards

The approach adopted is underpinned by two safeguards to ensure that the debt reference value is put on a downward, prudent path (the "debt sustainability safeguard") and to provide a safety margin below the deficit reference value in order to create fiscal buffers (the "deficit resilience safeguard"):

First, under the debt sustainability safeguard, the Commission's reference trajectory must ensure that the projected general government debt-to-GDP ratio decreases by a minimum "annual average amount" of 1% of GDP as long as the ratio exceeds 90%; and 0.5% of GDP as long as it remains between 60-90%.[47]

Second, in accordance with the deficit resilience safeguard, the reference trajectory shall ensure that fiscal adjustment continues, if needed, until the Mem-

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adjustment period shall be sufficiently detailed, front-loaded, time-bound and verifiable, comply with specific criteria and be consistent with commitments included in the approved recovery and resilience plan of the Member State concerned during the period of operation of the RRF and the Partnership Agreement agreed under the MFF with the Member State concerned (*ibid.*, Article 14(3)-(4).

46 *Ibid.*, Article 6.

47 This average decrease shall be computed from the year before the start of the reference trajectory or the year in which the EDP is projected to be abrogated pursuant to Regulation (EC) No 1467/97 (whichever occurs later) until the end of the adjustment period (*ibid.*, Article 7(1)-(2)).

ber State concerned reaches a deficit level that provides a common "resilience margin in structural terms" of 1.5% of GDP relative to the reference value. The annual improvement in the "structural primary balance" to achieve this required margin shall be 0.4% of GDP, which shall be reduced to 0.25% if the adjustment period is extended.[48]

4. National "medium-term fiscal-structural plans"

a) Content, submission, assessment, and endorsement

aa) Content

(1) In relation to Member States' obligation to continuously provide all the necessary information and data about their fiscal image and their convergence plans, a new document, titled national "medium-term fiscal-structural plan", was established. The plan is defined as the document "*containing the fiscal, reform and investment commitments of a Member State, covering a period of four or five years depending on the regular length of the legislative term of that Member State*".[49] National medium-term fiscal-structural plans have become the cornerstone of the Commission's monitoring system. They encompass country-specific fiscal trajectories, Member States' priority structural reform and investment commitments, as well as measures to address any possible macroeconomic imbalances during a fiscal adjustment period.

(2) In this respect, Article 5 of Directive 2011/85/EU was amended by Council Directive (EU) 2024/1265 to the effect that the country-specific "numerical fiscal rules" shall promote (anymore and in particular), apart from compliance with the (above-mentioned) reference values and provisions on deficit and debt set out in Article 1 of Protocol (No 12) on the EDP, the adoption of a medium-term fiscal planning horizon, consistent with Regulation (EU) 2024/1263.

bb) Submission by Member States

aaa) The rule

In relation to the submission of national medium-term fiscal-structural plans the following rules apply:

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48 *Ibid.*, Article 8(1)-(2).

49 *Ibid.*, Article 2, point (6).

(1) In the course of its "prior guidance", the Commission shall, by 15 January of the year in which the Member States have to submit their plans pursuant to Article 11, transmit to the Member State concerned and to the EFC: the underlying medium-term public debt projection framework and results; its macroeconomic forecast and assumptions; and (*inter alia*) the reference trajectory, if required under Article 5, and the corresponding structural primary balance, including spreadsheet templates and other relevant information required to ensure its full replicability.[50] In order to assess the plausibility of whether the projected general government debt ratio of a Member State is on a downward path or remains at a prudent level, the Commission shall apply a replicable, predictable and transparent methodology based on the conditions set out in Article 10(1); it must make public its "plausibility assessment", as well as any other relevant information to ensure the replicability of results at the time of the submission of the national medium-term fiscal-structural plan.[51]

(2) The national plans are submitted by Member States to the Council and to the Commission by 30 April of the last year of the plan in force (a deadline extendable, if necessary, by a reasonable period upon an agreement with the Commission). Prior to the submission of the plan, a technical dialogue shall be held between the Member State and the Commission to ensure that it complies with Articles 13 and 15. Furthermore, a Member State may ask the relevant independent fiscal institution ('IFI') (as referred to in Article 8a of (the amended) Directive 2011/85/EU) to issue an Opinion on the macroeconomic forecast and assumptions underpinning the "net expenditure path" (meaning[52] the multi-annual trajectory for its net expenditure, i.e., its "fiscal adjustment path"), providing the IFI with sufficient preparation time.[53]

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50 *Ibid.*, Article 9(1). During the month before the deadline by which the Commission is to transmit to a Member State its prior guidance, the latter may request a technical exchange with the Commission to discuss the latest statistical information available and its economic and fiscal outlook. *Furthermore*, Member States that are compliant with the reference values, may request from the Commission technical information regarding the structural primary balance necessary to ensure that the "headline deficit" is maintained below 3% of GDP; such technical information shall also be consistent with the deficit resilience safeguard referred to in Article 8 (*ibid.*, Article 9(2)-(3)).By way of derogation, for the first national plans, the Commission should have transmitted (and has, indeed, done so) prior guidance to the Member States by 21 June 2024 based on its latest forecast (*ibid.*, Article 36, point (a)).

51 *Ibid.*, Article 10(3).

52 *Ibid.*, Article 2, point (5).

53 *Ibid.*, Articles 11(1) and (2), first sub-paragraph and 12. The requirements for national medium-term fiscal-structural plans are set out in Article 13.

By way of derogation, Member States should submit their first national plans by 20 September 2024, unless they agree with the Commission on an extension by a reasonable period.[54]

(3) A Member State may request to submit a revised plan to the Commission before the end of the period covered by it if there are objective circumstances preventing its implementation within that period and can ask the Commission for a revision if there has been a change of government after elections.[55]

(4) In relation to the (just) above-mentioned Article 8a of Directive 2011/65/EU, this provides the following for IFIs:

First, they shall be established by Member States by national laws, regulations or binding administrative provisions (even more than one can be established) and shall be composed of members nominated and appointed on the basis of their experience and competence in public finances, macroeconomics or budgetary management, and by means of transparent procedures.[56]

Second, their (multi-dimensional) independence is guaranteed by 5 elements, notably: they shall (a) not take instructions from the budgetary authorities of the Member State concerned or from any other public or private body; (b) have the capacity to communicate publicly about their assessments and opinions in a timely manner; (c) have adequate and stable resources to carry out their tasks in an effective manner, including any type of analysis within their tasks; (d) have adequate and timely access to the information needed to fulfil their tasks; and (e) be subject to regular external evaluations by independent evaluators.[57]

Third, without prejudice to the tasks and functions attributed to IFIs in accordance with Regulation (EU) No 473/2013 "on common provisions for monitoring and assessing draft budgetary programmes and ensuring the correction of excessive deficit of the Member States in the euro area"[58] for Member States whose currency is the euro, all Member States shall ensure that the following tasks are undertaken by one of their IFIs: (a) producing, assessing or endorsing annual and multiannual macroeconomic forecasts; (b) monitoring compliance

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54 *Ibid.*, Article 36, point (a). At the closing of this study, 21 Member States had submitted their national plans; see at: <https://economy-finance.ec.europa.eu/economic-and-fiscal-governance/national-medium-term-fiscal-structural-plans_en>.

55 *Ibid.*, Article 15(1)-(2).

56 Directive 2011/65/EU, Article 8a (1)-(3).

57 *Ibid.*, Article 8a (4).

58 OJ L 140, 27.5.2013, pp. 11-23. This Regulation was adopted on the basis of Articles 136 and 121(6) TFEU.

with country-specific numerical fiscal rules unless performed by other bodies in accordance with Article 6; (c) undertaking tasks in accordance with Articles 11, 15(3) and 23 of Regulation (EU) 2024/1263 and Article 3(5) of Council Regulation (EC) No 1467/97; (d) assessing the consistency, coherence and effectiveness of the national budgetary framework; and (e) upon invitation, participate in regular hearings and discussions at the national Parliament.[59]

Fourth, IFIs shall issue assessments in the context of the tasks referred to in Article 8a (5) points (a)-(d) above without prejudice to the tasks and functions attributed to them in accordance with Regulation (EU) No 473/2013. By application of the "comply or explain principle", Member States must comply with those assessments or publicly explain why they do not.[60]

bbb) Derogation

By way of derogation, a Member State shall not be required to submit a national medium-term fiscal-structural plan (or an annual progress report, discussed below) if it is subject to a macroeconomic adjustment programme pursuant to Article 7 of Regulation (EU) No 472/2013 "on strengthening economic and fiscal surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability".[61] If a Member State has an active national plan and becomes subject to such a macroeconomic adjustment programme, the national plan shall be taken into account in the design of the latter.[62]

cc) Assessment by the Commission

National medium-term fiscal-structural plans are assessed by the Commission within 6 weeks of their submission (extendable upon mutual agreement, if necessary and as a rule, for up to 2 weeks). In its assessment, the Commission must examine for each Member State whether: *first*, its (just above-mentioned) net expenditure path: (a) complies with the requirements to put or keep general government debt on a plausibly downward path by the end of the adjustment period or it remains at prudent levels below the 60% reference value, and (b) brings and maintains the government deficit below the 3% ref-

59 Directive 2011/65/EU, Article 8a (5).

60 *Ibid.*, Article 8a (6). On the enhanced role of IFIs, see also the considerations in recitals (13)-(14) of Council Directive (EU) 2024/1265.

61 OJ L 140, 27.5.2013, pp. 1-10. This Regulation was adopted on the basis of Articles 136 and 121(6) TFEU.

62 Regulation (EU) 2024/1263, Article 32(1)-(2).

erence value over the medium term; *second*, its net expenditure path complies with the requirements set out in Articles 6-8 (this only if the Member State has received a reference trajectory); *third*, its plan complies with the requirements set out in Article 13; and *fourth*, the set of reforms and investments underpinning an extension of the adjustment period complies with Article 14.[63]

dd) Endorsement by the Council

(1) Member State's medium-term fiscal-structural plans shall be endorsed by a Council Recommendation (to be adopted, as a rule, within 6 weeks of the adoption of the above-mentioned Commission Recommendation). This will:[64] *first*, set the Member State's net expenditure path; *second*, if applicable, endorse the set of reform and investment commitments underpinning an extension of the adjustment period included in the national plan; and *third*, where the national medium-term fiscal-structural plan serves as the corrective action plan required for the correction of excessive macroeconomic imbalances, as provided for in Article 31 (on the interaction with the "Macroeconomic Imbalance Procedure" ('MIP') pursuant to Directive 2011/65/EU, as amended) also endorse the reforms and investment necessary to correct those imbalances.

The unsatisfactory implementation, as assessed in accordance with Article 21 of Regulation (EU) 2024/1263, of the reforms and investments included in a Member State's national medium-term fiscal-structural plan that are relevant for macroeconomic imbalances shall be taken into consideration as follows: *first*, by the Commission when undertaking in-depth reviews in accordance with Article 5(2) of Regulation (EU) No 1176/2011; and *second*, by the Council and the Commission for their respective Recommendations, when considering whether to establish the existence of an excessive imbalance and recommend that the Member State concerned take corrective action in accordance with Article 7(2) of that legislative act.[65]

A Member State in respect of which an EIP is opened in accordance with Article 7(2), must submit a revised national medium-term fiscal-structural plan in accordance with Article 15 of Regulation (EU) 2024/1263, which must follow the Council Recommendation adopted pursuant to Article 7(2) of Regulation (EU) No 1176/2011. The revised national plan shall be assessed by the Commission in accordance with Article 16 of Regulation (EU) 2024/1263; be endorsed by the Council in accordance with Articles 17-20 of that legislative act and serve as the corrective action plan required under Article 8(1) of Regulation (EU) No 1176/2011, set out the specific policy actions that the Member State concerned has implemented or intends to implement, and include a timetable for those actions.[66]

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63 *Ibid.*, Article 16(1)-(5).

64 *Ibid.*, Article 17(1)-(2).

65 The Commission shall take into account any information that the Member State concerned considers relevant.

66 In accordance with Article 8(2) of Regulation (EU) No 1176/2011, the Council shall, on the basis of a Commission report, assess the revised plan within 2 months of its submission.

(2) If the Council considers that a national plan does not comply with the requirements set out in Article 16(2)-(3) and (5), it shall (on a Commission Recommendation) recommend that the Member State concerned submits a revised one.[67] *Furthermore*, it shall (on a Commission Recommendation as well) recommend to that Member State that the reference trajectory issued by the Commission be, as a rule, its net expenditure path. This applies if, *inter alia*, that Member State fails to submit a revised national medium-term fiscal-structural plan within one month of the Council Recommendation.[68]

(3) If a Member State has been granted an extension of its adjustment period but fails to satisfactorily comply with the set of reform and investment commitments underpinning the extension under Article 14, the Council may, on a Commission Recommendation and in accordance with Article 29, recommend a revised net expenditure path with a shorter adjustment period, unless there are objective circumstances preventing the implementation by the initial deadline.[69] Article 29 introduced the "comply or explain principle", pursuant to which the Council is expected, as a rule, to follow the Commission's Recommendations and proposals or publicly explain its position. Thus, the role of the Commission has been enhanced.

b) Implementation

(1) On a yearly basis by 30 April, each Member State must submit to the Commission an (annual) "progress report", containing information on the progress in the implementation of the following aspects: the net expenditure path as set by the Council; broader reforms and investments in the context of the European Semester; and, if applicable, the set of reforms and investments underpinning an extension of the adjustment period pursuant to Article 14. This report shall be made public.[70] Member States may request the relevant IFI to provide an assessment of the compliance of the budgetary outturns data reported in the annual progress report with the net expenditure path as set by the Council and, where applicable, analyse the factors underlying a deviation

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The implementation of the revised plan shall be monitored and assessed in accordance (the above-mentioned) Article 22 of Regulation (EU) 2024/1263 and Articles 9-10 of Regulation (EU) No 1176/2011.

67 Regulation (EU) 2024/1263, Article 18.

68 By agreement between that Member State and the Commission, that deadline may be extended by, as a rule, up to one month (*ibid.*, Article 19).

69 *Ibid.*, Article 20.

70 *Ibid.*, Articles 2, point (7), and 21(1)-(3).

from the net expenditure path as set by the Council; such analysis shall be non-binding and additional to that of the Commission.[71]

(2) The monitoring of the implementation of the national medium-term fiscal-structural plan and, in particular, the net expenditure path as set by the Council and the reforms and investments underpinning the extension of the adjustment period has been conferred upon the Commission. This is required to set up a "control account", namely a record to keep track of the cumulative upward and downward deviations of the observed net expenditure in a Member State from the net expenditure path as set by the Council, which shall be reset after the Council has endorsed a new national plan.[72]

5. General escape and national escape clauses

As the activation of the "general escape clause" during the pandemic led to the realisation that there were no clear guidelines for its deactivation, a one-year duration limit in its activation was set out (a repeatable renewal for one year each time being an option) through a Council Recommendation (upon a Commission Recommendation based on its analysis). This will allow Member States to deviate from their net expenditure path as set by the Council in the event of a severe economic downturn in the euro area or the EU as a whole, provided that fiscal sustainability over the medium term is not endangered.[73]

A similar solution is given regarding the activation of the newly-established "national escape clauses", allowing each Member State to deviate from its net expenditure if exceptional circumstances outside the control of its government have a major impact on its public finances, under the same conditions.[74]

6. Inter-institutional aspects and the enhanced role of the European Fiscal Board

(1) In order to increase transparency, accountability and ownership for the decisions taken, the European Parliament shall also be involved in a regular and structured manner in the European Semester, in particular by means of the enhanced "economic dialogue" between the European Parliament, the Coun-

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71 *Ibid.*, Article 23(1)-(2).

72 *Ibid.*, Articles 2, point (9) and 22(1)-(2).

73 Regulation (EU) 2024/1263, Article 25(1) and (3). As long as such a severe economic downturn persists, the Commission shall continue to monitor debt sustainability and ensure policy coordination and a consistent policy mix that takes into account the euro area and the EU dimension (*ibid.*, Article 25(2)).

74 *Ibid.*, Article 26(1)-(2).

cil and the Commission as referred to in Article 28 of Regulation (EU) 2024/1263.[75] In this respect the following is briefly noted:

First, the Commission is required to transmit to the European Parliament the national medium-term fiscal-structural plans submitted by the Member States and inform it of its overall assessment of these plans. *Furthermore*, the President of the Council and the Commission must regularly inform the European Parliament on the results of the multilateral surveillance and include in their report to it its results, while the President of the Eurogroup must report on a yearly basis to it on developments in the area of multilateral surveillance pertaining to the euro area.[76]

Second, the Commission is also required to prepare and transmit to the Council and make available to the European Parliament without undue delay *at least* the following information: the debt sustainability assessments and its methodological framework, once published; the national medium-term fiscal-structural plans submitted by the Member States (including the reference trajectories and the net expenditure paths, and any revisions thereof), as well as their annual progress reports; its assessments and Recommendations to the Council pursuant to (the above-mentioned) Articles 17-20 of Regulation (EU) 2024/1263, its analysis of the economic and social developments published as part of the European Semester (where relevant), and its Warnings pursuant to Article 121(4) TFEU; and in the case of activation of the escape clauses pursuant to Article 25 or 26, its analysis establishing that fiscal sustainability over the medium term will not be endangered.[77]

Third, in the course of the economic dialogue, the European Parliament may invite the President of the Council, the Commission and, if appropriate, of the European Council or of the Eurogroup, to appear before it to discuss the policy guidance issued by the Commission to Member States, the conclusions of the European Council and the results of multilateral surveillance.

Finally, the ECON may invite the President of the Council, the Commission, and, if appropriate, of the European Council or of the Eurogroup to discuss the national medium-term fiscal-structural plans, as well as the other information listed in Article 27(6) under the new dedicated "medium-term fiscal-structural plan dialogue".[78] It may also invite the Commission at least twice a year to pro-

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75 *Ibid.*, Article 27(1). Provisions on the economic dialogue are also contained in Article 2a of Regulation (EC) No 1467/97, which has not been amended by Regulation (EU) 2024/1264.

76 Regulation (EU) 2024/1263, Article 27(2)-(5).

77 *Ibid.*, Article 27(6), points (a)-(g).

78 *Ibid.*, Article 28(1) and (4).

vide information on the results of multilateral surveillance in this economic dialogue.[79]

(2) The new Regulation also strengthens the independence and functionality of the advisory European Fiscal Board, established by Commission Decision (EU) 2015/1937,[80] which advises on the exercise of the functions of the Commission and of the Council in the multilateral surveillance set out in Articles 121, 126 and 136 TFEU.[81] Furthermore, the Commission must ensure an ongoing dialogue with Member States by carrying out missions for the purpose of assessing the socio-economic situation in the Member State concerned and identifying of any risks or difficulties in complying with Regulation (EU) 2024/1263, and seeking the views of relevant stakeholders based in that Member State.[82]

III. The key amendments to the corrective part of the SGR: Regulation (EU) 2024/1264 on speeding up and clarifying the implementation of the EDP

1. Scope, key considerations and the new provisions of Articles 2 and 3

a) The scope of Regulation (EU) 2024/1264

Regulation (EU) 2024/1264 has been adopted on the legal basis of Article 126(14), second sub-paragraph TFEU and has substantially amended Regulation (EC) No 1467/97 as of 30 April 2024[83] (*inter alia*, to bring the necessary alignment with the provisions of Regulation (EU) 2024/1263). The scope of Regulation (EC) No 1467/97, which sets out the enforcement rules within the economic governance framework, has been amended to the effect that it lays down the provisions for speeding up and clarifying "*the implementation of*" the EDP, the objective of which is to deter excessive government deficits and, if they occur, to further prompt their correction, "*where compliance with budgetary discipline is examined on the basis of the government deficit and government debt criteria.*"[84]

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79 *Ibid.*, Article 27(7).

80 OJ L 282, 28.10.2015, pp. 37-40. This Decision, whose legal basis is the Treaties (in general), was amended by Decision (EU) 2026/221 of 12 February 2016 (OJ L 40, 17.2.2016, p. 15).

81 Regulation (EU) 2024/1263, Article 24(1)-(7).

82 *Ibid.*, Article 33.

83 Regulation (EU) 2024/1264, Article 2.

84 Regulation (EC) No 1466/97, Article 1(1) as replaced by Regulation (EU) 2024/1264.

Thus, the objective of the EDP is to ensure budgetary discipline by *first*, deterring excessive government deficits and, if they were to occur, encouraging their swift correction; and *second*, gradually reducing debt in a sustainable manner until it is brought below the reference value.

b) Key considerations and the new provisions of Articles 2 and 3

aa) Introductory remarks

As already noted in Section 2, any modification in the reference values for government debt and government deficit (i.e., 60% and 3%, respectively, of GDP) requires an amendment of Article 2 of Protocol (No 12), no matter how strict, rigid and maladjusted they can prove under given circumstances. However, Regulation (EU) 2024/1264 provides that not any transgression of those reference values will immediately trigger the corrective part of the SGP and lead to an EDP. More specifically, while the rules of the deficit-based EDP remain broadly unchanged[85], the operation of the new multi-annual framework is seriously taken into account in the debt-based EDP. In effect, this new and clear distinction between the two different causes that can lead to the EDP demonstrates the specific weight recognised to the more peculiar parameters resulting to excessive deficit and its more severe implications.

bb) Breaches of deficit reference value

(1) The excess of the government deficit over the reference value shall be considered: (a) "exceptional", in accordance with Article 126(2), point (a), second indent TFEU, only if the severe economic downturn or the exceptional circumstances provided for, respectively, in Articles 25 and 26 of Regulation (EU) 2024/1263 (on the above-mentioned escape clauses) are met under the conditions set out therein; and (b) "temporary", if the Commission's budgetary forecasts indicate that the deficit will fall below the reference value following the end of the severe economic downturn or the exceptional circumstances set out in (the above-mentioned) Articles 25-26.[86]

(2) The deficit reference value of 3% of GDP is considered a well-established element of the EU's fiscal surveillance framework "*that has been effective in influencing fiscal policy in the Member States*".[87] Once a Member State is in an EDP for breaches of this reference value, a "corrective net expenditure path"

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85 Regulation (EU) 2024/1264, recital (23).

86 Regulation (EC) No 1466/97, Article 2(1) as replaced; see also recital (16).

87 Regulation (EU) 2024/1264, recital (9).

is implemented. This should bring or keep the general government deficit below the reference value by the deadline set by the Council. In this respect, *in principle*, it would be the one originally set by the Council, while taking into account the need to ensure a "minimum annual structural adjustment" of at least 0.5% of GDP in case of a breach of the deficit criterion *or* the need to correct the deviation from that path as a rule in case of a breach of the debt criterion; *alternatively*, if the original path is no longer feasible, due to objective circumstances, the Council should be able to set a different path under the EDF.[88] Thus, if the EDP is opened on the basis of the deficit criterion, for the years when the general government deficit is expected to exceed the reference value, the corrective net expenditure path shall be consistent with the minimum annual structural adjustment benchmark of at least 0.5% of GDP.[89]

Against the backdrop of the significantly changed interest rate environment, during a transition period in 2025-2027 the Commission may adjust this benchmark to take into account the increase in interest payments when setting the proposed corrective path relating to the first medium-term fiscal-structural plan for these years within the EDP. This is in order not to compromise the positive effects of the "Recovery and Resilience Facility" ('RRF') (part of the NextGenerationEU recovery programme[90]) established by virtue of Regulation (EU) 2021/241 of the co-legislators of 12 February 2021,[91] which aims to boost aggregate demand, support the most hard-hit Member States, and strengthen EU economic growth. As a condition, the Member State concerned must *first* explain how it will ensure the delivery of the reforms and investments responding to the main challenges identified in the context of the European Semester and *second* address the EU common priorities as laid down in Regulation (EU) 2024/1263 "*consistent with the objective of achieving the green and digital transitions and building up defense capabilities*".[92]

cc) Breaches of the debt reference value

(1) The Commission must prepare a report in accordance with Article 126(3) TFEU if the government debt to the GDP exceeds the reference value of 60%, the budgetary position is not close to balance or in surplus and if the deviations recorded in the Member State's control account exceed *either* 0.3% of GDP on an annual basis, *or* 0.6% of GDP on a cumulative basis,[93] considering initiating a debt-based EDP.

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88 *Ibid.*, recital (15).

89 Regulation (EC) No 1466/97, Article 3(4), new third sub-paragraph.

90 At: <https://ec.europa.eu/info/strategy/eu-budget/eu-borrower-investor-relations/nextgenerationeu_en>. On this programme, see Bosque et al. (2021).

91 OJ L 57, 18.2.2021, pp. 17-75.

92 Regulation (EU) 2024/1264, recital (23).

93 Regulation (EC) No 1466/97, Article 2(2) as replaced.

(2) In accordance with the considerations set out in Regulation (EU) 2024/1264,[94] in order to strengthen the EDP for breaches of the debt reference value of 60% of GDP, the focus should be on Member States' departure from the net expenditure path set by the Council pursuant to Regulation (EU) 2024/1263. Thus, if the EDP is opened on the basis of the debt criterion, the corrective net expenditure path shall be at least as demanding as the net expenditure path set by the Council in accordance with Article 17 of Regulation (EU) 2024/1263 and correct as a rule the cumulated deviations of the control account by the deadline set by the Council.[95] In other words, if the government debt to GDP ratio exceeds the reference value, it shall be considered sufficiently diminishing and as approaching that value at a satisfactory pace, pursuant to Article 126(2), point (b) TFEU, if the Member State concerned respects its net expenditure path as set by the Council.

2. Other provisions

a) Speeding up the EDP: the provisions of the new Articles 4, 5 and 8 of Regulation (EC) No 1466/97

(1) When considering whether effective action has been taken in response to its Recommendations made in accordance with Article 126(7) TFEU, the Council shall base its Decision on the report submitted by the Member State concerned in accordance with Article 3(5) of Regulation (EC) No 1466/97 (as replaced by Regulation (EU) 2024/1264) and its implementation, as well as on any other publicly announced and sufficiently detailed decisions by the government of this Member State. If the Council establishes, in accordance with Article 126(8) TFEU, that this Member State has failed to take effective action, it shall report to the European Council accordingly.[96] Any Council Decision under this Article to make its Recommendations public shall be taken immediately after the expiry of the deadline set in accordance with the newly drafted Article 3(4) of Regulation (EC) No 1466/97.

(2) The Council Decision to give notice to a participating Member State[97] to take measures for the deficit reduction pursuant to Article 126(9) TFEU, which must be taken within 2 months of its Decision in accordance with Article 126(8) TFEU establishing that no effective action has been taken, shall request the Member State to implement a corrective net expenditure path in accordance

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94 Regulation (EU) 2024/1264, recital (10).

95 Regulation (EC) No 1466/97, Article 3(4), new fourth sub-paragraph.

96 *Ibid.*, Article 4(1)-(2) as replaced.

97 This Article does not apply to the Member States with a derogation.

with the requirements set out in Article 3(4) of Regulation (EC) No 1466/97 and indicate measures conducive to the achievement of this path. The Council may decide, upon a Recommendation from the Commission, to adopt a revised notice if *either* effective action has been taken in response to such a notice and the conditions referred to in Article 26 or 25 of Regulation (EU) 2024/1263 (on the above-mentioned escape clauses), which may, in particular, extend the deadline for the correction of the excessive deficit by 1 year as a rule.[98]

(3) Any Council Decision under Article 126(11) TFEU to intensify sanctions shall be taken no later than 2 months after the reporting dates pursuant to Regulation (EC) No 479/2009.[99] *Furthermore*, and most importantly, any Council Decision under Article 126(12) TFEU to abrogate some or all of its Decisions shall be taken as soon as possible and, in any event, no later than 2 months after the above reporting dates. Such a Council Decision shall only be taken if: (a) the deficit has been brought below the reference value and is projected by the Commission to remain so in the current and following year; and (b) if the EDP was opened on the basis of the debt criterion, the Member State concerned respected the corrective net expenditure path set by the Council in accordance with (the just above-mentioned, new) Articles 3(4) *or* 5(1) of Regulation (EC) No 1466/97.[100]

b) Abeyance and monitoring: replacements in Articles 9-10 and amendments in Article 10a of Regulation (EC) No 1466/97

(1) If the Member State concerned complies with *either* Recommendations made pursuant to Article 126(7) TFEU *or* with notices given pursuant to Article 126(9), the EDP shall be held in abeyance.[101]

(2) The Council and the Commission shall regularly monitor the implementation of action taken by the Member State concerned in response to Recommendations made under Article 126(7) TFEU, and by the participating Member State concerned in response to notices given under Article 126(9). If action by a participating Member State is not being implemented or, in the Council's view, is proving to be inadequate, the latter shall immediately take a Decision under Article 126(9) *or* (11) TFEU,[102] respectively. The same applies if actual data pursuant to Regulation (EC) No 479/2009 indicate that an excessive deficit has

98 Regulation (EC) No 1466/97, Article 5(1)-(2) as replaced.

99 *Ibid.*, Article 8(1) as replaced.

100 *Ibid.*, Article 8(2)-(3) as replaced.

101 *Ibid.*, Article 9(1) as replaced.

102 Article 126(11) also does not apply to the Member States with a derogation.

not been corrected within the time limits specified in these Recommendations or notices.[103]

(3) From an institutional point of view, the Commission is called upon to ensure a permanent dialogue with authorities of Member States pursuant to the objectives of Regulation (EC) No 1466/97 (as amended), in particular, by carrying out missions for the assessment of the actual economic situation in a Member State and the identification of any risks or difficulties in complying with these objectives and allow an exchange with other relevant stakeholders, including the national IFIs. *Furthermore*, following the adoption by the Council of a notice under Article 126(9) TFEU, and if requested by the parliament of the Member State concerned, the Commission may present its assessment of the economic and fiscal situation therein. Enhanced surveillance may be undertaken for Member States which are the subject of Recommendations and notices issued following a Decision pursuant to Article 126(8) and Decisions under Article 126(11) TFEU for the purposes of on-site monitoring.[104]

3. Sanctions

(1) The rule set out in Article 11 of Regulation (EC) No 1466/97, namely that whenever the Council decides under Article 126(11) TFEU to impose sanctions on a participating Member State a fine shall be required, remains unchanged. However, recital (20) of Regulation (EU) 2024/1264 considers that "*these fines should not provide for a minimum amount, but should accumulate until effective action is taken, in order to constitute a real incentive for compliance with the notices given to Member States under an excessive deficit procedure in accordance with Article 126(9) TFEU.*" As already noted, for the years when the deficit ratio exceeds the 3% reference value, the net expenditure path set by the national medium-term fiscal-structural plan would be adjusted by the minimum annual structural adjustment benchmark of at least 0.5% of GDP.

In effect, until effective action is taken, Member States in an EDP will face fines up to 0.05% of GDP to be paid every 6 months, up to cumulative fines of 0.5% of GDP.[105] Accordingly, the upper limit of 0.5% of GDP is lowered in comparison to the previous regime, and the imposed sanctions become more granular. These fines shall constitute general revenue for the EU budget.[106]

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103 Regulation (EC) No 1466/97, Article 10(1)-(3) as replaced.

104 The Member States concerned shall provide all the necessary information for the preparation and conduct of the mission (*ibid.*, Article 10a (1)-(2), respectively, as amended).

105 Regulation (EC) No 1466/97, Article 12(1)-(2) as replaced.

106 *Ibid.*, Article 16 as replaced.

(2) Furthermore, Regulation (EU) 2024/1264 sets out, that in accordance with Article 126(12) TFEU, the Council shall abrogate: *first*, the sanctions referred to in Article 126(11), first and second indent depending on the significance of the progress made by the participating Member State concerned in correcting the excessive deficit; and *second*, all outstanding sanctions if the Decision on the existence of an excessive deficit is abrogated. Fines imposed under Article 12 will not be reimbursed to the participating Member State concerned.[107]

IV. Concluding remarks

(1) The main objectives of the reform of the economic governance framework are to ensure sound and sustainable public finances, while promoting sustainable and inclusive growth in all Member States through reforms and investment. It has addressed several issues which were for a longer time discussed within the EU in order to simplify it, improve the transparency of its implementation, and improve it to ensure the public finances' sustainability in Member States and facilitate the unwinding of existing macroeconomic imbalances and the avoidance of new ones. It also addressed the questions relating to:

> *first*, how the framework can ensure responsible fiscal policies to ensure long-term sustainability while enabling short-term macroeconomic stabilisation; incentivise Member States to undertake the key reforms and investments needed to deliver the "Green Deal" on the basis of the related Commission Communication of 11 December 2019[108] *and* to help address current and future economic, social and environmental challenges, while maintaining safeguards against risks to debt sustainability; ensure effective enforcement and what should be the role of financial penalties, reputational costs and positive incentives; and take into account the euro area dimension and the deepening of the EMU;
>
> *second*, in light of the broad impact of the pandemic crisis and the new temporary policy tools launched to address it, how the framework, including the SGP, the MIP and, more generally, the European Semester, can best ensure an adequate and coordinated policy response at EU and national level;
>
> *third*, how surveillance can focus on Member States with more pressing policy challenges and ensure the quality of dialogue and participation;
>
> *fourth*, how the design, governance and functioning of the RRF can provide useful information on economic governance through improved own-

107 *Ibid.*, Articles 14-15 as replaced; see also recital (19) of Regulation (EU) 2024/1264.

108 COM/2019/640 final.

ership, mutual trust, sanctions in case of breaches, as well as the interaction between the economic, employment and fiscal dimensions; and

finally, the scope for strengthening national fiscal frameworks and improving their interaction with the EU fiscal framework.

(2) Even though public debts and deficits remain important and are taken into account as indicators of each Member State's performance in managing its finances, and specific safeguards are provided that are triggered depending on the levels of these variables, net expenditure has become the key indicator to evaluate when supervising and assessing its performance towards fiscal consolidation. *Furthermore*, the above changes reflect the fact that national governments, which have reserved the competence in the exercise of economic policy, should still have discretion when planning on how to achieve the reference trajectory. *In addition*, temporary or on-off measures (e.g., windfall taxes or asset sales) do not alter net expenditure under the definition provided by Article 2 of Regulation (EU) 2024/1263; thus, any adjustments to public spending must be structural.

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The Rise of the Far Right in the European Union: Assessing its Significance following the June 2024 European Parliamentary Elections

Lee McGowan

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2024 was undoubtedly a great year for the far right. There were a series of firsts and these included the National Rally (*Rassemblement National*) securing its record breaking performance (with 41% of the vote) at the French presidential elections; the Austrian Freedom Party (*Freiheit Partei Österreichs*) or FPÖ emerging as the largest national party; the Alternative for Germany finishing in first ever placing in a regional election (in Thuringia), the Croatian government of Andrej Plenković entering into a coalition agreement with the far right Homeland Movement and the largest ever number of far right MEPs being elected to the European Parliament. The successes and scale of the far right are remarkable after decades languishing on the margins of the political system.

The sudden turnaround in the political fortunes of the far right was the product of a long process of re-invention and mainstreaming (supply side) that began in the 1990s. It also owes the increasing the receptiveness of the electorate to a deeply nationalist rhetoric and one infused with increasingly populist, anti-elite and anti-immigration messaging (demand side).

The modernisation process was accompanied by the discarding of more extremist positions on race and sympathies for past regimes. Charismatic leadership has very much played an intrinsic role in transforming the fortunes of the far right. The first signs of a more permanent far right caucus occurred in the 1990s in Austria, France and Italy, swiftly followed by improved far right performances in states like Hungary and Sweden in the first decade of the twenty-first century. Support, however, only starts to grow after 2010 in the wake of the economic hardships following the 2008/09 financial crisis and increasing opposition to immigration. Indeed, both events fuelled the emergence of new far right forces such as the *Alternative für Deutschland* (Alternative for Germany or the AfD) and Vox in Spain in the early 2010s.

The recent 2024 European Parliamentary elections reaffirmed a general shift to the right across the board with the centre right European Peoples Party (EPP) improving its position at the expense of the Liberals in Renew Europe, the Socialists and the Greens. These elections also the advance of far tight forces. The trend towards far right parties may not have been as pronounced as many commentators had predicted, but in the three largest EU states, namely France, Germany and Italy, the far right forces of the National Rally, the Alternative for Germany and the Brothers of Italy polled particularly well.

The EP elections underscored the continuing appeal of anti-establishment, populist and Eurosceptic parties. (Chatham House, 2024). Around a quarter of the 720 newly installed MEPs belong to the far right. Two things are worth noting. Firstly, of the 187 confirmed right-wing Eurosceptics in the EP, at least 111 of these can be considered as potentially belonging to far right parties. The inclusion of handful of right-wing independents (*non-inscrits*) would increase this figure marginally. Secondly, even with 187 MEPs the forces of the far right remain a minority in the assembly and a very fractured one as the far right MEPs sit in three distinct and rival party groups. In short, for the moment ideological priorities and personal rivalries make an alignment of the entire far right scene practically impossible as the parties and their leaders jostle for position and influence.

However, given that these far right MEPs are all, if to varying degrees, critical of the European integration project we should expect heightened opposition amongst the far right benches towards all pro-integration efforts from the three mainstream pro EU parties, namely the European Peoples' Party (EPP), the Progressive Alliance of Socialists and Democrats (S D) and Renew Europe. The label far right is contentious and carries negative overtones in its usage. It is rejected by the 'far right' parties who describe themselves unapologetically

as proud patriotic nationalist forces. So, this raises a fundamental question at the outset of this chapter: What constitutes the far right in Europe today?

I. Defining the Far Right

The term 'far right' very much remains a key descriptor for much of the media's coverage of events and personalities, but this label remains too nebulous and wide-reaching to be really helpful to distinguish between different parts of the far right scene in the mid 2020s. The first task of this chapter is to provide a clearer and working definition of the 'far right' for the 2020s.

There now exists a substantial and an ever growing academic literature on the subject of the far right in Europe, the Americas and increasingly across the globe. (Goncalves and Caldeira Neto, 2022; Fernando, 2020: Hermansson et al, 2020; Mudde and Kaltwasser, 2017 and Toscano, 2019). In seeking greater clarity, the academic community has introduced a range of competing and overlapping labels to explain the nature of the 'far right'. Writings have referred to radical (Kitschelt with McCann, 1995; McGowan, 2002), extremist (Arzheimer, 2015; 2017 and Hainsworth, 2008), populist radical right (Havertz, 2021), populist (Moffitt, 2019; Müller 2018; Pauwels, 2014), neo-populist (Taggart, 1995), new radical right-wing populist party (Betz, 1994) Berning, 2017), neo-Nazi (Klikauer, 2020) and even anti-immigrant parties, (Van der Brug et al, 2000; 2005). The deployment of each label is so often dependent on the context and country in question.

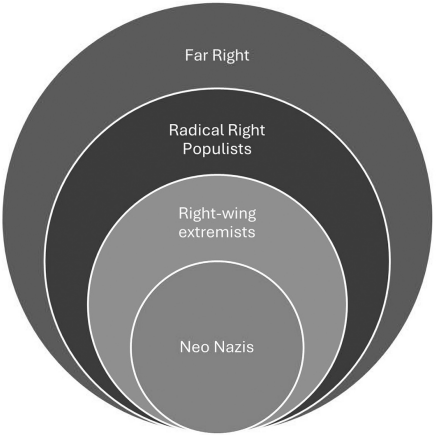

Figure 1: The Far Right scene

Essentially the term far right cover parties that are radically conservative (particularly on family and social issues such as abortion, same-sex marriage and divorce) and possessing strong anti Woke convictions. It also includes those marked more by their ultra-nationalist and nativist positions; contain a pronounced degree of historical nostalgia with a desire to return to some 'Golden Age', which is often expressed in landmark historical events and personalities. Researchers of the far right have also identified degrees of exclusivism (as expressed through race, xenophobia and ethnopluralism), strong positions on the need for greater law and order and clear authoritarian tendencies and anti-democratic sentiment. The far right scene should be thought of as a series of inter-related circles with each inner circle representing a heightened level and more radical manifestation of activity. Four groups can be identified.

The most extreme variant of far-right activity, out first group, is embodied by neo-Nazi and neo-Fascist groups who openly express their admiration for inter-war leaders such as Adolf Hitler, Benito Mussolini and Francisco Franco and openly espouse their support for the politics, policies and political structure of the Third Reich, Fascist Italy or Falangist Spain. The term neo-Nazi (or neo-fascist) is a pejorative term that is often deployed unhelpfully by primarily left-wing radicals and critics to denounce all far right groups and parties. Basically, while all neo-Nazis belong to the far right scene not everyone in the far right scene can be identified as a Neo-Nazi. The neo-Nazi or neo-Fascist label is normally associated now with small (50-150 members) avowedly militant groups such as the *Artgemeinschaft* and Hammerskins in Germany (both banned in 2023) and National Action (also proscribed) and the Patriotic Front in the United Kingdom.

From the 1960s to the early 2000s right-wing extremism, our second group, was often the preferred term of political scientists in the UK when writing in English about far right parties. The term was used to identify parties whose support for the liberal democratic order was at best limited and more often questionable, whose programmes contained strong elements of 'othering', as frequently pronounced in a hostility towards immigration and whose rhetoric prioritised the interests of their respective nation's citizens (welfare chauvinism) over both legal and illegal arrivals, whether constructed around blood ties (ethnic nationalism) or citizenship (civic nationalism). The extremist label also encompassed those forces who accepted of the use of violence as a legitimate means of advocating their desire for regime change.

From the late 1990s onwards, however, perceptions started to shift as many, but not all as parties once branded as extremist, initiated efforts to mainstream their activities by toning down their racist, anti-immigrant and anti-democratic rhetoric and demonstrating a willingness to engage in democratic

party politics. Many academic writers such as Betz (1994), Kitschelt with McCann (1997) and Mudde (2000), recalibrated their definitions and set aside the term extreme right in favour of the use of the radical right and radical right populist parties (RRPP). The deployment of this term, our third group, is most often deployed today to refer to National Rally, the Sweden Democrats, the Freedom Party in Austria and the Brothers of Italy.

The standard wisdom now runs that parties who fail to modernise their image, remain convinced of racial hierarchies and equalities, reject liberal democracy very much remained consigned to the margins of political life as right-wing extremists as illustrated by the case of the NPD/*Heimat* in Germany.

The context for understanding the rise and popularity of radical right populist parties (Mudde, 2007, 2019) over the last two decades is best understood as the coming together of both demand (policy) led and supply providers (a party) in a rapidly changing political environment characterised by three factors; firstly, an increasing disconnect between the established political parties and the electorate with a growing distrust in mainstream media information outlets; secondly, a growing sentiment and belief in the nation and state sovereignty across Europe and one that increasingly questions the process of European integration and globalisation and thirdly, growing resentment over issues such as immigration, the threat posed by Islamic inspired terrorism and the loss of freedoms in the Covid pandemic. This rise has also taken place against the emergence of a new technical revolution in communication. The arrival of media platforms such as Twitter, Facebook, Tik-Tok and Instagram, each with billions of subscribers, have opened up new audiences for far right messaging and are a key ingredient in their current successes.

Our fourth subset of the far right is both more recent and nuanced. Whereas the RRPPs emerged from earlier extremist pasts, the origins of our fourth group can be located from within centre right forces who come free of any problematic historical baggage. Interestingly they are, as seen in the cases of the AfD and Vox, now out-righting the RRPPs and moving closer to the territory of the extreme right.

In short, the far right comprises a selection of parties who find common ground on a set of principles. However, the unveiling of clear differences in approach reveals just how complex the far right scene actually is. It also explains why these parties often find it difficult to form meaningful alliances with each other as the next section illustrates.

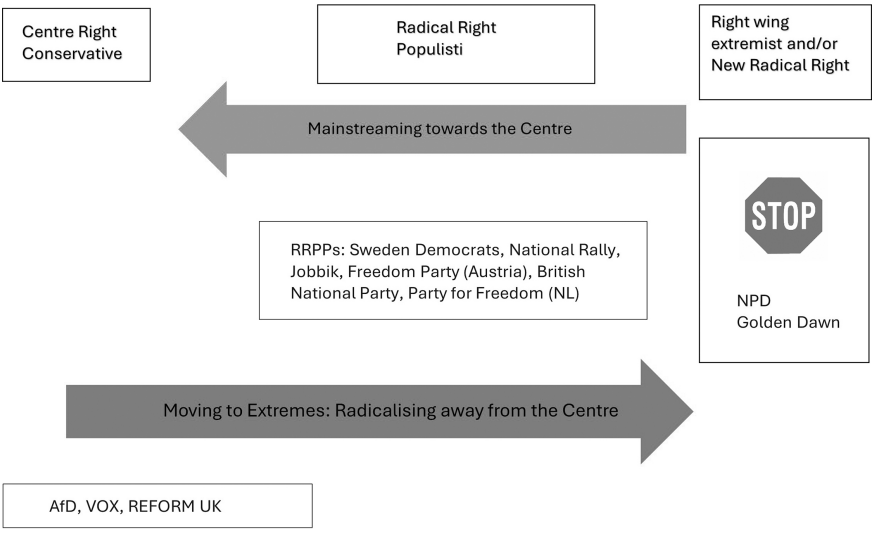

Figure 2: Shifting Right: Trajectories of the Far Right in Europe

II. Far Right Parties in the 10th European Parliament, 2024-29

Division is the first striking feature of the far right in the 10th EP with three rival groups, namely the European Conservatives and Reformists or ECR (established in 2009), the Patriots for Europe of PfE (created in 2024) and the Europe of Sovereign Nations or ENS (also founded in 2024). These groups contain 78, 84 and 25 MEPs respectively. This splintering of the far right caucus limits the full impact that a truly united far right force of 187 MEPs could have on parliamentary proceedings. Co-operation may still be possible as these three groups hold much in common, but it will be difficult. This fragmentation of the far right is even more problematic as it enables the mainstream parties to pursue a 'divide and rule' policy by putting in place *a cordon sanitaire* against some of them whilst working with others, simply reinforcing divisions. Each of the three groups is now considered.

1. The European Conservatives and Reformists

The inclusion of the European Conservative and Reformists or ECR as a far right group may seem questionable given that it was co-established by David Cameron, the then leader of the UK Conservative party in 2009. The ECR was conceived as a right-wing Eurosceptic party and an alternative to the 'federalist' EPP. Cameron found ready partners for his brand of centre right eu-

roscepticism party such as the Polish Law and Justice. In its early years the ECR displayed the characteristics of a traditional conservative and eurosceptic minded force and one that distanced itself from the harder Eurosceptic, anti-immigration and increasing populist radical right parties such as Lega Nord.

The group's short history has been one of constant party affiliation ebb and flow and regular internal party disagreements and resignations as the party established its brand. By the time of the UK's departure from the EU in January 2020 the ECR had clearly shifted to the right with Law and Justice steering an ever more illiberal trajectory in relation to civil liberties and freedom of expression. The ECR's radicalisation was reflected with the inclusion of new party members with far right histories and preferences, harder anti-EU positions and strong anti-immigrant stances.

Today the ECR describes itself as a centre right party whose members are united by their aim to seek a 'common sense reform of the EU'. Its brand of euroscepticism is not in question as it seeks limits on further EU integration, opposes eastward enlargement and seeks stricter controls on immigration. The ECR's 78 MEPs in the current parliament come from 20 parties across 18 EU member states https://ecrgroup.eu/ecr. Within the ECR it is possible to identify a broad range of right leaning political parties that can be described as socially conservative, right-wing populist, Conservative and Christian Democratic but its ranks also include parties that have clear far right affiliations and histories. The Brothers of Italy is one example and now sits comfortably alongside Jimmy Akesson's Sweden Democrats, the Alliance for the Union of Romanians and Law and Justice (see table 1). The ECR is identified in this chapter as belonging to the wider far right force.

Table 1: ECR: *Parties and Seats in the European Parliament* (2024-29)

Party	Seats Won 2019	Seats won 2024	Party Group in the EP	% of national vote in 2024 (2019)
Sweden Democrats	3/20	3/21	ECR	13.17 (15.3)
Law and Justice (Pol)	27(51)	18/53	ECR	36.16 (45.38)
Sovereign Poland – part of United Right coalition		2/53	ECR	
*Alternative Democratic Reform Party (Lux)	0/6	1/6	ECR	11.76 (10)
*National Peoples Front (Cyp)	0/6	1/6	ECR	11.2 (8.3)

*Homeland Movement (Cro)	–	1/6	ECR	8.84
*Alliance for the Union of Romanians	–	6/33	ECR	14.59
*Reconquete	–	1/81	ECR	5.54
New Flemish Alliance (Bel)	3/21	3	ECR	13.9 (14.1)
Dutch Reformed Party	1/29	1/31	ECR	3,6(6.8)
Civic Democratic Party (CZ)		3	ECR	
*Denmark Democrats		1/15	ECR	7.4
National Alliance for all Latvia	2/8	2/9	ECR	22.3
Greek Solution	1/21	2/21	ECR	9.3 (4.18)
Electoral Action for Poles in Lithuania	1/11	1/11	ECR	5.8 (5.5)
Lithuanian Farmers and Green Union Party	2/11	1/11	ECR	9.3(11.9)
United List (Lat)		1	ECR	
Brothers of Italy	6(76)	23/76	ECR	28.8 (6.4)
There is such a People		1	ECR	
**Finns Party	2/13	1/15	ECR	7.6(13.28)
Independents (Est) 4 from France_		1 4		
Total		78/720		

* New members from June 2024
** Rejoined the ECR after a four year period in Identity and Democracy (ID) group

2. The Patriots for Europe

The creation of the Patriots for Europe (PfE) on 8th July 2024 represents arguably the most audacious attempt to coordinate the activities of the far right in the chamber. The PfE is very much a vehicle driven by Victor Orban, the Hungarian prime minister, to unite 'far right' forces in the EP as much as also

to frustrate and challenge the priorities of the centre left and centre right forces of the S D and the EPP. Orban's Fidesz party had its membership of the EPP suspended in 2019 and before being formally removed altogether, Orban left the EPP in March 2024, by-passing the ECR where Fidesz would not have been welcome, and with no other alternative created a new party.

The proposal for this new euro group was first outlined on the 30th June when Orban, alongside the leaders of the Austrian Freedom Party and the Action of Dissatisfied Citizens, Herbert Kickl and Andrej Babas respectively, signed a 'Patriotic Manifesto for a European Future' in Vienna. Essentially Orban repackaged most of the members of the former far right Identity and Democracy group (2019-2024) but he also secured the support of two former ECR members in the shape of Vox and ANO (from Chechia). The selection of Jordan Bardella, the president of the National Rally and Marine Le Pen's protégé as the PfE's new head just days after the French parliamentary elections, ensured that the establishment of the PfE received significant media attention. It was a bold move. Orban's efforts, however, were not all successful and he failed to woo Georgia Meloni's Brothers of Italy into his new group.

Very much like the ECR, the PfE is shaped by particularly strong Eurosceptic rhetoric (**https://www.patriotsforeurope.org/**) and a determination to slow the pace of European integration and to limit the degree of European Union policy making. The PfE identifies three core pillars that define its purpose: A belief in national sovereignty, a realist view on world affairs and a patriotic vision for Europe's future. The substantive differences between the ECR and the PfE can be found in the latter's foreign policy priorities, where it advocates a pro-Russia stance, is critical of current EU financial and military hardware support for Ukraine and forwards the accession of pro-Russian candidate states such as Serbia. The PfE is a pro-Europe party but one built on nation states and in strongly supporting President Donald Trump, has its own MEGA (Make Europe Great Again) aspirations.

The PfE's patriotism is constructed around antagonism towards the EU and 'othering'. Its visualisation of national identity is built around a Christianity that all its members share. Indeed, it places a heavy emphasis on the teachings of the church and the values established and shaped by Europe's Judeo-Christian roots' (*Deutsche Welle*, 2024a). The emphasis on Christianity allows the PfE to identify Islam as an alien creed, one it portrays as a threat to European civilisation and one it constructs its anti-immigration stance around.

The PfE's strong support for traditional family values, support for more births in marriage and a greater focus on the woman as both child bearer and motherhood leads the PfE to challenge sexual equality legislation and oppose left

leaning and progressive issues on gender, diversity and minority protections. Critical attention is directed towards members of the LBGTi community. Ultimately, it is opposition to migration that will define much of the group's popularity and when added to a series of beliefs that run contrary to liberal democratic norms on human rights the PfE's place within the far right scene is easily confirmed.

This emergence of the PfE gives rise to several questions. Can this new group be a major player in the European Parliament and to what extent can it impact on EU institutional interactions and decision-making? Much depends on how far the PfE can maximise its influence and find common connections with other EP groups but there are also avenues for influence. Can Orban find new allies within the European Council and can the Hungarian Commissioner thwart pro-integration initiatives within the European Commission?

The PfE now constitutes the third largest group in the EP with some 84 members (of 720) from 15 parties (see table 2). Its prospects for disruption appear good. Caution, however, is required for two reasons. It is unlikely that the three centre ground parties will indicate any willingness to work with the PfE. The established form of non-interaction (*a cordon sanitaire*) with the far right is not so straightforward with a larger group and potentially made more difficult if the PfE can find common cause on certain issues with the other far right parties and those on the left of the political spectrum in the EP.

Table 2: The Patriots for Europe: Parties and Seats in the European Parliament, 2024-29

Party	**Seats won in 2019**	**Seats won in**	**Euro Group affiliation**	**Percentage of vote 2024 (2019)**
FPO (Austria)	3/18	6/20	PfE	25.3 (17.2)
National Rally	23/79	30/81	PfE	31.4 (23.3)
Fidesz (H)	12/21	10/21	PfE	44.8 (52.56)
Vox (€)_	4/59	6/61	PfE	9.6 (6.2)
Lega (I)	29/76	7/76	PfE	8.8 (17.4)
ANO (Cz)	6/21	7/21	PfE	26.1 (21.1)
Freedom Party (NL)_	1/29	6/31	PfE	17 (3.5)
Danish Peoples' Party	1/14	1/15	PfE	6.4 (10.8)

Chega (P)		2/21	PfE	9.8
Vlams Belang (B)	3/21	3/22	PfE	14.5 (12.05)
*Voice of Reason (GR)		1/21	PfE	3.04
*Latvia First		1/9	PfE	6.23
Christian Democratic peoples Party (H)	1/21	1/21	PfE	Was linked to Fidesz
Total		84/720	PfE	

* New Political Party

The decision of the EPP to impose a *cordon sanitaire* on the PfE (and also the ENS) in the summer of 2024 whilst simultaneously opening a dialog with the ECR members illustrates a determination to isolate Orban and his supporters. The EPP was playing strategic 'divide and rule' politics and seeking the ECR's support for Ursula von der Leyen's reappointment as European Commission president. In return the ECR group was to be rewarded with the being able to chair EP parliamentary committees. This approach is not without some risk because it enables the PfE and the ENS to claim that the elite forces in the EP are engaging in open discrimination, and working contrary to EP rules, and against their voters. None of the PfE's proposed candidates for taking up one of the 14 vice presidential positions in the EP (3 EPP; 5 S+D; 2 Renew; 2 ECR and one from the Left and one from the Greens) were sanctioned and the PfE found itself barred from holding any of the EP's 20 committee chairs (European Parliament, 2024).

The PfE could be a game changer. It is worth noting at this point in time that this newly established group does not include other right-wing forces and particularly Georgia Meloni's Brothers of Italy or FdI (24/76), Germany's AfD (15/96) and the Polish Law and Justice Party or PiS (18/53).[1] It is also striking that Orban has so far been unable to bring in some of his neighbours such as the Slovakian Republican Movement (2 MEPS who joined the AfD led group in July 2024). These facts could change in the future.

Orban's ambitions now go much deeper, and another priority lies in building his own support base within other European Union institutions. All depends on whether his 'far right' allies can win national elections and actually form

[1] The FdI and PiS parties remain within the ECR group while the AfD created an alternative far right force in the form of the Europe of Sovereign Nations Group (created July 2024).

governments. This is no longer a far-fetched idea. The Austrian Freedom Party finished the national elections in first place with 29.2 per cent of the vote in September 2014, but it was not included in the coalition negotiations which eventually collapsed. It is hard to see how the FPO and others it can be excluded from government in the longer term if they can maintain their levels of support. The arrival of a future kindred fellow leader in the European Council and the Council of the European Union would not just ease Hungary's isolation but give it and the PfE a greater voice on issues such as links with Russia, climate change and immigration.

3. Europe of Sovereign Nations Group (ENS)

The Europe of Sovereign Nations (ENS) represents the third, smallest and latest incarnation of the far right force in the EP. It was created on 10th July 2024 as a berth for the AfD after it had been thrown out of the former ID group in the previous May. The AfD's expulsion reflected the changing nature of the party (or more accurately sections of it) and its drift towards more extremist positions e.g. on re-migration and on revisiting Hitler (specifically highlighted by Maximilian Krah's statement) and the crimes of National Socialism.[2] It was the AFD's push to the right that so alarmed parties such as the NR and Lega and in the process raised concerns about reputational damage for the entire ID that explains the AfD's exit.

Cast adrift the AfD successfully managed to pull together a new group within the EP with members from a range of minor parties and independents (*non-inscrits*) as illustrated in see table 3. The AfD is by far the dominant force within the group, making up some 62% of its composition. The classification of the ENS is therefore straightforward given that the AfD was declared an extrem-

[2] Maximilian Krah (now 47 in August 2024) has been an MEP since 2019. He was one of Germany's most prominent AfD members and closely affiliated to the more radical Flugel wing of the AfD and Bjorn Hoecke's more right-wing extremist sympathies. He reflects the lifespan of the AfD, first bring a member of the CDU before moving to the right and membership of the AfD in 2016. He was selected as the lead candidate for the 2024 EP elections. He caused controversy in May 2024 following an interview with an Italian newspaper where he stated that 'I would never say that anyone who wore an SS uniform was automatically a criminal'. This view further strained relations within the ID party group given Krah's already known and supportive stance towards China leading the National Rally to threaten severing ties with the AfD unless it expelled Krah. The ID group expelled the AfD from the ID with immediate effect on 23rd May 2024. Following the EP elections Krah was removed from the AfD group in the EP. He claims that his views were taken out of context and currently sits as a non-attached MEP. His views are available on his MEP website available at <https://www.europarl.europa.eu/meps/en/197481/MAXIMILIAN_KRAH/home>.

ist organisation by the German intelligence authorities (*Bundesamt für Verfassungsschutz* or the Office for the Protection of the Constitution). It is fiercely Eurosceptic, staunchly critical of the EU's immigration policy, resolutely opposed to climate emission targets within the European Commission's Green Deal, exudes anti-NATO positions, is openly pro-Vladimir Putin's Russia and highly critical of Volodymyr Zelenskyy's Ukraine. In the words of its co-president Rene Aust (Starcevic and Wax, 2024) the ENS aims to 'realise our shared vision of a strong, united, and forward looking Europe of fatherlands'. The ENS is likely to remain a fringe force in the EP, but cooperation on certain issues is highly probable.

Table 3: The Europe of Sovereign Nations

Party	Seats won in the EP within national group in 2024	Group Affiliation	Percentage of Vote at EP 2024 elections
AfD	15/96	ESN	16%
Revival (Bulgaria)	3/17	ESN	13.98%
Freedom and Direct Democracy (Cz)	1/21	ESN	5.73%
Reconquête	1/21	ESN	5.46%*
Our Homeland Movement (H)	1/21	ESN	6.71%
People and Justice Union (Lith)	1/11	ESN	5.45%
New Hope (Pol)	1/53	ESN	12.08%**
Republic Movement (Slovakia)	2/15	ESN	12.5%
Total	25/720	ESN	

* Ran as part of a joint list with the other part scoring 4 seats
** as part of a Confederation group that won 6 seats and hence the higher percentage here

III. Assessing the Influence and Impact of the Far Right in Europe

The presence of these three far right groups will be increasingly felt across the EU in relation to both its institutional fabric and policy base. While attention has focused on the EP, there are also issues and concerns about the rise of the

far right for the European Commission, the Council of the European Union and the European Council. The arithmetic in the EP is all important and one of the fundamental questions is how far the far right can influence and shape parliamentary policy proceedings. To appreciate this, it is necessary to remember that the EP has shifted to the right. With the 187 far right MEPS and the 188 EPP MEPs the right possesses a clear majority in the parliamentary chamber. There is potential for an even larger majority if we consider the political preferences of at least 11 of the current 32 *non-inscrits* MEPs.[3] Co-operation, albeit on different issues, between the centre right and the far right is certainly possible and there is evidence of it already happening at the national level.

The far right is really for the first time setting the mainstream parties real challenges and policy dilemmas. Should we be witnessing a normalisation of the far right? It might not always be wanted and may prove a destabilising factor in national politics, but it raises pertinent questions about how far right influence might determine and shape future policy agendas. Could it be that these parties come to negatively affect the rule of law, human rights and fundamental freedoms? Any alignment will certainly prove challenging for all three parties, and indeed the mainstream parties, involved and which group moves onto which group's policy territories and why, but ultimately it will reflect the preferences of the electorate at national level and the necessity for a functioning and stable government.

The far right is on the rise across Europe, and it is the context of the national government setting that any analysis of the far right at the EU level is best understood. The national context provides the leadership in the European Council and representation in the Council. It also directly determines a country's nomination to the European Commission.

Currently, the centre right holds government in 17 EU member states. In seven of these states there is representation far right parties in government, namely Croatia, the Czech Republic, Finland, Hungary, Italy, the Netherlands and Slovakia. (International Bar Association, 2024). Some of these, for example in Slovakia, are problematic and give rise to concerns that these parties will challenge human rights in areas such as abortion and gender equality. Others not in office are likewise unsettling the status quo. The RN's challenge to Emmanuel Macron continues and the possibility of a Marine Le Pen victory in the

[3] [3] These include Mamimilian Krah (AfD); the Greek *Victory* party (1 MEP); from Poland both the *National Movement* (2 MEPs) and the *Confederation of the Polish Crown* (1 MEP); SOS Romania (2 MEPs); 1 MEP from the Slovakian *Republic Movement* and three MEPs from the *Spanish The Party is over*

2029 presidential elections cannot be discounted. The FPÖ may still find a path to government in Vienna in 2025.

The AfD's popularity in eastern Germany, winning its first state outright in Thuringia in September 2024 since the Federal Republic of Germany's creation in 1949 provides yet another example. Portugal seemed immune to the far right until a new force, Chega, captured some 18% of the vote in 2024 elections, effectively quadrupling its share of seats to 50 in the national parliament.

Such successes make a future centre right/far right coalition more likely which could culminate in the chipping away of the rule of law. Hungary's illiberal democracy is a good illustration of so-called 'back-sliding'. Law and Justice in Poland (who lost power in late 2023) had already initiated a similar trajectory to bolster the executive by appointing their own people to senior offices in the judiciary and the civil service and introduced measures to curtail the independence of the media. The impact of the far right in society may be felt mostly in minority rights and especially in relation to the immigration issue. Most centre right parties have hardened their positions on this theme as a means of combatting the far right. In short, the far right is successfully changing political discourse.

Many challenges for the far right in the EU remain, but there are also potential opportunities. The EP serves as one potential locus for exerting influence given its co-legislator status (via the use of the Ordinary Legislative Procedure) with the Council of the European Union in the most policy areas. As a minority force the far right may struggle to find a common purpose with other party groups on both sides of the political spectrum.

The first opportunity for the three far right parties to coalesce came in July 2024 over Ursula von der Leyen's reappointment as European Commission president. While both the PfE and the ESN voted against her candidacy, the ECR was split with the Brothers of Italy allying itself with Matteo Salvini's Lega (PfE) in opposition to von der Leyen. This incident aptly revealed the limitations of the far right because and even with a strong degree of far right unity, von der Leyen triumphed with 401 votes in favour, 284 against and 15 abstentions.

The European Council, currently dominated by centre right leaders, offers another potential point of influence for the far right. Orban, Fico and Meloni would be intent on directing the European Council on policy direction on issues such as immigration, climate change and enlargement that appease their respective electorates. They could also use their six month presidencies of the Council of the European Union to set an agenda on their terms. Moreover, with

only four members required for a blocking minority far right administrations would be able to disrupt Council decision making.

Viktor Orban may set the precedent. Orban has become something of a disruptor in the top echelons of the EU, but he is also a figurehead for many in the far right scene. Many readily support his take on European and international politics and his 'illiberal democracy' activities that curtail free speech and control the judiciary. Hungary's presidency of the Council in the second half of 2024 strove publicly for a peaceful, secure and prosperous Europe built on a meaningful European defence policy; strong external borders, a merit-based enlargement policy; an effective immigration policy and an urgent need to address demographic changes (Hungarian Council Presidency, 2024). These sensible aspirations were all constructed, however, around a firm belief in defending national sovereignty. Freed from the constraints that EPP membership had required, he can pursue his own priorities via the PfE. As a lone voice, he could be readily contained, but as a ringleader within the PfE group, he is well situated to challenge EU priorities and how the EU institutions operate.

The rise of the far right is opening up a new political discourse on themes such as immigration and climate change and relations with Russia and ones that are resonating with sizeable sections of the electorate. Incumbent governments are no longer in a position to ignore far right priorities but need to confront them. So too, do the EPP, Renew and the S+D. We are seeing a normalisation of far right issues and the final section of this chapter raises four salient far right challenges in relation to Russia, enlargement, immigration and climate change.

1. Challenge 1: Relations with Russia

Russia's invasion of Ukraine has brought conflict to the very borders of the EU and increased security concerns across the Union about Putin's long term territorial ambitions. It has demanded a solidarity of purpose in the EU. The European Council responded swiftly to Russia's attempt to overthrow a democratically elected government (with EU and NATO membership ambitions) and imposed sanctions on Putin's regime. While many EU member states alongside the UK sent military aid (equipment and training) and humanitarian aid (Becker et al, 2024), clear divisions have emerged within the European Council and on the floor of the EP as far right (and far left) parties challenge and indeed seek to subvert European security policy. Orban's government is in the frontline of such activities, always being much more lukewarm to Ukraine's position whilst maintaining close relations with Russia. After three years of conflict Orban is exploiting a growing war weariness and anger at high energy prices in many EU member states that find expression is a number of far right parties.

While some far right parties are opposed to Putin's regime, most notably Meloni's Brothers of Italy and the Sweden Democrats, others such as the NR and the Dutch Freedom party have been courting the Russia president over the last decade. More extreme forces such as the AfD are coming under increasing scrutiny for their links to Putin's regime and wider links to Russia. (*Der Spiegel*, 2024; *Deutsche Welle*, 2024b and Solomon, 2024). As Russia intensifies its hybrid warfare across Europe, so the demands for coordinated action have increased but if Orban can muster his allies such as Bardella, Fico, Salvini and Wilders to his side, then support will never be universal. Indeed, the potential of the far right challenge on Russia could well intensify with the accession of new EU member states such as Serbia.

2. Challenge 2: Enlargement

The process of EU enlargement has historically constituted one of the most important aspects of EU's foreign policy activities. The EU is currently in negotiations with six potential member states in the Western Balkans (Albania, Bosnian and Herzegovina, Kosovo, Montenegro, North Macedonia and Serbia). Russia's invasion of Ukraine also accelerated the arguments in the European Council for the accession for Moldova and Ukraine, leading to formal negotiations being launched in June 2024.

Opposition to enlargement from far right parties is one largely based largely on principle. In practice, however, the enlargement issue for the far right is much more nuanced and much actually depends on whose application is being reviewed.

The applications from the six states from the Western Balkans finds common support from RRPPs and especially from the Meloni and Orban governments as they facilitate their ambitions for a looser EU and one based on illiberal and nationalist values. Orban is particularly supportive of the Bosnian and Serbian bids as both countries would make for strong allies for his vision of Europe, thereby extending Budapest's influence in the EU and securing greater support for its more favourable position towards Russia. An enlarged EU could precipitate renewed friction in the European Council over a variety of issues.

Many far right parties (including the PVV, FPÖ AfD and the RN) and sections of the public do not support the Commission's enlargement priorities towards states bordering the Black Sea (including Georgia, Moldova and Turkey) and their opposition is constructed around the economic costs and demands of enlargement and the likelihood of more internal EU migration (from poorer states).

The influence of the far right matters on enlargement matters because once the complex accession negotiations have been successfully completed both the European Council (via unanimity) and the European Parliament must approve each candidacy. Herein lie potential difficulties over certain prospective EU member states and questions over how far the rise of the far right could unite (and with other factions) to impact and frustrate the Commission's enlargement process and the likelihood of an EU with some 35+ states by the late 2030s?

3. Challenge 3: Immigration

The issue of illegal immigration into the EU represents one of the greatest challenges facing European governments. As the numbers of people fleeing war torn regions in Africa and Asia have intensified and show no signs of stopping, governments have come under increasing political pressure at the ballot box from far right forces whose anti-immigrant messaging is proving immensely popular. Far right rhetoric rarely distinguishes between legal immigrants (arriving for secure work) and illegal immigrants. It is heavily nationalist in tone and displays strong also welfare chauvinistic tendencies. It presents all new arrivals as extra competition for housing, hospital appointments and school places. Most far right parties also hold that western civilisation and its values are under threat from an aggressive Islam. They do this through the spreading of conspiracy theories such as the Great Replacement' and capitalise on terrorist attacks perpetrated by Islamic extremists.

Within the European Council all 27 member state governments are finding that they are being propelled in a direction that has been set by their own electorates' preferences via far right messaging. The far right continually sowed distrust among communities in their respective states and have facilitated the potential for violent street demonstrations as occurred in the UK in the summer of 2024. Immigration remains highly sensitive and there is still no effective policy in place across the EU. The long awaited Migration and Asylum Pact (European Commission 2024) is more an attempt at tinkering with the issue rather than solving it. As the numbers of immigrants grows, so the far right will seem a more attractive political option and they will continue to agitate on the issue for electoral advantage and to the extreme discomfort of national governments.

4. Challenge 4: Climate Change

If 2024 turned out to be a very good year for the far right populism, it proved to be a very disappointing one for Green parties and most especially at the EP

elections where they lost votes and seats. In economic downturns the public tends to be more concerned about employment opportunities and the standard of living than green issues. More extreme right-wing parties have always expressed an interest in nature and national purity with some adding emphasis on the biological factor as a determinant of a nation's health. The focus of most radical right populists is on challenging human responsibility for climate change and in so doing, question the drive from national governments to cut emissions, to introduce electric cars, to make flights more expensive and to find alternative sources of energy when these will make peoples' daily lives more difficult in the short term.

These policies not only all work to the advantage of the far right but reveal a sense of unity among the ECR, the PfE and the ENS. Opposition to climate change science has become a far right enabler. The AfD and Fidesz have made much political capital from their position as climate change deniers. This stance is reflected in their opposition of the European Commission's Green Deal that intends to bring about the EU's transition to net zero carbon emissions by 2050. More worryingly for national governments this position is gaining ground amongst the public and we can already detect efforts to reduce the ambitious emission targets at the national level. Such backpedalling is further illustration of the far right's impact on government policy. and this is set to continue with many fractious debates ahead on fracking, mining and nuclear energy.

IV. Conclusions

European democracies are facing challenges at home and abroad that few could have imagined at the turn of the millennium. External security threats, millions of displaced persons seeking sanctuary in Europe, rapidly rising living costs and the rise of on-line misinformation and disinformation echo chambers have unsettled many peoples' lives and beliefs in the established systems of government. Electorates are moving to the right. The rise of radical right populism at the ballot box reflects public concerns which in turn throughout 2024 have weakened, destabilised and even toppled governments in Germany, France, Austria, the Netherlands and Spain.

We are living in an age where emotional rhetoric be it on immigration and national sovereignty finds greater appeal than debates about economics and political realities. At its core political populism is about exploiting grievances without offering any credible solutions. The EU presents a perfect example from the populists' handbook. Portrayed as a threat to national identity the radical right populist parties deliberately misrepresent the EU and blame it for

all the worlds' woes. They offer the solution of an alliance of sovereign nations where the power of the EU's supranational actors has been diminished and national sovereignty has been restored. It is a popular message but lacking in substance and difficult to digest as a post Brexit UK reveals. Nevertheless, radical right populist messaging worked well electorally in 2024 and is expected to garner even more support in 2025 following Donald Trump's return to the White House, but at what price and what values?

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Neutrality in Times of War: The Case of Switzerland

Andreas Kellerhals / Fatlum Ademi

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Switzerland's policy of neutrality has been a cornerstone of its foreign and security policies for centuries. As a neutral state, Switzerland has successfully navigated global conflicts while maintaining its independence, territorial integrity, and humanitarian contributions. However, in the face of contemporary challenges, including the Russo-Ukrainian War, the concept and practice of neutrality have been questioned and may need to be re-defined. This article examines Switzerland's neutrality through its historical development, legal framework, practical applications, and current challenges.

I. Introduction – current context

The ongoing war of aggression by Russia against Ukraine stands as a blatant violation of the UN Charter and International law. This unjustified conflict has caused a multifaceted crisis in Europe, disrupting stability and security across the region.[1]

[1] See the EÙs response to Russiàs war of aggression against Ukraine, available at: <https://www.consilium.europa.eu/en/policies/eu-response-russia-military-aggression-against-ukraine/#invasion>, according to the EU all sanctions are fully compliant with obligations under international law, whilst respecting human rights and fundamental freedoms.

As a response to the aggression, various sanctions have been implemented by the international community.[2] These sanctions aim to hold Russia accountable for its actions and serve as a deterrent against further escalation. Meanwhile, solidarity with the people of Ukraine has been a recurring theme, as nations around the globe extend support and humanitarian aid.

Switzerland, traditionally known for its neutrality, finds itself in a complex position amidst the ongoing war in Ukraine. This conflict has placed significant pressure on Swiss foreign and security policies, raising fundamental questions about the country's stance and its ability to maintain neutrality in the face of modern geopolitical challenges. The re-definition of neutrality has become a key topic of debate, with discussions emerging about whether Switzerland should adapt its long-standing policy to respond more actively to current crises.[3] A commission from the Ministry of Defence has proposed such adaptations, sparking nationwide discourse on the implications of this potential shift.[4]

One of the most contentious issues in this context is Switzerland's involvement in international sanctions. There are differing views on whether Switzerland should align itself with the European Union's sanctions, create and implement its own independent measures, or refrain from such actions altogether. Each option comes with consequences, particularly regarding the potential impact on the country's neutral status and international reputation.

Beyond sanctions, Switzerland must also consider alternative responses to the crisis. Diplomatic or strategic actions that maintain neutrality while contributing to the resolution of the conflict are part of the ongoing discussions. These alternatives highlight the delicate balance Switzerland must strike between upholding its traditional values and addressing the expectations of the global community.

The Swiss public opinion is another crucial factor in shaping the neutrality approach. The Swiss population's views play an essential role in determining the

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2 See also Butchard Patrick, Sanctions, international law and seizing Russian assets, 7. November 2024, p. 15.

3 See Foreign Policy Strategy 2024-27 by the Head of the Federal Department of Foreign Affairs, p. 40.

4 See Marvis Giannis, The Swiss government has decided to participate in military projects of the European Union. What does this mean for the countrỳs neutrality, 31. August 2024, available at: <https://www.swissinfo.ch/eng/foreign-affairs/neutral-switzerland-dips-its-toe-in-european-military-activities/87458215>.

direction of the country's policies.[5] As these discussions evolve, the challenge lies in balancing national values, historical commitments, and the responsibilities Switzerland bears as a member of the international community.

II. The Way to Neutrality: Historical milestones

Switzerland's tradition of neutrality has its roots in pivotal historical events that have shaped its foreign policy and its role in the international community.

In **1515**, the Battle of Marignano marked a significant turning point. Following their defeat, the Swiss concluded a landmark peace agreement with Francis I of France in 1516, establishing the contractual basis for Switzerland's reticence in foreign policy for centuries to come.

The **1647/1648 Treaty of Westphalia**, influenced by the Thirty Years' War, was another milestone. Johann Rudolf Wettstein, mayor of Basel, successfully secured international recognition of Switzerland's independence, reinforcing its position as a neutral state.

In **1815**, at the Congress of Vienna and Paris, major European powers formally recognized Switzerland's permanent neutrality and guaranteed its territorial integrity. This codified Switzerland's role as a neutral state and introduced the concept of permanent armed neutrality.

The **1907 Hague Conventions** further enshrined the principles, rights, and duties of neutrality in international law. They established rules to protect neutral countries during armed conflicts and emphasized the protection of civilians, prisoners of war, and combatants, forming the foundation for modern humanitarian law.

During the **First World War** in **1914**, Switzerland's neutrality was respected despite being surrounded by warring states. The Federal Council maintained neutrality while asserting Switzerland's independence, ensuring that its borders remained intact.

The **1920 establishment of the League of Nations** saw Swiss neutrality officially recognized. Switzerland supported economic sanctions imposed by the League but avoided military commitments, maintaining its neutral stance. This period also introduced the concept of **Differential Neutrality**, where Switzer-

[5] See Clarity and guidance on neutrality policy, Federal Council report, in response to Postulate 22.3385 put forward by the Council of States Foreign Affairs Committee (FAC-S), 11. April 2022, p. 3.

land engaged selectively in international affairs based on ethical or strategic considerations.

However, in **1938**, after unsuccessful sanctions against Italy, Switzerland abandoned the concept of Differential Neutrality in favor of **Integral Neutrality**, committing to impartiality in all forms of international relations and conflicts.

During the **Second World War (1939–1945)**, Switzerland reinforced its neutral stance by mobilizing its forces for self-defense. Despite skepticism from the Allies, Federal Councillor Max Petitpierre's post-war policies coined the concept of **Active Neutrality**, a dynamic approach to foreign relations that gained greater recognition.

In **1986**, Switzerland held a referendum on accession to the UN. While the Federal Council clarified that joining the UN would not compromise neutrality, 75% of the Swiss population voted against membership. That same year, Switzerland adopted the **Para Norma Principle**, prohibiting the export of goods supporting apartheid in South Africa.

In the **1990s**, Switzerland demonstrated its commitment to peacekeeping and humanitarian efforts. It supported UN sanctions against Yugoslavia in **1992** and later allowed the transit of military personnel and equipment during the Bosnian conflict in **1995**. In **1996**, Switzerland joined the **Partnership for Peace**, intensifying security policy cooperation in Europe while avoiding NATO membership to uphold neutrality. By **1999**, Switzerland adopted nonmilitary sanctions against Yugoslavia during the Kosovo crisis and provided humanitarian aid, along with peacekeeping personnel under the **SWISSCOY** initiative.

The **2001 partial revision of the Swiss Military Act** regulated Swiss participation in international peace support operations, marking a step toward active engagement in global peacekeeping efforts. In **2002**, Switzerland finally joined the UN after a national vote, becoming the first country to do so through a popular referendum. However, it remained committed to participating only in UN economic sanctions while maintaining neutrality in military conflicts.

In **2011**, Switzerland joined EU sanctions against the Assad regime in Syria, signaling its stance against severe human rights violations. By **2014 and 2022**, Switzerland extended EU sanctions against Russia following the annexation of Crimea and the war in Ukraine. These actions demonstrated Switzerland's evolving interpretation of neutrality, emphasizing that neutrality does not equate to indifference to international law violations. Switzerland's policy of

Active Neutrality became evident, allowing the country to engage dynamically in conflict resolution and peacebuilding while maintaining its neutral identity.[6]

III. Definition of Neutrality and Legal Codification

1. Accession to the UN as a Game Changer?

Switzerland's accession to the UN raised questions about the impact on its long-standing policy of neutrality, particularly within the legal and political framework established by the UN Charter.[7]

Under **Article 2 § 4 of the UN Charter**, the use of force in international relations is explicitly prohibited. This foundational principle requires all member states to refrain from the threat or use of force against the territorial integrity or political independence of any state. The Charter mandates adherence to these principles as part of the collective responsibility to uphold international peace and security.

However, exceptions to this general prohibition exist. **Article 51** permits the use of force in cases of self-defense, and **Chapter VII** allows for force under the mandate of the UN Security Council in response to threats to peace, breaches of peace, or acts of aggression. These provisions establish a ground where force is only considered a last resort under clearly defined circumstances.

Switzerland's membership in the UN introduces potential challenges to its traditional definition and understanding of neutrality. Neutrality, as historically interpreted by Switzerland, entails non-involvement in military alliances or conflicts.[8] However, the obligations of UN membership, such as participating in sanctions or supporting peacekeeping operations under the Security Council's mandate, can create tensions with this interpretation.

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6 For an overview of the milestones in Swiss neutrality, see also Möckli Daniel, The Swiss Neutrality Debate: An Overview, October 2024; and Neutrality, Federal Department of Foreign Affairs, available at: <https://www.eda.admin.ch/eda/en/fdfa/foreign-policy/international-law/neutrality.html>.

7 See Charter of the United Nations, especially Chapter VII: Action with Respect to Threat to the Peace, Breaches of the Peace, and Acts of Aggression, available at: <https://www.un.org/en/about-us/un-charter/chapter-7>.

8 See Kreis Georg, What does neutrality mean for Switzerland, Georg Kreis?, by the University of Basel, February 2022, available at: <https://www.unibas.ch/en/News-Events/Uni-Nova/Uni-Nova-140/Uni-Nova-140-neutrality-Switzerland-Kreis.html>.

Additionally, there is a potential contradiction between Switzerland's duties under international agreements and its traditional understanding of neutrality. While Switzerland remains committed to its neutral status, its UN membership requires it to align with collective international actions, which may include economic sanctions or other measures that could be seen as partial involvement in conflicts.[9]

2. Context of International and National Law

The word neutrality, derived from the Latin term "ne uter" meaning "neither one nor the other," and signifies non-intervention in conflicts.[10] The Hague Conventions represent the sole international agreement regulating the laws of neutrality, complemented by evolving customary international law. Notably, neutrality applies exclusively to conflicts between states and international armed conflicts.

Switzerland's neutrality is not codified in any specific federal law but is profoundly ingrained in its policy and national identity. As defined by the Vienna Congress, Swiss neutrality is self-determined, permanent, and armed. This sets it apart from other neutral countries such as Ireland, Sweden, Finland, and Austria.

Key elements shaping the understanding of Swiss neutrality include national interests, the body of neutrality laws, the prevailing international situation, and the country's deep historical traditions. Together, these factors define Switzerland's unique approach to neutrality as a cornerstone of its foreign policy and identity.

Article 54 of the Swiss Federal Constitution assigns responsibility for foreign relations to the Confederation. It emphasizes that the Confederation must ensure the preservation of Switzerland's independence and welfare. Neutrality, as outlined in the Constitution, is recognized as a tool for safeguarding this independence, rather than being an objective in itself. It is not explicitly included in the Constitution's article of purpose (**Article 2**) but is applied and interpreted by the Federal Council in practice.

The principle of neutrality is also reflected in various federal laws, such as:

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9 See Swiss neutrality, Federal Department of Foreign Affairs, 4 March 2022; and The neutrality and the sanctions of Switzerland, Federal Department of Foreign Affairs, last updated 1 May 2023, available at: <https://www.eda.admin.ch/missions/mission-eu-brussels/en/home/key-issues/neutralitaet-der-schweiz.html>.

10 Pictet Jean S., The Doctrine of the Red Cross, p. 305.

- The **War Material Act**, which governs the export of military equipment to maintain neutrality.[11]
- Laws related to Switzerland's role as a host for international organizations, supporting its position as a neutral ground for global diplomacy.[12]

IV. Neutrality in Practice

In its relations with international organizations such as the UN, neutrality remains intact, as no obligations are imposed that contradict Switzerland's neutral stance. Similarly, its neutrality aligns with the Organization for Security and Cooperation in Europe (OSCE), as there are no obligations to provide assistance in the event of war. Neutrality is also compatible with the relations between EU and Switzerland, provided there are no binding mutual military assistance obligations for all member states. However, the relationship with NATO differs, as the mutual assistance obligations inherent in NATO membership are incompatible with Switzerland's neutral policy.

Swiss neutrality also serves as an opportunity for peace promotion. With its long-standing tradition of good offices and humanitarian aid, Switzerland plays a significant role in international peace efforts. Neutrality enables Switzerland to foster peace, facilitate dialogue, act as a mediator, and host international peace conferences and negotiations. Additionally, Switzerland actively participates in peace missions, contributing to global stability and conflict resolution.

In times of war, Swiss neutrality reveals itself as a principle that continuously evolves and adapts to new circumstances. In conflicts such as those in Kosovo, Iraq, or Ukraine, Switzerland maintains its neutrality while selectively engaging in actions consistent with its policies. The export and transfer of war materials are governed by the principle that all conflicting parties must be treated equally, including the supply of protective equipment. Military cooperation, such as training and armament agreements, is permissible as long as it does not compromise neutrality. Furthermore, the overflight of foreign aircraft over Swiss territory is strictly regulated, requiring diplomatic clearance to ensure compliance with neutrality.

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11 Federal Act on War Material, SR 514.51.

12 Such as the Feder Act on the Privileges, Immunities and Facilities and the Financial Subsidies granted by Switzerland as a Host State (Host State Act), SR 192.12.

V. Current Challenges

The **Russo-Ukrainian war** has introduced complex geopolitical challenges that raise questions about the applicability and limitations of neutrality. One critical issue is whether neutrality should be reconsidered when a UN Security Council member exercises its veto power in violation of international law. Such scenarios challenge the principles of neutrality and the role of international governance in maintaining peace.

Switzerland's position in **security cooperation in Europe** is increasingly important. As a country highly interconnected economically, technologically, and socially, and as an organizer of significant international events, Switzerland recognizes the necessity of intensifying cooperation within Europe. Strengthening ties and fostering collaboration in the region has become essential for stability and security.

The **perception of neutrality** is another crucial factor. Neutrality remains a valuable instrument of foreign and security policy only if it is recognized and respected internationally. Switzerland's credibility in adhering to its neutral stance is pivotal in maintaining its influence and effectiveness on the global stage. The trustworthiness of its actions directly affects how neutrality is perceived by the international community.

Additionally, the **digital space** has emerged as a critical domain in modern conflicts. Digital platforms are increasingly used to carry out cyberattacks in armed conflicts, presenting challenges that transcend traditional territorial boundaries. Switzerland recognizes that the principles of neutrality must also apply in the digital realm, ensuring that its policies adapt to the realities of cyberwarfare and the digital age.

Public opinion remains a cornerstone of Switzerland's neutrality policy. Swiss citizens largely view neutrality as an integral part of their national identity and foreign policy. Movements like the Swiss People's Party's (SVP) Neutrality Initiative aim to preserve traditional neutrality by advocating for its enshrinement in the constitution. This initiative seeks to prevent Switzerland from participating in international sanctions or aligning with military alliances, emphasizing its role as a mediator in global conflicts.[13] Internationally, Switzerland's credibility as a neutral state is crucial. The effectiveness of its foreign

[13] See also Presse Release by the Federal Council from 27. November 2024, Dispatch on the Neutrality Initiative: Federal Council recommends rejection without counterproposal, available at: <https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-103338.html>.

policy depends on the global recognition and respect for its neutrality, which in turn enhances its ability to mediate and facilitate peace negotiations.

VI. Outlook and Key Points

Contemporary challenges are testing Switzerland's neutrality in unprecedented ways. The future of Swiss neutrality lies in balancing historic principles with modern obligations. Potential reforms include codifying neutrality in the constitution to address contemporary challenges, clarifying Switzerland's role in international sanctions and security frameworks, and enhancing its active neutrality to contribute more effectively to peacebuilding and digital security. As global conflicts and norms evolve, so must Switzerland's interpretation and application of neutrality. By respecting tradition while addressing contemporary realities, Switzerland can continue to promote peace and stability in an interconnected world.

Swiss neutrality remains a cornerstone of its foreign and security policy, successfully balancing national interests and international responsibilities. Deeply rooted in Swiss tradition, history, and self-perception, neutrality is strongly supported by the population and serves as a defining element of Switzerland's identity.

Neutrality has proven instrumental in maintaining Switzerland's position on the global stage while adhering to international laws that clearly define its boundaries, such as prohibiting accession to military alliances. Its scope is broad, encompassing economic sanctions, participation in the Partnership for Peace Programme, and the arming of soldiers for self-defense, all while upholding neutrality as a guiding principle.

However, neutrality is not static. It evolves in response to changing circumstances and requires active implementation in a manner appropriate to each situation. It also necessitates solidarity, ensuring that neutrality remains a credible and meaningful policy. In practice, the Federal Council interprets and applies neutrality, but questions arise about whether formalizing neutrality in the Constitution might alter its understanding or application.

Ultimately, neutrality is only effective and legitimate when it is recognized and respected by other nations. Without this mutual recognition, neutrality loses its purpose and value. As global challenges become increasingly complex, Switzerland's ability to adapt and redefine its neutral stance will determine its continued success as a tool for peace and security.

Digital transformation: Regulation of Artificial Intelligence in the European Union

Jelena Ceranic Perisic

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I. Introduction

The Fourth Industrial Revolution is gradually transitioning into the Fifth, which is characterized by the diminishing boundaries between the physical, digital, and biological realms.[1] Although the forthcoming era will prioritize concepts such as sustainability, human-centeredness, and environmental concern, there is no doubt that it will be characterized by the use of artificial intelligence in almost all aspects of life.

[1] Howells, 145 et seq.

To date, there is no universally accepted definition of artificial intelligence (hereinafter: AI). However, a number of definitions do capture its fundamental aspects.

At the very beginning, it would be interesting to see what Artificial Intelligence says about itself. We have asked ChatGPT itself to give us a definition of AI in general. It has responded with the following text:

"AI, or Artificial Intelligence, refers to the simulation of human intelligence in machines that are programmed to think and learn like humans. These systems can perform tasks that typically require human intelligence, such as understanding natural language, recognizing patterns, solving problems, and making decisions."

One of the most used definitions is the updated OECD definition, which is integrated into the EU legislation. The definition stipulates: "An AI system is one that is based on a machine that, for explicit or implicit purposes, deduces, from the inputs it receives, how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments. Different AI systems vary in their levels of autonomy and adaptability once deployed."[2]

Although this OECD definition draws a broad perimeter, which is useful for framing the largest number of existing AI technologies, it does not consider the human component. This definition ignores other essential elements of artificial intelligence. Nonetheless, it should be clarified that AI is neither intelligent nor artificial.[3] "Due to great expectations and possibilities deriving from its use, the fact that artificial intelligence is also a product of human being is often neglected."[4] "The work and development of technologies that artificial intelligence is based on relies on previously entered information and parameters entered by humans."[5]

The general public became familiar with AI through ChatGPT roughly a year and a half ago. "ChatGPT is a language model created by the San Francisco-based AI company OpenAI. ChatGPT can generate natural language responses to various end-user queries. Its main focus is on language modeling, which includes creating plausible models that can accurately predict the following word in a given sequence based on the previous words. Such a system can gen-

2 <https://www.oecd.org/en/publications/explanatory-memorandum-on-the-updated-oecd-definition-of-an-ai-system_623da898-en.html>.

3 Bianchiani/Ancona, 1.

4 Avramovic/Jovanov, 162.

5 Andonovic, 112

erate text in any language, in any format, and on any topic in a few seconds."[6] However, it's important to note that generative AI, which underpins ChatGPT, is just one type of AI. In fact, various AI applications have long been part of our everyday lives. These include algorithms used by social networks to recommend content, predictive analytics in finance, and programs that diagnose and personalize therapies in healthcare.

The transformative nature of this technology is undeniable: AI has the potential to revolutionize various aspects of human experience and, more profoundly, to alter reality itself and the very role of humans within it.

Five years ago, the White Paper on Artificial Intelligence drafted by the European Commission recognized the significance of the AI for the improvment of healthcare, national security, industry, production, farming.[7] However, "artificial intelligence posed a puzzle for lawyers and academia all over the world"[8], as it remains an uncertain and unpredictable field, with its implementation potentially giving rise to various legal issues.[9]

The challenge of AI has recently been addressed by the international community, particularly at the regulatory level.[10] Significant efforts are being made to implement legislative actions in light of the rapid evolution of AI technologies. While several recent initiatives demonstrate a growing awareness of this issue, the European Union is emerging as a leader in regulating this technology, as seen with its AI legislation. Such an approach of the European Union to the issue of AI will be particularly discussed and examined later in the paper.

Accordingly, it is not surprising that the industrial development of AI technologies is becoming a new arena of fierce confrontation between global players.

In terms of approach to artificial intelligence, three models stand out in today's market:

- the market-led US model;
- the state-led Chinese model;
- the rights-led European model.

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6 Zivkovic, 331.

7 White Paper on Artificial Intelligence: A European approach to excellence and trust of 19 February 2020, COM (2020) 65 final.

8 Glintic, 33.

9 Mihajlovic/Coric, 9 et seq.

10 For more on regulatory interventions at the level of the European continent see *Ibid.*, 17–19. On initiatives on broader international level see Stanic/Tintor, 171–174.

The European approach is clear, at least in its intentions: to enhance AI research and industrial capacity while guaranteeing fundamental rights. The guiding principles are equally clear: the technological sovereignty of the European Union for strategic economy and the central role of people in the digital transformation.[11]

Despite the ambition underlying this approach, it must be acknowledged that the European Union is, at best, a secondary player in the development of AI. This is not surprising, as it reflects the historically slow progress of the European innovation sector.[12]

This paper aims to examine the current state of digital transformation and the regulation of artificial intelligence within the European Union, addressing both practical and legislative dimensions. To this end, the paper is structured into four main parts. Following a brief introductory remark dedicated to the concept and definitions of AI (Part I.), the paper analyses the challenges faced by the EU in the context of artificial intelligence, with particular emphasis on the underlying factors contributing to the slow progress of the AI industry (Part II.). The third part delves into the key features of the new AI Act (Part III.), highlighting its provisions and the categorization of use cases based on their level of risks to health, safety, and fundamental rights. Finally, the paper seeks to offer a preliminary assessment of whether the regulatory approach introduced by the AI Act effectively addresses the causes of the EU's slow progress in the AI sector (Part IV.).

II. Causes for the slow progress of the AI industry in the European Union

At the very beginning, the question arises as to the root causes of the slow progress of the AI industry in the EU. This part of the paper will briefly explore four primary factors contributing to the industry's stagnation and suggest potential solutions to address them. Those factors are:

1. Lack of investments → financing of the European AI
2. An incomplete European Single Market → Building an ecosystem of excellence: a Union tailored to AI
3. A shortage of data → Feeding AI: European data sovereignty?
4. Low attractiveness for European talent → Skills for AI: European expertise

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11 Bianchiani/Ancona, 2.

12 *Ibid.*

1. Lack of investments

The limited availability of venture capital and a weak stock market are among the primary factors contributing to the slow progress of the AI industry, hindering the development of a dynamic technological innovation sector for start-ups in this field. The situation is even more concerning when compared to other global players: from 2012 to 2020, venture capital investments in the United States were ten times greater than those in the euro area. Furthermore, equity investment in AI within the European Union accounts for less than 10%, while China and the United States together hold approximately 80% of global AI investments. This gap is likely to continue expanding. Moreover, the power dynamics are striking: as illustrated in the table, only three European countries—Germany, France, and Spain—are among the top fifteen nations in terms of AI investment, and US private investment is thirty-five times greater than that of Germany, the largest investor in AI within Europe.[13]

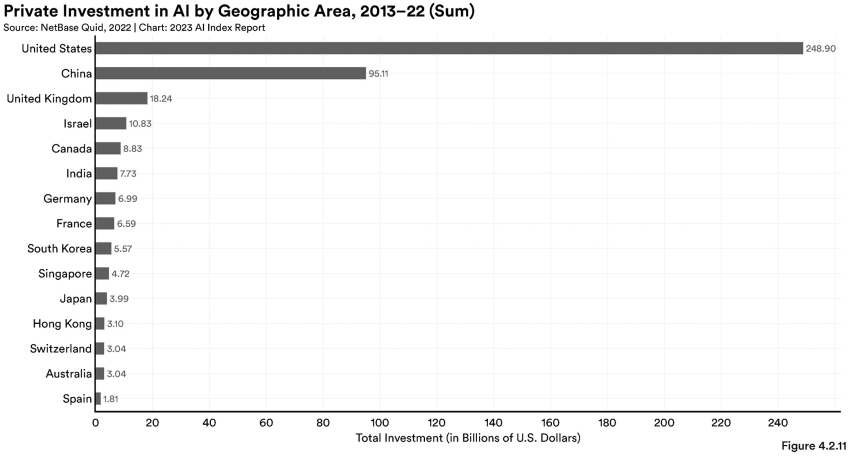

Fig. 1 HAI – Artificial Intelligence Index Report 2023 — page 190

To address this issue, it would be necessary to revise the rules of the European financial framework to facilitate investment in start-ups, including the adoption of more flexible regulations for institutional investors.[14]

13 Bianchiani/Ancona, 2–4.

14 *Ibid.*, 3–4.

2. An incomplete European Single Market

The lack of an integrated innovation ecosystem represents a significant obstacle to the establishment of the European Union as a dynamic centre for innovation, with substantial repercussions for the burgeoning artificial intelligence sector. This deficiency not only constrains the development and growth of European excellence but also jeopardizes the EU's position in global competitive dynamics. Consequently, it is imperative to create conducive conditions for the establishment of an ecosystem of excellence in AI.[15]

In terms of fostering new AI ventures, the EU, and its Member States to an even lesser extent, have not effectively challenged the dominant positions held by the United States and, to a lesser degree, China. Key criticisms of the current situation include delays in data availability crucial for AI development, inefficient talent mobility, and insufficient funding for AI initiatives.

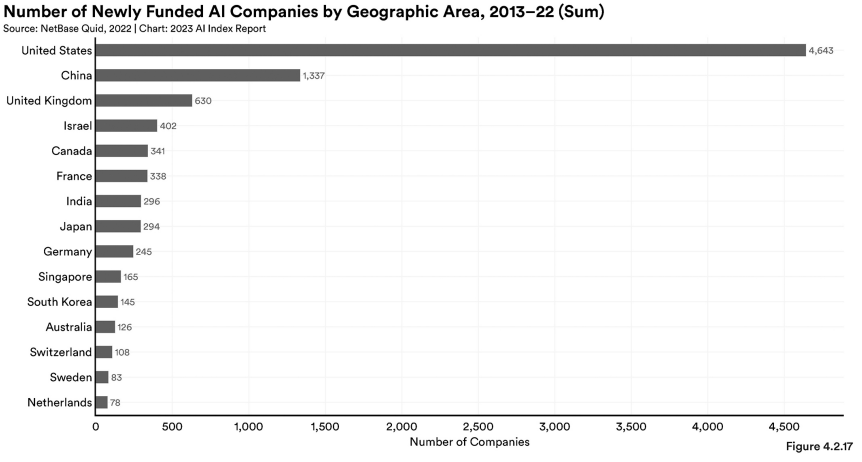

Fig. 2 HAI – Artificial Intelligence Index Report 2023 — page 194

The main challenges are the geographical fragmentation of innovation and the still incomplete European digital market.

3. A shortage of data

Data are frequently described as the "new oil", a characterization that is increasingly contested. Nevertheless, data remain a critical resource for artificial

15 *Ibid.*, 4–5.

intelligence (AI), both in terms of research and development and for facilitating its widespread adoption by non-specialist users and businesses. "The usage of data, data science, and analytic tools that enable extracting insights from a great amount of randomly collected data still remains a viable field in many commercial sectors due to the importance of collected information."[16] Therefore, it is urgent for Europe to address the significant delays in data availability and access to ensure strategic autonomy and technological sovereignty in AI.[17]

The underlying causes of the data shortage are closely linked to the digital industry ecosystem within Europe. First, a few non-European "Big Tech" companies control the majority of global data, while European small and medium-sized enterprises (SMEs) typically lack comprehensive internal databases and have limited access to external ones. Additionally, the fragmentation of the European digital market hampers the creation of unified data sets, largely due to insufficient collaboration and data-sharing practices between private enterprises, institutions, and other stakeholders. This fragmentation also accounts for the disparity with the United States and China, which benefit from two distinct but equally powerful forces—private sector initiatives and central institutions—that facilitate the construction of extensive data sets.[18]

The Common European Data Spaces (CEDS) is an EU initiative designed to facilitate large-scale data collections at significantly lower upfront costs for European businesses. It aims to create a "level playing field" for data sharing and exchange, thereby reducing the dominance and dependency on large, quasi-monopolistic entities.[19]

4. Low attractiveness for European talent

The competitiveness of the European Union cannot be assessed without acknowledging the crucial role of talent. The artificial intelligence relies on the availability of natural intelligence, that is, skilled human capital, both for research and development (R&D) activities and for the widespread adoption of AI technologies.[20]

The EU does not face a shortage in the production of talent, but rather an inability to retain it. In terms of R&D, European academic research in AI is increasingly threatened by the migration of human capital, particularly to the

16 Glintic, 102.

17 Bianchiani/Ancona, 5.

18 *Ibid.*

19 Ryan/Gürtler/Bogucki, 2 et seq.

20 Bianchiani/Ancona, 6.

United States, where researchers are offered higher salaries, more flexible contracts, and more prestigious academic and entrepreneurial opportunities.[21] To illustrate the scale of this brain drain, consider that one-third of AI talent in American universities originates from the EU.

It is therefore unsurprising that one of the primary obstacles cited by European companies in adopting AI is the scarcity of talent in the labour market.[22]

Prioritizing AI expertise has become a recurring theme in European policymakers' recent statements. EU Commission President has advocated for a concerted effort to tackle labour market challenges, highlighting critical issues such as skills and labour shortages. The European Commission aims to foster AI talent in Europe by providing the necessary infrastructure and public-private partnerships to support researchers.[23]

The European Union's strategic objective must be to establish a hub for AI R&D that not only retains European talent but also attracts skilled professionals from other countries.[24]

III. Regulation on Artificial Intelligence – Artificial Intelligence Act

The "Act" is a regulation based on Article 114 of the Treaty on the Functioning of the European Union (TFEU), which concerns the approximation of laws to improve the functioning of the internal market.[25]

The AI Act[26] was adopted by EU co-legislators in May 2024 and came into force 20 days after its publication in the Official Journal of the European Union on July 12. It will be fully applicable starting August 2, 2026. In the meantime, the European Commission has introduced the AI Pact[27], a voluntary initiative that

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21 <https://www.stiftung-nv.de/publications/where-is-europes-ai-workforce-coming-from>

22 Bianchiani/Ancona, 6.

23 <https://commission.europa.eu/about/commission-2024-2029/president-elect-ursula-von-der-leyen_en>

24 Bianchiani/Ancona, 7.

25 Engel, 13 et seq.

26 Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act), OJ L, 2024/1689 of 12 July 2024.

27 <https://digital-strategy.ec.europa.eu/en/policies/ai-pact>.

encourages AI providers to proactively adhere to the key obligations of the AI Act before its official enforcement.

One of the primary objectives of the AI Act is to regulate the deployment of AI technology across various sectors through a risk-based approach. In this context, the Act establishes tiered obligations for different stakeholders in the AI value chain, tailored to the level of risk associated with specific AI applications. As such, the AI Act should be regarded as a targeted regulatory intervention, rather than a broad, cross-cutting legislation like the General Data Protection Regulation (GDPR).[28]

The AI Act can be regarded as one piece in a complex AI regulatory puzzle[29], i.e. the AI Act is also part of a broader regulatory framework, which consists of Data, Infrastructure and Algorithms.[30]

Given the length and complexity of the AI Act, this chapter examines only its most significant provisions. The analysis of the AI Act will start by presenting the scope and definitions. Since the AI Act makes a distinction between AI systems and General-Purpose AI models (GPAI), provisions regulating both categories will be examined. Finally, the measures to support innovation outlined in the AI Act will be presented; afterwards, governance, sanctions, and the implementation timeline will be briefly outlined.

1. Scope and definitions

The AI Act has a very broad scope and a strong extraterritorial reach, as it applies to any AI system having an impact in the EU, regardless of the provider's place of establishment. Specifically, the AI Act would apply when the *AI system is placed on the market or put into service in the EU, when a user is located in the EU or when the output is used in the EU.*[31]

AI itself is defined in very broad terms in the AI Act. It covers "any machine-based system designed to operate with varying levels of autonomy and that

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28 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, *OJ L 119 of 4 May 2016.*

29 Stanic/Tintor, 169 et seq.

30 Samman/de Vanssay, 1.

31 Art. 2 of the Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 on laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act).

may exhibit addictiveness after deployment and that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments."[32]

The AI Act distinguishes between *AI systems* and *General-Purpose AI models* (GPAI), which are AI models trained with a large amount of data, using self-supervision at scale and which can competently perform a wider range of distinct tasks.

AI Act Provides for several exceptions regarding its scope:

- "AI systems and models that are developed and used exclusively for military, defence and national security purposes;
- AI systems and models specifically developed and put into service for the sole purpose of scientific research and development;
- Any research, testing, or development activity regarding AI systems or models prior to their being placed on the market or put into service;
- AI systems released under free and open-source licenses, except where they fall under the prohibitions and except for the transparency requirements for generative AI."[33]

2. Regulation of AI systems

The AI Act distinguishes four categories of use cases based on their level of risk to health, safety, and fundamental rights. Specific requirements for providers and users of these systems are associated with each category. These categories are:

- Prohibited AI practices;
- High-risk AI systems;
- Limited risk AI systems; and
- Low- or minimal-risk AI systems.

The following sections will examine Prohibited AI practices, High-risk AI systems and limited-risk AI systems, except low or minimal risks, where Member States and Commission merely 'encourage' and 'facilitate' voluntary codes of conduct.[34]

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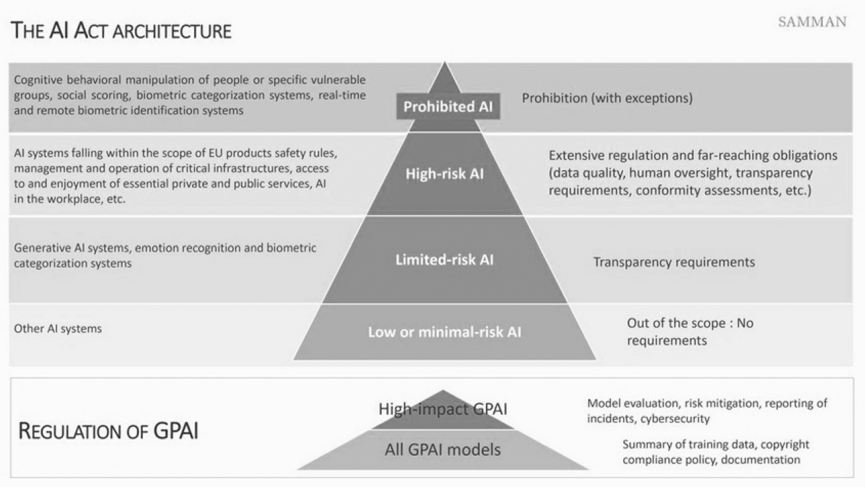
32 Art. 3 of the Regulation (EU) 2024/1689.

33 Samman/de Vanssay, 2.

34 Veale/Zuiderveen Borgesius, 98.



Source: What to take away from the European law on Artificial Intelligence, Schuman Paper 757/2024

a) Prohibited AI practices

The AI Act prohibits the placing on the market, the putting into service or the use of the following AI systems (with exceptions for certain cases):[35]

- "AI systems that deploy subliminal techniques beyond a person's consciousness or purposefully manipulative or deceptive techniques;
- AI systems that exploit any of the vulnerabilities of a person or specific group of persons due to their age, disability, or a specific social or economic situation;
- Biometric categorization systems that categorize individual natural persons based on their biometric data to deduce or infer some sensitive attributes;
- AI systems for social scoring purposes;
- Use of 'real-time' remote biometric identification systems in publicly accessible spaces for the purpose of law enforcement, with some important exceptions;
- AI systems for making risk assessments of natural persons in order to assess or predict the risk of a natural person committing a criminal offence;
- AI systems that create or expand facial recognition databases through the untargeted scraping of facial images from the internet or CCTV footage;

[35] Art. 5 of the Regulation (EU) 2024/1689.

– AI systems that infer the emotions of a natural person in situations related to the workplace and education, with some exceptions."

b) *High-risk AI systems*

The regulation of high-risk AI systems constitutes the core of the AI Act.[36] It outlines the criteria for classifying AI systems as high-risk, along with a series of obligations and requirements for these systems and the various stakeholders in the value chain, ranging from providers to deployers.

Qualification of high-risk AI systems

The AI Act qualifies as high-risk some AI systems that have a significant harmful impact on health, safety, fundamental rights, the environment, democracy and the rule of law. More specifically, the AI Act establishes two categories of high-risk AI systems:[37]

AI systems are caught by the net of EU product safety rules (toys, cars, health, etc.), if *they are used as a safety component of the product* or *are themselves a product* (e.g. AI application in robot-assisted surgery).[38]

AI systems are listed in an annex to the regulation, which outlines the use cases and sectors where the deployment of AI is deemed high-risk. In summary, the following areas and AI systems are included:[39]

- Biometrics;
- Critical infrastructure;
- Education and workplace;
- Access to essential services;
- Law enforcement, justice, immigration, and the democratic process.

The AI Act also allows providers of high-risk AI systems to demonstrate that their systems do not qualify as high-risk (referred to as "the filter") and do not significantly impact the decision-making process. To this end, providers must show that they meet at least one of the following conditions:

- "the AI system is intended to perform a narrow procedural task;
- the AI system is intended to improve the result of a previously completed human activity;

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36 Art. 6 of the Regulation (EU) 2024/1689.

37 Samman/de Vanssay, 3.

38 *Ibid.*

39 Art. 7 of the Regulation (EU) 2024/1689.

- the AI system is intended to detect decision-making patterns or deviations from prior decision-making patterns and is not meant to replace or influence the previously completed human assessment, without proper human review;
- the AI system is intended to perform a preparatory task to an assessment relevant for the purposes of the use cases listed in Annex III."[40]

Main requirements for high-risk AI systems and obligations for parties in the AI value chain[41]

First, the AI Act establishes a set of requirements for high-risk AI systems, including risk management, data governance, technical documentation, record-keeping, instructions for use, human oversight, as well as accuracy, robustness, and cybersecurity.

Second, the AI Act imposes a range of obligations on various stakeholders within the value chain, including providers, importers, distributors, and deployers. It also outlines the rules for determining the distribution of responsibility, particularly when one of these parties makes a substantial modification to an AI system. The majority of obligations are placed on providers, encompassing areas such as compliance and registration, quality management systems, documentation maintenance, logs, corrective actions, and the duty to inform.

c) *Limited risk AI systems*

The third category pertains to providers and deployers of generative AI systems, as well as deployers of emotion recognition or biometric categorization systems, who must, among other things, comply with the transparency requirements. When it comes to *chatbots* it is essential to inform individuals that they are engaging with an AI system, ensuring transparency regarding the nature of the interaction. In regard to *generative* AI, the obligation is to maintain clarity and prevent confusion. It is crucial to mark the outputs in a machine-readable format, ensuring they are identifiable as artificially generated or altered (e.g., through watermarking techniques). As for *deepfakes*, content must be clearly labelled as either artificially generated or altered. Additionally, it is important to notify users when such content is part of a work that is intentionally artistic, creative, satirical, or fictional. Regarding *Generated News Informa-*

40 Samman/de Vanssay, 3.

41 Art. 16 of the Regulation (EU) 2024/1689.

tion, it is necessary to disclose when content has been artificially generated or manipulated, except in cases where the content has been subjected to human review or editorial oversight.[42]

3. Regulation of general purpose AI models (GPAI)

The AI Act establishes a two-tier regulatory framework for General-Purpose AI (GPAI) models. The first layer of obligations applies to all GPAI models, while the second layer is reserved for those GPAI models that present systematic risks.[43]

a) Horizontal requirements for GPAI models

Under the AI Act, some obligations are imposed on the providers of GPAI models, regardless of whether their models are used in high-risk areas. These obligations relate to:[44]

- drawing up and keeping technical documentation (*inter alia* training, testing process and evaluation results);
- Providing documentation to users integrating the GPAI model in their own AI systems (including information about the limitations and capabilities of the model);
- Putting in place a policy to respect EU copyright law;
- Publishing a detailed summary of the content used for training of the model.

However, providers of non-systematic open-source models are exempt from the first two obligations. The definition of open source is narrow, as it only pertains to "models released under a free and open license that allows for the access, usage, modification, and distribution of the model, and whose parameters, including the weights, the information on the model architecture, and the information on model usage, are made publicly available".[45]

b) Requirements for GPAI models with systematic risks

The AI Act defines GPAI models with systematic risks as those with "high-impact capabilities", or in other words, the most capable and powerful models.

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42 Samman/de Vanssay, 4.

43 Art. 51 of the Regulation (EU) 2024/1689.

44 Samman/de Vanssay, 4–5.

45 Samman/de Vanssay, 5.

In addition to the first layer of obligations, providers of GPAI models with systematic risks are required to:[46]

- "Perform model evaluation with standardized protocols and tools;
- Assess and mitigate possible systematic risk at EU level;
- Report serious incidents and corrective measures to the European Commission and national authorities;
- Ensure an adequate level of cyber security protection."

4. Measures in support of innovation

The primary measure outlined in the Commission's proposal is the mandatory establishment of at least one AI regulatory sandbox in each member state.[47] A sandbox is a framework created by a regulator that enables businesses, particularly start-ups, to conduct live experiments with their products or services in a controlled environment under the supervision of the regulator.[48]

5. Governance and sanctions

The AI Act establishes a complex and hybrid governance framework, with the implementation and enforcement powers shared between the EU and national levels.

The European Commission will play a central role in the governance and implementation of the AI Act. In summary, it will be responsible for enforcing provisions related to GPAI models, ensuring the harmonization of the AI Act's application across the EU, defining compliance with the AI Act, and updating key aspects of the regulation. At the national level, regulators will be tasked with enforcing all provisions related to prohibited and high-risk AI practices.[49]

6. Implementation timeline

The AI Act was published in the EU Official Journal on 12 July 2024. It entered into force 20 days after the publication and will be applied gradually.

The rules governing prohibited AI practices are expected to come into effect in early 2025 – six months after the regulation's entry into force.

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46 Art. 55 of the Regulation (EU) 2024/1689.

47 Art. 58 of the Regulation (EU) 2024/1689.

48 Samman/de Vanssay, 5.

49 Samman/de Vanssay, 5.

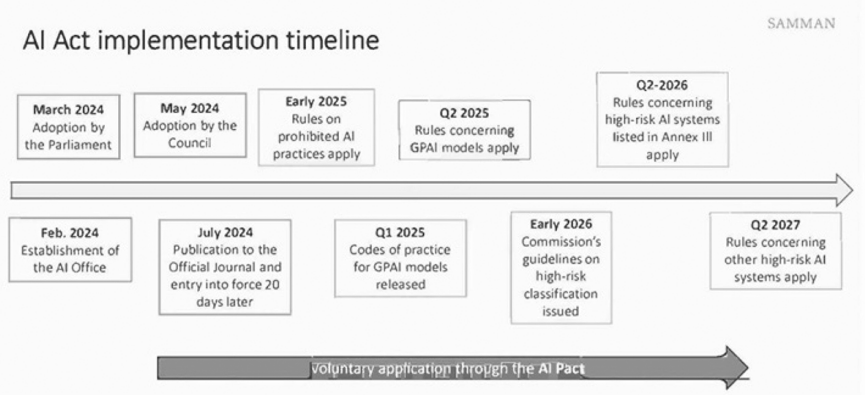
Codes of practice for General Purpose AI (GPAI) models must be issued by the Commission no later than nine months after the regulation's entry into force, which is anticipated for the first quarter of 2025.

Rules related to GPAI models will apply 12 months after the regulation enters into force, around mid-2025. This will also mark the deadline for designating national market surveillance authorities and issuing guidelines on high-risk AI systems by the Commission.

The Commission is required to issue guidelines on the classification of high-risk AI systems no later than 18 months after the regulation's entry into force, expected in early 2026.

Rules concerning high-risk AI systems listed in Annex III will come into effect 24 months after the regulation's entry into force, which is projected for mid-2026.

Rules regarding other high-risk AI systems will apply 36 months after the regulation's entry into force, anticipated for mid-2027.



Source: What to take away from the European law on Artificial Intelligence, Schuman Paper 757/2024

7. Financial penalties

In addition to being able to request corrective actions, national authorities and the Commission will have the authority to impose fines, the amount of which will vary depending on the nature of the infringements.[50]

[50] Art. 99 of the Regulation (EU) 2024/1689.

IV. Concluding remarks

We live in an era where it is evident that innovations are progressing at a pace that outstrips the capacity of legislators to keep up. Therefore, the question arises as to how to approach the regulation of AI in a manner that avoids the waste of time and resources.

When it comes to the regulation of AI, three approaches have emerged in comparative law: the market-led US model, the state-led Chinese model, and the rights-led European model. It is undisputed that the EU's approach is inspired by the principles of technological sovereignty and the central role of humans in digital transformation. This approach is completely in line with the EU's fundamental objective of advancing research in the field of AI and protecting human rights. The recently introduced AI Act has been developed entirely in accordance with these principles.

Considering the causes of slower progress in the EU's AI industry, the question arises whether the new AI Act will contribute to addressing these causes, which should certainly be one of its goals. However, even before the beginning of its implementation, part of the academic and professional community has expressed concerns that the regulation may have gone too far and that various types of challenges may arise during its enforcement.[51] Moreover, there is a well-founded fear that this regulatory approach could further weaken the EU's position relative to the United States and China.

In this regard, it is often heard in both academic and professional circles that the AI revolution represents a unique opportunity that Europe cannot afford to overlook.[52] Over the past fifteen years, during which it has fallen behind the United States and, to a lesser extent, China, Europe often seemed to be the "continent of the old". This perception is not so much demographic but, more importantly, stems from widespread mistrust of innovation, reluctance to embrace risk, and a tendency to emphasize the dangers of the unknown rather than the opportunities for progress. Ultimately, innovation is measured in the marketplace, where the European Union, at best, plays a supportive role.

It is clear that the EU has chosen an approach based on rights. However, it may be necessary to find the right balance in this regard, in terms of regulation, but not over-regulation.

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51 Veale/Zuiderveen Borgesius, 97 97 et seq., Samman/de Vanssay , 1 et seq.

52 Bianchiani/Ancona.

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The management of migration at the EU external borders in the New Pact of Migration and Asylum

Juan Santos Vara*

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I. Introduction

The main aim of the New Pact on Migration and Asylum is to introduce a new system to manage migration flows at the EU external borders. According to the Commission, the implementation of the Pact will create a seamless approach to further enhance the effective management of the external borders of the European Union.[1] All irregular migrants have to be registered and subject to a screening of their identity, security risk, vulnerability and health. This includes persons apprehended within the territory who have not yet been subject to screening at a border check. In a second stage, a mandatory border asylum procedure will apply for those who are likely not in need of international protection, present a security risk or mislead the authorities. It is considered that the successful implementation of the Screening Regulation and the Asylum Procedure Regulation will lead to the set-up of fast and efficient procedures for asylum and return in full respect of fundamental rights, includ-

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[1] Communication on a New Pact on Migration and Asylum, COM (2020) 609 final, 23.9.2020.

ing the respect of the principle of *non-refoulement* and the right to an effective remedy in relation to decisions taken in border procedures.[2] Member States are required to have the capacity to screen all irregular arrivals and to host a certain number of applicants for international protection for the duration of the border procedure in adequate conditions. As will be explained in this contribution, during the screening and the border asylum procedures, persons are not authorised to enter the EU territory, but they have the right to remain there.

Member States are obliged to adapt their national regulatory frameworks to the new provisions, identify the locations to carry out screening and border asylum procedures and build the necessary infrastructure if needed. In addition, Member States have to ensure sufficient competent staff and acquire the necessary equipment to carry out the effective management of the external borders. Since the implementation of the new legal instruments that constitute the Pact on Migration and Asylum involves substantial changes in many Member States, they only become applicable two years later, as of mid-2026. The Commission has also adopted a Common Implementation Plan to support the Member States in this process.[3] There is no doubt that the screening of third country nationals at the external borders is one of the major novelties introduced by the Pact. The first part of this article will be devoted to analysing the implications of this screening and the introduction of the fiction of 'non-entry' in EU law. The second part will focus on the generalisation of asylum border procedures. It aims to ensure that there are no procedural gaps between the issuance of a negative decision on an application for international protection and the issuance of a return decision.

II. The screening of third-country nationals at the external borders

The Pact on Migration and Asylum introduces the obligation to screen all irregular third-country nationals at the external borders. The objective of the Regulation introducing the screening of third-country nationals at the external borders (hereafter Screening Regulation)[4] is to establish uniform rules and ensure proper registration of irregular migrants and asylum seekers entering the EU and a seamless link to ensuing return and asylum procedures. The

2 Common Implementation Plan for the Pact on Migration and Asylum, COM (2024) 251 final, 12.6.2024.

3 Ibid.

4 Regulation 2024/1356 of 14 May 2024 introducing the screening of third-country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817, OJ [2024] OJ L 1356/1.

screening applies to three categories of non-EU nationals who do not fulfill the entry conditions under the Schengen Borders Code: i) those apprehended in connection with an unauthorised crossing of the external border of a Member State; ii) those disembarked following search and rescue (SAR) operations at sea; and iii) those seeking international protection at a border crossing point without fulfilling the entry conditions.

The aim of the screening is to facilitate a proper identification of third country nationals and refer them to the appropriate procedures at the earliest possible stage. At the same time, 'the screening should help to counter the practice whereby some applicants for international protection abscond after having been authorised to enter the territory of a Member State based on their request for international protection'.[5] Therefore, the Commission intends 'to establish a seamless procedure at the border applicable to all non-EU citizens crossing without authorisation comprising pre-entry screening, an asylum procedure, and where applicable, a swift return procedure'.[6]

The Screening Regulation introduces the legal fiction of 'non-entry' because the persons are physically in the territory, but they are not authorized to enter the territory of the Member States during the screening process. The human rights implications of screening at the borders are going to be analysed in this chapter. The completion of the screening involves filling out a form, including all relevant data, and the referral to the appropriate procedures such as asylum or return.

1. The introduction of the fiction of 'non-entry' in EU law

The fiction of 'non-entry' has been criticized by civil society and several commentators because it creates a legal vacuum.[7] The implications in practice of the fiction of 'non-entry' for migrants are not evident. The legal status of persons unauthorised to entry and kept in transit zones at international airports and seaports has always been controversial. More recently, this notion has been expanded to land border zones or even inland. Although the persons are physically present, they are not considered to have legally entered the country's territory until they have been granted entry by a border or immigration officer. Some Member States make use of the fiction of 'non-entry' in transit zones at ports of entry, but usually in the context of border control, not asylum. In 2018, Germany was one of the first countries to extend this concept

5 Screening Regulation, recital 6.

6 COM (2020) 609 final, 23.9.2020, p. 3.

7 See European Parliament, *Legal fiction of non-entry in EU asylum policy*, briefing, April 2024.

to land border crossings. Increasingly, other EU countries are also applying the fiction of 'non-entry' to oversee the arrival of asylum seekers. Countries such as Austria, Belgium, France, Spain, Greece, Hungary and Portugal consider persons applying for international protection at their borders or transit zones as not having legally entered their territory.

The screening entails identification, health and security checks, fingerprinting and registration in the Eurodac database. Member States also need to carry out the screening if a person eludes border controls but is later identified within the territory of a Member State. Screening is the first step in the overall asylum and return systems. It is considered that it will accelerate the process of determining the status of a person and what type of procedure should apply to each asylum seeker.

Apparently, the Screening Regulation regulates a procedure that is not new as such since national authorities are already obliged to implement similar controls at the borders under the Schengen Borders Code and the Eurodac Regulation. The only new addition is the obligation to carry out a preliminary health check with a view to identifying any needs for health care or isolation on public health grounds. This practice was already introduced by most Member States in the context of the COVID-19 pandemic.[8] It is not surprising that it has been stated that 'the screening exercise is a smart new label, but hardly a novelty in substance'.[9] The novelty is related to the outcome of the screening procedure. The information collected during the identification of third country nationals at the border determine whether they should be directed to asylum or return procedures. Furthermore, national authorities have to decide to follow border or regular asylum procedure in case an application for asylum is lodged at the border.[10]

It has been considered that the new screening system can be interpreted as an adaptation and generalisation of the border control practices implemented following the establishment of hotspots in Greece and Italy in 2015.[11] The ex-

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8 See Guidelines for border management measures to protect health and ensure the availability of goods and essential services (2020/C 86 I/01).

9 D. Thym, 'European Realpolitik: Legislative Uncertainties and Operational Pitfall of the "New" Pact on Migration and Asylum', *EU Migration and Asylum Law and Policy*, 2020; E. Brouwer and others, *The European Commission's legislative proposals in the New Pact on Migration and Asylum* (Study Requested by the LIBE Committee, 2021) 17.

10 See Art. 18, Screening Regulation.

11 See E. Brouwer and others, *The European Commission's legislative proposals in the New Pact on Migration and Asylum* cit.17; J. Santos Vara, *El Nuevo Pacto de la Unión Europea sobre Migración y Asilo* (Tecnos, 2024).

perience of the Greek islands shows that keeping third-country nationals in these hotspots throughout the screening phase and the subsequent asylum or return procedures can easily lead to overcrowding and a rapid deterioration of reception conditions.[12] The Screening Regulation seems to rely exclusively on the introduction of time limits for carrying out border checks to address this problem.

The screening at the external border should be completed as soon as possible and should not exceed seven days from the apprehension in the external border area, the disembarkation in the territory of the Member State concerned or the presentation at the border crossing points.[13] The period is reduced to three days for persons intercepted on the territory. The time limits foreseen in the Screening Regulation are similar to the periods provided in the past for carrying out the registration of asylum seekers.[14] However, the time limits laid down in the Eurodac Regulation for the fingerprinting and registration of asylum seekers have not prevented thousands of migrants and asylum seekers from being stranded for long periods of time at the hotspots[15]. Even the support provided by EASO officers in carrying out rapid border procedures in Greece has not avoided the process of registration and adoption of decisions on asylum applications taking more than seven months on average, despite the fact that it is meant to be completed in two weeks.[16]

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12 The ECHR has found that the treatment of asylum seekers in the Greek 'hotspot' amounted to inhumane and degrading treatment. See cases of *M. L. v. Greece* (Application No. 8386/20), *M. B. v. Greece* (Application No. 8389/20) of 23 November 2023 and *D. F. and others v. Greece* (Application) No. 65267/19) of 4 April 2023.

13 Art. 8, Screening Regulation.

14 See art. 6(1), Directive 2013/32 of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), OJ [2013] OJ L 180/60.

15 Art. 14(1), Regulation (EU) No 603/2013 of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast), OJ [2013] OJ L 180/1.

16 See L. Jakulevičienė, 'Pre-Screening at the Border in the Asylum and Migration Pact: A Paradigm Shift for Asylum, Return and Detention Policies?' in D. Thym (ed.), *Reforming the Common European Asylum System. Opportunities, Pitfalls, and Downsides of the Commission Proposals for a New Pact on Migration and Asylum* (Nomos, 2022); L. Tsourdi, 'Bottom-up Salvation? From Practical Cooperation Towards Joint Implementation Through the European Asylum Support Office' (2016) 1 *European Papers: a Journal of Law and Integration*.

The fiction of 'non entry' has potentially negative effects on the rights of asylum seekers. According to the 1951 Convention relating to the Status of Refugee, third country nationals applying for international protection are granted the status of asylum seekers and benefit from special treatment in relation to entry and residence in the host country. However, the effect of the screening process is to delay the access of refugees to the asylum procedure and to the reception conditions provided for in EU law. It has been rightly pointed out that the new Screening Regulation attempts to create a 'hollow asylum seeker status' stripped of its main benefits.[17] The fiction of 'non-entry' leads to the introduction of 'a liminal space where states exert control by restricting access to rights for third-country nationals'.[18] In conclusion, the fiction of 'non-entry' may in practice lead to the introduction of special legal regimes where access to fundamental rights is essentially restricted in the EU.

2. The human rights implications of screening at the borders

The objective of the Screening Regulation is to strengthen the control of third-country nationals crossing the external borders and identify persons who pose a threat to internal security.[19] The Regulation eliminates the fine line that international and EU law draws between persons seeking international protection and migrants.[20] The screening is based on the premise that asylum seekers and migrants belong to the same category of persons, having entered the territory of the Member States without authorisation.[21] It does not sufficiently take into account the fact that the need to provide protection to asylum seekers may make it necessary to derogate in practice from the rules governing the entry conditions into the territory of the Member States.[22] The screening itself does not constitute a breach of the international obligations binding on the EU and the Member States, provided that refugees are directed to the asylum procedure. However, the screening could lead in practice to treating ap-

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17 M. Mouzourakis, 'More laws, less law: The European Union's New Pact on Migration and Asylum and the fragmentation of "asylum seeker" status' (2021) 26 *European Law Journal* 172.

18 K. Soderstrom, 'An analysis of the fiction of non-entry as appears in the screening regulation' (2022) ECRE 2.

19 Art. 1, Screening Regulation.

20 See L. Jakulevičienė, 'Re-decoration of existing practices? Proposed screening procedures at the EU external borders' (2020) *EU Migration and Law blog*.

21 Arts. 1 and 5, Screening Regulation.

22 Art. 6.5, Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (codification), OJ [2016] OJ L 77/1.

plicants for international protection in the same way as other persons apprehended in connection with an unauthorised crossing of the external borders of the Member States.[23]

The screening has to be conducted 'at any adequate and appropriate location designated by each Member State, generally situated at or in proximity to the external borders or, alternatively, in other locations within its territory'.[24] It is actually unclear how the reception of migrants will be organised during the assessment of their personal circumstances, i.e. whether they will be accommodated in transit zones, hotspots or other facilities. During the screening, migrants are not authorised to enter the territory of the Member States.[25] The Regulation provides that 'Member States should lay down in their national law provisions to ensure the presence of those third-country nationals during the screening in order to prevent absconding'.[26] If needed, Member States may detain a person subject to screening based on an individual assessment of each case, 'if other less coercive alternative measures cannot be applied effectively'.[27] Although the Regulation does not include automatic detention, 'it is questionable how without detention MSs will ensure that applicants remain at the disposal of the authorities (…) or which less coercive alternative measures could be used at the borders'.[28] Detention should only be applied as a measure of last resort in accordance with the principles of necessity and proportionality and should be subject to an effective remedy, in line with national, EU and international law. Member States, in particular frontline countries, will have to develop new infrastructures and recruit more personnel to implement in practice the screening mechanism.

The problem is that the distinction between detention and restrictions on freedom of movement is difficult to draw in the case of border detention and practices vary widely between Member States.[29] National Governments have argued very often that keeping migrants in an international transit zones does

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23 L. Jakulevičienė, 'Re-decoration of existing practices? Proposed screening procedures at the EU external borders' cit.

24 Art. 8, Screening Regulation.

25 See Art. 6, Screening Regulation.

26 Recital 11, Screening Regulation.

27 Ibid.

28 L. Jakuleviciene, 'EU Screening Regulation: closing gaps in border control while opening new protection challenges' (2024) *EU Migration and Asylum Law and Policy*.

29 G. Cornellise, 'The Pact and Detention: An Empty Promise of certainty, clarity and decent conditions' (2020) *EU Migration and Asylum Law and Policy* 6: European Council on Refugees and Exiles, 'ECRE's assessment of proposals for increasing or mandatory use of border procedure' 2019, available at ecre.org.

not qualify as deprivation of liberty because they are allowed to voluntarily leave the country. The detention of third country nationals must be based on an individual decision subject to appeal.[30] It should be recalled that the applicants for international protection have the right to remain in the territory of the Member States under EU law and cannot be returned to the country of origin until it is determined that there is no risk *of refoulement*. As Carrera has pointed out, 'the Pact's model (...) risks blurring international protection and migration management by giving preference to the latter and engaging in the securitisation of refugees and people seeking international protection'.[31] In recent years, some Member States have clearly exploited this legal ambiguity by keeping third-country nationals, pending the determination of their right of entry, in places such as islands or geographically inaccessible areas where, even if they are not formally detained, their freedom of movement is severely restricted. In conclusion, it is not clear if the migrants waiting for screening are deprived of liberty or not.[32]

In addition to the screening of persons apprehended at the borders, it will also apply to third-country nationals illegally staying within the territory of a Member State.[33] The screening within the territory may lead 'to the emergence of special zones throughout the territory of the EU that are allegedly outside the regular application of EU law'.[34] It has also been considered that screening within the territory may encourage discriminatory policing and difficulties upon apprehension in proving that they had crossed external borders in an authorised manner, especially if that had occurred a long time beforehand.[35] The implementation of this provision of the Screening Regulation is very problematic if third country nationals are not able to prove the legality of their stay.

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30 Recital 11, Screening Regulation. The CJEU held that 'an applicant for international protection may be held in detention only where, following an assessment carried out on a case-by-case basis, that is necessary and where other less coercive measures cannot be applied effectively. It follows that national authorities may hold an applicant for international protection in detention only after having determined, on the basis of an individual assessment, whether such detention is proportionate to the aims pursued by detention' (Judgment of 25 June 2020, *VL/Ministerio Fiscal*, C-36/20 PPU, EU:C:2020:495, parr. 102).

31 S. Carrera, 'Whose Pact? The cognitive Dimensions of the New EU Pact on Migration and Asylum' (2020) *CEPS Policy Insights*.

32 E. Brouwer and others, *The European Commission's legislative proposals in the New Pact on Migration and Asylum* cit. 17.

33 See Art. 7, Screening Regulation.

34 L. Jakuleviciene, 'EU Screening Regulation: closing gaps in border control while opening new protection challenges' (2024) *EU Migration and Asylum Law and Policy*.

35 ECRE, *Reforming EU Asylum Law: The Final Stage* 2023, p. 29, available at ecre.org

The Screening Regulation does not clarify how the risk of absconding can be prevented without resorting to detention at the borders. From the perspective of the protection of fundamental rights, it is unacceptable to leave Member States such a wide margin of discretion.[36] It has been rightly stated that 'the impression is that the Commission was not ready or willing to acknowledge that the screening procedure will necessarily entail detention. This ambiguity is likely to have serious consequences, as it may further encourage the practice of resorting to *de-facto* detention at the border'.[37] As Thym has pointed out, 'the remaining tension between non-admission during the border procedures and the prohibition of automatic detention cannot be disentangled straightforwardly'.[38] Therefore, the lack of clarity as regards the relation between screening and detention may lead to the enhancement of automatic detention practices at external borders and pushbacks.

The ECtHR and the CJEU have held that not every restriction on freedom of movement in such zones amounts to a deprivation of liberty. In *Ilias and Ahmed v. Hungary*, the ECtHR considered that migrants in the Hungarian transit zones of Röszke were not actually detained because they could return to the country from which they had entered the EU.[39] The ECtHR did not take into account that this was not a real possibility, since Serbia refused to readmit migrants on the grounds that they had not entered Hungary illegally. However, in similar circumstances, the CJEU held that the fact that asylum seekers were allowed to leave the transit zones of Röszke and Tompa to travel to Serbia did not call into question the fact that they were detained, if the possibility of leaving was not real or they risked losing refugee status in Hungary.[40] The CJEU stated that 'the obligation imposed on a third-country national to remain permanently in a transit zone the perimeter of which is restricted and closed, within which that national's movements are limited and monitored, and which he or she cannot legally leave voluntarily, in any direction whatsoever, appears to be a deprivation of liberty'.[41] The case law of the CJEU in relation to access

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36 See ECRE, *Comments on the Commission proposal for a screening regulation*, COM (2020) 612, November 2020, p. 14.

37 E. Brouwer and others, *The European Commission's legislative proposals in the New Pact on Migration and Asylum* cit. 60.

38 D. Thym, 'European Realpolitik: Legislative Uncertainties and Operational Pitfall of the "New" Pact on Migration and Asylum' cit.

39 Judgment of the ECHR, 21 November 2019, *Ilias and Ahmed v. Hungary*, Application No. 47287/15, ECHR:2019:1121JUD004728715.

40 Judgment of the CJEU of 14 May 2020, C-924/19 PPU and C-925/19 PPU, *FMS and others v. Országos*, EU:C:2020:367, parrs. 211-249.

41 Ibid. parr. 231.

to asylum in the transit zones situated at the Serbian-Hungarian border could also be applied to the migrants that are waiting for screening in the future.

Finally, there is some ambiguity as regards whether third-country nationals undergoing the screening process will have access to legal assistance, as these procedures will usually take place at external border locations and in detention. In the Screening Regulation, there is no mention of legal assistance, only the right of organisations and persons providing advice to have access to third-country nationals during screening.[42] This uncertainty has been criticized since legal assistance is very relevant in the asylum procedure and in order to prevent *refoulement*.[43] Article 3 of the Screening Regulation recalls the obligation of Member States to act in compliance with relevant Union and international laws, including the principle of *non-refoulement*. In order to ensure compliance with EU and international law, including the Charter, during the screening, each Member State should introduce a monitoring mechanism regarding compliance of screening procedures with fundamental rights.[44]

3. Completion of the Screening

The Screening Regulation foresees filling out a form, and the referral to the authorities registering applications for international protection or to the authorities competent for return procedures.[45] The screening authorities have to include the relevant information justifying the referral of the refugees to the regular or the border asylum procedures. The screening can also lead to a refusal of entry, but only if the individual screened has not requested international protection. The decision completing the screening process will be a 'screening form' and not a formal administrative decision. The information included in the screening form shall be recorded in such a way that it is amenable to administrative and judicial review during any ensuing asylum or return procedure.[46] Therefore, only the decisions concerning the asylum or return procedures are subject to legal remedy.

The completion of the screening procedure gives rise to three different situations. Firstly, asylum applicants have to be referred to the border asylum procedures in the following cases: i) are considered to have intentionally misled the authorities by presenting false information or destroyed documents;

42 Art. 8(6), Screening Regulation.

43 E. Guild, EU Pact Instruments on Asylum and Minimum Human Rights Standards (2024) *EU Migration and Asylum Law and Policy*.

44 Art. 10, Screening Regulation.

45 Arts. 17 and 18, Screening Regulation.

46 Art. 17, Screening Regulation.

ii) pose a danger to national security or public order; iii) are from countries of origin with low recognition rates at first instance, understood by the APR as countries that have a recognition rate of 20% or lower, according to the latest available yearly Union-wide average Eurostat data. Third country nationals referred to the border asylum procedure are not entitled to an automatic right of entry. Secondly, the regular asylum procedure will continue to apply to the rest of the asylum seekers. However, it has been correctly pointed out that the Screening Regulation should automatically have foreseen the referral to the regular asylum procedure of those applicants belonging to nationalities with a high rate of recognition of international protection.[47] Thirdly, migrants who have not applied for international protection or whose application is rejected in the context of border procedure have to be referred to the EU return system. In conclusion, the screening procedure does not determine the outcome of the asylum procedure as it is focused on collecting all relevant information determining the correct procedure. It is not surprising that it has been stated that 'screening would not be much more than a reinforced border check and asylum registration'.[48]

The implementation of the Screening Regulation cannot be dissociated from the Asylum Procedure Regulation[49]. When an application is rejected in the context of the border procedure, the applicant should be immediately subject to a return decision. As regards the implications of the screening system, 'it could be seen as promoting fast-track border procedures focusing on low recognition rate countries (...)'.[50] In the implementation phase, national authorities should correctly implement the screening in order to take duly into account the circumstances of every migrant. Otherwise, refugees may be redirected to a procedure that is not applicable to them. Most Member States have to build new infrastructures to hold third-country nationals submitted to screening, acquire new technical equipment and engage new agents in border management and asylum.

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47 L. Jakulevičienė, 'Pre-Screening at the Border in the Asylum and Migration Pact: A Paradigm Shift for Asylum, Return and Detention Policies?' cit. See also UNHCR Discussion Paper on Accelerated and Simplified Procedures in the European Union; ECRE, Accelerated, prioritised and fast-track asylum procedures Legal frameworks and practice in Europe, 2017, available at AIDA-Brief_AcceleratedProcedures.pdf (ecre.org) (consulted 11 December 2024).

48 D. Thym, 'Never-Ending Story? Political Dynamics, Legislative Uncertainties, and Practical Drawbacks of the "New" Pact on Migration and Asylum' cit. 24.

49 See recital 70, Asylum Procedure Regulation.

50 L. Jakulevičienė, 'Re-decoration of existing practices? Proposed screening procedures at the EU external borders' cit.

As noted above, the introduction of time limits in the Screening Regulation is not going to provide solutions to the challenges that the EU is facing in this area. The fact that all asylum seekers have to go through screening before having access to the asylum procedure may delay access to the protection afforded to asylum seekers in the EU.[51] In addition, the Screening Regulation gives priority to border surveillance over access to the asylum procedure in order to prevent secondary movements of migrants.[52] The Commission considers that the Schengen Borders Code does not provide sufficient instructions to border guards on how to treat third country nationals seeking international protection at border points and the practice varies across Member States.[53] The Commission sustains that persons seeking international protection are likely to abscond. For this reason, the Commission opts for introducing an obligation for Member States to restrict the freedom of movement of asylum seekers at the borders by extending to air and land borders a practice already tested in the context of hotspots.[54] It is important to bear in mind that the experiences of countries like Greece or Hungary, which have implemented a model based on the systematic containment of asylum seekers in border areas, show that screening is likely to have a negative impact on human rights.[55]

The screening procedure concerns primarily countries located along the eastern and southern borders. The logic behind the Screening Regulation is similar to the hotspots, since a responsible implementation of border control procedures is considered a necessary prerequisite for the proper functioning of solidarity mechanisms such as relocation and financial support.[56] However, it is still not clear that the obligations imposed by the screening procedure on eastern and Mediterranean countries can be compensated by the solidarity mechanisms laid down in the Regulation on asylum and migration management.[57]

The preventive approach followed by the Screening Regulation may negatively impact asylum seekers. The merging or overlap in practice of the pre-entry screening, the asylum border procedure and the return border procedure may

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51 European Council for Refugees and Exile, Comments on the Commission proposal for a screening regulation COM (2020) 612, 9.

52 E. Brower and others, *The European Commission's legislative proposals in the New Pact on Migration and Asylum* cit. 56.

53 COM (2020) 612.

54 Ibid.

55 See also case *FMS and others v. Országos*.

56 E. Brouwer and others, *The European Commission's legislative proposals in the New Pact on Migration and Asylum*, cit. 57.

57 J. Santos Vara, *El Nuevo Pacto de la Unión Europea sobre Migración y Asilo*, cit. 77 and 98.

undermine the procedural safeguards for asylum seekers and the substantive EU rules on qualification of refugees and other third-country nationals in need of international protection.[58] For this reason, the non-entry fiction raises significant challenges in relation to the rule of law in the EU. Despite having crossed the external borders, third-country nationals are considered not to have arrived on the territory of EU Member States.[59] While pushbacks entail 'access to the territory without access to law', the legal fiction of 'non entry' leads 'to prevention of access to the full asylum procedure and safeguards under EU law'.[60] Cassarino and Marin have called this a process 'deterritorialisation, whereby territory is separated from the legal order'.[61] This approach has been identified as 'the preventive paradigm in EU border control', which considers third-country nationals as a threat.[62]

In conclusion, while the pre-entry screening procedure is a mere information-gathering and 'does not entail any decision affecting the rights of the person concerned',[63] the information collected is useful in the process of redirecting third-country nationals to the appropriate procedure. Since migrants during the pre-entry screening phase are *de facto* in the EU territory, the Screening Regulation introduces a legal fiction of 'non-entry'.[64] The introduction of this legal fiction does not exonerate Member States from complying with their obligations under international law, EU law and, in particular, the Charter of Fundamental Rights. There is no doubt that the screening may have substantial implications for the fundamental rights of the persons concerned.

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58 J. Vested-Hansen, 'Border Procedure: Efficient Examination or Restricted Access to Protection?' (2020) *EU Immigration and Asylum Law and Policy*; European Parliamentary Research Service, *Asylum procedures at the border*, 2020.

59 A similar reasoning was followed by the ECHR. See Judgment of 13 February 2020, *N.D. and N.T. v. Spain*, (Applications nº 8675/15 and 8697/15).

60 V. Mitsilegas, 'The EU external border as a site of preventive (in)justice' (2022) 28 *European Law Journal*

61 J. P. Cassarino and L. Marin, 'The Pact on Migration and Asylum: Turning the European Territory into a Non-territory' (20202) 24 *European Journal of Migration and Law* 4.

62 E. Guild, 'Promoting the European way of life: Migration and asylum in the EU' (2020) 26 *European Law Journal* 367; V. Mitsilegas, *The Crimininalisation of Migration in Europe* (Springer, 2015).

63 COM (2020) 612 final, 12

64 E. Brouwer and others, *The European Commission's legislative proposals in the New Pact on Migration and Asylum* cit. 142.

III. The generalisation of the asylum border procedure

1. A seamless asylum border procedure

The new Regulation establishing a common procedure for international protection in the EU intends to ensure that there are no procedural gaps between the issuance of a negative decision on an application for international protection and of a return decision (hereafter Asylum Procedure Regulation).[65] As I have already noted, the Pact introduces new mechanisms in order to allow Member States to face the challenges arising from the substantial increase in mixed movements of migrants and refugees in the last years.[66] The interconnectedness between the Screening Regulation, the Asylum Procedures Regulation and the Return Directive may lead to the creation of border procedures essentially comprising or merging different issues, 'depending on the legal and organisational modalities of Member States' implementation'.[67] The purpose of the connected asylum-return procedure at the external borders is to set up a seamless procedure in order to swiftly return those without a right to stay in the EU. This is an important migration management tool, in particular where a large share of asylum applicants originates from low recognition rate countries. Persons subject to the border return procedure are not authorised to enter the territory of the Member States and must be kept near the external borders or in transit zones.[68] The new rules on border asylum constitute a substantial innovation that could, in practice merge the pre-entry screening procedure and the return border procedure. If this happens, there is a risk of negatively affecting the safeguards for asylum seekers and undermining the effective application of the substantive rules on qualification.[69]

The 2016 Proposal for an Asylum Procedure Regulation allows Member States the introduction of border procedures in the framework of accelerated examination of asylum applications on the basis of the designation of 'safe countries

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65 Regulation (EU) 2024/1348 of the European Parliament and of the Council of 14 May 2024 establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, OJ [2024] OJ L 1348/1.

66 COM (2020) 609, p. 3 and Explanatory Memorandum of Screening, p. 1.

67 E. Brouwer and others, *The European Commission's legislative proposals in the New Pact on Migration and Asylum* (2021) 66.

68 Art. 41a, COM (2020) 611 final.

69 See J. Vedsted-Hansen, 'Border Procedure on Asylum and Return: Closing the Control Gap by Restricting Access to Protection?' in D. Thym (ed.), *Reforming the Common European Asylum System. Opportunities, Pitfalls, and Downsides of the Commission Proposals for a New Pact on Migration and Asylum*, cit. 99-112.

of origin' at EU level.[70] By contrast, the Procedures Regulation stipulates that the asylum border procedure is mandatory for the accelerated examination of three types of cases:

1) Where the applicant has misled the authorities by presenting false information or documents or by withholding relevant information or documents with respect to identity or nationality,
2) Where the applicant may, for serious reasons, be considered a danger to the national security or public order of the Member States, and
3) Where the applicant holds a nationality or has a country of former habitual residence for which the proportion of decisions granting international protection is 20% or lower.[71]

It is not explained in the Pact why border procedure becomes mandatory in these circumstances, nor does it explain why asylum seekers are not authorised to enter the territory of the Member States. This accelerated examination procedure may, in practice become subject to significant amplification in the context of a migratory crisis. It is considered that in a situation of crisis characterised by mass arrivals of third-country nationals and stateless persons applying for international protection, it could be necessary to broaden the scope of the application of asylum border procedures. As a result, Member States could extend the application of it to third-country nationals or stateless persons who come from third countries where the Union-wide average recognition rate is above 20% but lower than 50%.[72]

In order to increase the efficiency of procedures and to reduce the risk of absconding and the likelihood of unauthorised movements, the Procedures Regulation provides for the integration of asylum and return decisions. A return decision should immediately be issued to applicants whose applications are rejected. For this reason, the return decision should either be part of the negative decision on an application for international protection or, if it is a separate act, be issued at the same time and together with the negative decision or without undue delay thereafter.[73] The Commission considers that this novelty is needed in order to prevent migrants from delaying procedures with the

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70 European Commission, 'Proposal for a Regulation of the European Parliament and of the Council establishing an EU common list of safe countries of origin for the purposes of Directive 2013/32/EU', COM (2015) 452 final, 9 September 2015.

71 Art. 42, Procedures Regulation.

72 Art. 11(4), Regulation (EU) 2024/1359 of the European Parliament and of the Council of 14 May 2024 addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147, OJ [2024] OJ L 1359/1.

73 Art. 37, Procedures Regulation.

sole purpose of avoiding being expelled from the Union.[74] In the event that a return decision is taken jointly with a decision rejecting an application for asylum, both legal acts have to be appealed jointly before the same court or tribunal.[75]

The Commission justifies the generalisation of the border asylum procedures on the significant increase in the number of applications made by applicants coming from countries with a low recognition rate, lower than 20%, and the need to put in place efficient procedures to deal with those applications, which are likely to be unfounded.[76] The Commission considers that border asylum procedures can increase the chances of successful returns directly from the external border within a short period of time after the arrival and decrease the risk of applicants absconding or performing unauthorised movements.[77] However, the Commission does not recognize the difficulties faced by Member States in systematically applying the asylum procedure at the external borders.[78]

Some of the provisions included in the Procedures Regulation are likely to have a significant impact on the Southern Member States. Mediterranean countries are obliged to set up large reception centres for asylum seekers where they would be *de jure or de facto* detained and to manage the return of a significant number of persons to third countries.[79] As happens with the pre-entry screening analysed in the previous section, the relationship between the refusal of entry of asylum seekers and the right to personal liberty is not clear in the case of border asylum procedures.[80] In this respect, asylum seekers subject to the border procedure have not yet been authorised to enter the territory of the Member States concerned.[81] As regards the reception of asylum seekers, the Commission considers that 'border procedure would be more flexible than it currently is, allowing for the holding of applicants not only at the border or in

74 COM (2020) 611 final, 17.

75 Art. 61(1), Procedures Regulation.

76 Explanatory Memorandum of the Proposal on the Procedures Regulation, COM (2020) 611 final, 13-14.

77 Ibid.

78 J. Santos Vara, *El Nuevo Pacto de la Unión Europea sobre Migración y Asilo*, cit. 89-90.

79 See EASO, *Border Procedures for Asylum Applications in EU+ Countries*, 2020, 11; EPRS Study, *Asylum procedures at the border. European Implementation Assessment*, November 2020, 15-17 and 74-84.

80 G. Cornelisse, 'Border Control and the Right to Liberty in the Pact: A False Promise of "Certainty, Clarity and Decent Conditions"?' in D. Thym (ed.), *Reforming the Common European Asylum System. Opportunities, Pitfalls, and Downsides of the Commission Proposals for a New Pact on Migration and Asylum* cit. 64-65.

81 Art. 43(2), Procedures Regulation.

proximity to the border, but also at other locations, capacity should become stretched'.[82]

2. Asylum border procedure and fundamental rights

The generalisation of border asylum procedures poses many challenges to the effective protection of fundamental rights. Refugees held at the external borders of some Member States have very often suffered a systematic infringement of their right to liberty and substandard living conditions.[83] In addition, it is not always feasible to examine a large number of asylum applications in a period not exceeding 12 weeks, including judicial appeals.[84] An additional period of between 12 and 20 weeks is foreseen to complete the return border procedure.[85] However, most Member States have been unable to complete the regular asylum procedure within the maximum time limit of six months, as provided for by former legislation.[86] As it has already been pointed out, the accelerated border procedure entails 'a significant risk of damage to the quality of asylum decisions',[87] which may be exacerbated if recourse to this procedure is based on purely statistical reasons.

Border asylum procedures are not really a novelty in EU law, since they were already introduced in the first phase of the CEAS under the old Asylum Proce-

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82 G. Cornelisse, 'Border Control and the Right to Liberty in the Pact: A False Promise of "Certainty, Clarity and Decent Conditions"?' cit. 75.

83 See Judgments of the Court of Justice, *PPU y PPU*, *FMS and others*; Commission v. Hungary, C-808/18. The ECtHR has also dealt with issue in several cases in the last years. See *Sharifi and Others v. Italy and Greece*, of 21 October 2014; *Ilias and Ahmed v. Hungary*, Grand Chamber judgment, 21 November 2019; *M.K. and Others v. Poland*, of 23 July 2020; *Shahzad v. Hungary*, of 8 July 2021; *D.A. and Others v. Poland*, of 8 July 2021.

84 Art. 67, Asylum Procedures Regulation.

85 The Commission considers that 'irregular migrants in a return border procedure would not be subject to detention as a rule. However, when it is necessary to prevent irregular entry already during the assessment of the asylum application, or there is a risk of absconding, of hampering return, or a threat to public order or national security, they may be subject to detention, in compliance with fundamental rights and with specific safeguards in place' (Commission Staff Working Document Accompanying the document Proposal for a Regulation of the European Parliament and of the Council on Asylum and Migration Management and amending Council Directive (EC)2003/109 and the proposed Regulation (EU)XXX/XXX [Asylum and Migration Fund], SWD(2020) 207 final, 23/09/2020).

86 See Art. 31(3), Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) OJ [2013] OJ L 180/60.

87 E. Brouwer and others, *The European Commission's legislative proposals in the New Pact on Migration and Asylum*, cit. 77-88.

dures Directive of 2005, which allowed Member States to use such procedures at the border or in transit zones. It was held at the time that border procedures generally run counter to the acknowledged necessity of admitting asylum seekers to the territory in order to carry out a proper asylum process.[88] However, the possibility of using border asylum procedures was kept in the recast Asylum Procedures Directive of 2013. Therefore, Member States were allowed to introduce border asylum procedures at the external borders, in transit zones, or international areas of airports, and in the case of the arrival of a large number of third-country nationals, in locations close to the border or transit zones.[89] Border procedures are primarily applied in circumstances where asylum seekers are considered to be a threat or acting in bad faith.[90] In this regard, it has been noted that 'border procedures thus reflect a preventive paradigm targeting the unwanted migrant who is portrayed increasingly as unworthy of full legal protection'.[91] Border procedures are applied in areas that form an integral part of the State's territory and over which the State exercises jurisdiction. This kind of procedure often involves deprivation of liberty, such as conventional detention or restrictions in the freedom of movement. A study carried out by EASO in 2020 has highlighted that there is no uniform interpretation among Member States of what is meant by a border asylum procedure.[92] It has also been argued that consistent violations of the right to liberty, the prohibition of *refoulement*, the right to asylum and the right to an effective judicial remedy are committed in the context of border procedures.[93]

Although the implementation of border asylum procedures poses many challenges, the New Pact on Migration and Asylum calls for its expansion and consolidation. According to the Commission, the purpose is to further prevent migrants from delaying procedures for the sole purpose of preventing their removal from the Union and misusing the asylum system.[94] As happens with the screening, it is not clear whether asylum seekers are going to be detained while their asylum application is being examined. In this regard, it has been

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88 Immigration Law Practitioners' Association (ILPA) Analysis and Critique of Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status (30 April 2004) 32.

89 Art. 43(1) and (6), Directive 2013/32/EU.

90 See C. Costello and E. Hancox, 'The Recast Asylum Procedures Directive 2013/32/EU: Caught between the Stereotypes of the Abusive Asylum-Seeker and the Vulnerable Refugee' in V. Chetail; P. de Bruycker and F. Maiani, *Reforming the Common European Asylum System, The New European Refugee Law* (Brill, 2016) 377-445.

91 V. Mitsilegas, 'The EU external border as a site of preventive (in)justice' cit.

92 EASO, *Border Procedures for Asylum Applications in EU+ Countries*, 2020, 23.

93 Ibid.

94 Véase COM (2020) 611 final, p. 4.

argued that the new asylum and border return procedure 'flaunts a complete ignorance of the challenges encountered at the borders of Europe when it comes to respecting the fundamental rights of migrants'.[95] The conditions of detention at the border or in transit zones have raised very complex problems in recent years and it is not clear that the New Pact clearly addresses this issue.

IV. Conclusions

In the Pact of Migration and Asylum, border procedures are considered a fundamental instrument for managing migration. In the screening phase, third-country nationals are deemed not to have been authorised to enter the Member States, thus creating a fiction of 'non-entry'. The creation of this legal fiction does not exempt States from compliance with the obligations provided for in international law, EU law and, in particular, the Charter of Fundamental Rights. There is no doubt that pre-entry control can have substantial implications for the fundamental rights of the persons concerned. This problem arises with particular intensity in relation to the detention of migrants in transit zones or in the context of border procedures since the CJEU has pointed out that detention constitutes an autonomous concept of EU law and the Member States must be held accountable for breaches of the common asylum rules. In addition, screening blurs the distinction between refugees and other migrants and promotes expedited procedures with limited safeguards.

It is still too early to determine if the implementation of the new border and asylum procedures will enhance the effective management of the external borders of the European Union. The Member States still have two years in front of them to adapt themselves before the new regulations will have to be applied in practice in 2026. The first reactions coming from Poland, Hungary and Slovakia about the new system are not very optimistic. While the Regulation is likely to achieve its main goal of enhancing control of third-country nationals and facilitating their return, the potential for litigation may increase the length and complexity of the procedures. Although screening will not lead to the adoption of a formal administrative decision, its input is amenable to administrative and judicial review during any ensuing asylum or return procedure.

The imposition of border asylum procedures in some cases such as for asylum seekers coming from countries whose recognition rate is below the European

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[95] CORNELISSE, G., 'Border Control and the Right to Liberty in the Pact: A False Promise of "Certainty, Clarity and Decent Conditions"?', *loc. cit.*, p. 75.

average of 20% is another innovation introduced by the Pact. The mandatory application of border asylum procedures based on purely statistical reasons, without taking into account the general situation in the migrants' country of origin is likely to exacerbate the deficiencies associated with border procedures. Furthermore, border asylum procedures may prove incompatible with the obligation not to discriminate between applicants for international protection on the basis of nationality.

The Commission has considered that the Pact will contribute to avoiding the repetition of tragedies such as the overcrowded refugee camps on the island of Moria. This objective is to a certain extent inconsistent with some of the obligations imposed by the new asylum regulations that could lead to the establishment of large reception centres for irregular migrants at the external borders of the EU, especially in the Mediterranean countries. The Pact does not represent 'a fresh start' as claimed by the Commission. On the contrary, it may generalize the notion of the EU external borders as a liminal territory where certain fundamental rights and basic guarantees could be *de facto* suspended.

Value Conditionality As a New EU Mechanism Used Against Autocratizing Hungary

Gabor Halmai*

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I. Introduction

Hungary has first received international attention as one of the first and most thorough political transitions after 1989, which, due to the negotiated 'rule of law revolution'[1] provided all the institutional elements of liberal constitutional democracy: rule of law, checks and balances, and guaranteed fundamental rights. The characteristic of system change that Hungary shared with other transitioning countries was that it had to establish an independent nation-state, a civil society, a private economy, and a democratic structure all together at the same time.[2] Plans for transforming the Stalin-inspired 1949 Rákosi Constitution into a 'rule of law' document were delineated in the National Roundtable Talks of 1989 by participants of the Opposition Roundtable and representatives of the state party. Afterwards, the illegitimate Parliament only rubberstamped the comprehensive amendment to the Constitution, which went into effect on 23 October, 1990, the anniversary of the 1956 revolution.

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1 See the term used by the first Constitutional Court in its decision 11/1992. (III. 5.) AB.

2 The terms 'single' and 'dual' transitions are used in Przeworski. Later, Claus Offe broadened the scope of this debate by arguing that post-communist societies actually faced a triple transition, since many post-communist states were new or renewed nation-states. *See* Offe.

Twenty years later, the same country became the first, and probably the model case, of backsliding to an illiberal system dismantling the rule of law. Both Freedom House and the Varieties of Democracy Project have tracked Hungary as it has passed from a 'consolidated' liberal democracy in 2010 into the status of a 'hybrid regime'[3] or an 'electoral autocracy.'[4] The 2024 Rule of Law Index of the World Justice Project[5] ranked Hungary last out of 31 selected countries of the European Union, the European Free Trade Association (EFTA), and North America. The country is no longer a constitutional democracy able to ensure a peaceful rotation of power. Why was the EU, whose foundation is the values of democracy and the rule of law, unable to intercept the process for one of its own members? Hungary's transition into an authoritarian state was first and foremost facilitated by willing autocrats and fragile domestic democratic institutions, including the disproportional election system and easy amendment rule of the constitution. But the EU has also failed to force its Member State to comply with its original admission criteria. This calls for a strong democratic opposition in the country, but also for self-reflection from the EU that, despite being built on the values of democracy and the rule of law, was unable to intercept the rise of authoritarianism in Hungary.

The current Hungarian state of affairs was made possible by the governing Fidesz party's 2010 electoral victory. Due to the disproportional electoral system, Fidesz, with a slight majority of the votes, received two-thirds of the seats. This allowed them to enact a new constitution without the votes of the weak opposition parties. Hungary, not even a Republic in its name anymore, according to the new Fundamental Law and proudly announced by PM Orbán, became an 'lliberal state,' which abolished all checks on the government's power, like the independence of the Constitutional Court or ordinary judiciary, and does not guarantee fundamental rights, such as freedom of the media or religious freedom.

Hungary's constitutional transformations obviously matter to Hungary. But the country's backsliding to an authoritarian state, the re-emergence of right-wing 'national identity,' the development of illiberalism as an alternative ideology, the populist appeal to voters, and the inability of transnational institutions to halt domestic democratic decline also pose challenges to the European Union and beyond. Orbán's regime is often described as 'populist' or 'illiberal.' But reference to the 'pure people' distinguishing them from the 'corrupt elite'

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3 <https://freedomhouse.org/report/nations-transit/2020/dropping-democratic-facade>.

4 <https://www.v-dem.net/media/filer_public/de/39/de39af54-0bc5-4421-89ae-fb20dcc53dba/democracy_report.pdf>.

5 <https://worldjusticeproject.org/rule-of-law-index/global/2024/Hungary/>.

is rethoric by a nationalist elite, which is much more corrupt than its predecessor has ever been, and 'illiberalism' covers antidemocrats, whose ideas are authoritarian to their core. Therefore, instead of using the unhelpful concepts of populism or illiberalism to characterize the current Hungarian regime, it is better to call it by its name: autocracy. In this authoritarian system, the institutions of a constitutional state (such as the Constitutional Court, ombudsman, and judicial or media councils) still exist, but their power is very limited. Furthermore, while, as in many autocratic regimes, fundamental rights are listed in the constitution, the institutional guarantees of these rights are endangered through the lack of an independent judiciary and Constitutional Court.

In other words, although Hungary became a liberal democracy on an institutional level after 1989, the consolidation of the system on a behavioral level was always very fragile. If one considers liberalism as not merely a limit on the public power of the majority, but also as a concept that encompasses the constitutive precondition of democracy — the rule of law, checks and balances, and guaranteed fundamental rights — then Hungary is not a liberal democracy anymore. Ever since the victory of the current governing party, almost all public power has been in the hands of the representatives of one party.

In this paper I raise the question of whether whether after almost one and a half decade of unsuccessful use of traditional EU mechanisms, such as infringement actions, or even Article 7 to force an autocratizing member state, it is time for the EU to use values conditionality. Here I'll investigate the origins and successes of two such new tools: the Rule of Law Conditionality Mechamism and the use of the Charter of Fundamental Rights for the same purposes.

II. The Rule of Law Conditionality Mechanism

During the EU's long and mostly unsuccessful struggle to bring Viktor Orbán's government into compliance since he came to power in 2010, occasionally the European Commission has put on hold some EU funding to Hungary. This happened in 2013 after the Hungarian Parliament enacted the Fourth Amendment to the new Fundamental Law, finally dismantling the Constitutional Court and other checks and balances on governmental power. But the official reason for this suspension was not the grave violation of the rule of law, but some alleged irregularities in the way development subsidies had been managed by Budapest.[6]

[6] <https://www.ft.com/content/9b85c228-04f1-11e3-9e71-00144feab7de>.

Real financial sanctions were proposed against Hungary (and Poland) in mid-August 2016 by two German members of the European Parliament. Ingeborg Grässle, a Christian-Democrat MEP and the head of the Parliament's committee on budgetary control suggested: "There needs to be stronger rules for the disbursement of funds…Countries that don't respect EU laws, or countries that don't participate enough in the resettlement of migrants or the registration of refugees, should be deprived of funds." Vice president of the Parliament, the Liberal Alexander Graf Lambsdorff, singled out Poland and Hungary as net recipients of EU funds that have been flouting EU values by saying: "The federal government must ensure, when the EU budget is reviewed this fall, that EU countries that are net recipients, such as Poland and Hungary, show more solidarity in [on] the issue of refugees and also respect European values."[7] Similarly, then-Austrian Chancellor, Christian Kern said that "If countries continue to duck away from resolving the issue of migration, they will no longer be able to receive net payments of billions from Brussels," arguing that "solidarity is not a one-way street."[8] Also, French presidential candidate Emmanuel Macron stated that "You cannot have a European Union which argues over every single decimal place on the issue of budgets with each country, and which, when you have an EU member which acts like Poland or Hungary on issues linked to universities and learning, or refugees, or fundamental values, decides to do nothing."[9] Vivian Reding, member of the European Parliament and former EU commissioner for justice and fundamental rights declared: "This would be the most effective way to influence the behavior of a government like the Pol-

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7 <http://www.welt.de/politik/ausland/article157586134/Deutschland-ist-Zahlmeister-in-Europa.html>. Hungary has received enormous EU cohesion funds sums during the period Orbán has been in power. The country has received as much as 6-7% of its GDP as inflows from the various cohesion and structural funds of the Union since 2010. This has generated an average GDP growth of around 3%, which according to a KPMG study commissioned by the government, would have been zero without the EU transfers. This means that without the cohesion and structural fund transfers, Hungary would have no autonomous economic growth. See Zoltán Pogátsa, 'The Political Economy of Illiberal Democracy', Social Europe (20 November 2017). That is why it is nothing but political propaganda when Viktor Orbán claims that Hungary does not need EU money. See his interview in the Hungarian Public Radio on 22 December 2017. <http://hvg.hu/gazdasag/20171222_orban_magyarorszag_nincs_raszorulva_senkinek_a_penzere>.

8 'Austria calls for less money for EU states opposing refugee distribution', Deutsche Welle, 8 March 2017. <http://www.dw.com/en/austria-calls-for-less-money-for-eu-states-opposing-refugee-distribution/a-37848662>.

9 Pierre Bertrand, 'France's Macron wants sanctions on Poland, others, for violating EU principles', Euronews (28 April 2017). <http://www.euronews.com/2017/04/28/france-s-macron-wants-sanctions-on-poland-others-for-violating-eu-principles>.

ish one – making a link with the money. It's the only thing they understand."[10] Gajus Scheltema, then-ambassador of the Netherlands to Hungary, referring to the Hungarian government in an interview, claimed: "The argument over what happens with our money is indeed growing ever fiercer. We can't finance corruption, and we can't keep a corrupt regime alive."[11]

First-hand proof of governmental corruption, also mentioned in the Sargentini report, has been provided by OLAF, the EU's anti-fraud office, following an investigation in Hungary, which found serious irregularities related to street-lighting contracts awarded to a company that had been owned by Orbán's son-in-law, István Tiborcz. OLAF has called on the European Commission to claw back more than €40m of EU funds spent on lighting projects.[12] But since Hungary was among the eight Member States that declined to take part in the EU prosecution service, which was created in 2017, the criminal investigation of the matters depends on the Hungarian prosecutor̀s office, led by Fidesz loyalists. Hence, one obvious measure would be to oblige Hungary to join the EU prosecutor service if it wants to continue to receive EU funds.

In 2017 the European Parliament linked the monitoring of EU funds in Hungary with the government's disrespect of EU values and policies, for instance on migration and refugees. After a debate on Hungary at the plenary session on 26 April 2017, the Parliament stated in a resolution that "recent developments in Hungary have led to a serious deterioration in the rule of law, democracy and fundamental rights, which is testing the EU's ability to defend its founding values".[13] Therefore, the resolution calls for: "a) the launching of Article 7(1). MEPs instruct the LIBE Committee to draw up a formal resolution for a plenary vote, b) the Hungarian Government to repeal laws tightening rules against asylum-

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10 Jonathan Stearns, 'Europe's Eastern Rebels Expose Next Fault Line for EU Leaders', Bloomberg (30 July 2017). <https://www.bloomberg.com/news/articles/2017-07-30/europe-s-eastern-rebels-expose-next-fault-line-for-eu-leaders>.

11 <http://hungarianspectrum.org/2017/08/31/ambassador-scheltema-we-mustnt-keep-a-corrupt-regime-alive/>.

12 <https://www.theguardian.com/world/2018/feb/12/orban-allies-could-use-eu-as-cash-register-meps-say>.

13 The resolution was adopted by 393 votes to 221 with 64 abstentions, which means some members of European Peoples Party (EPP), the party goup of Fidesz, the Hungarian governing party, did not vote against the resolution. Manfred Weber, the president of the EPP-group also harshly criticized the Lex CEU. According to its press-release "the EPP wants the CEU to remain open, deadlines suspended and dialogue with the US to begin". The EPP also stressed that "NGOs are an integral part of any healthy democracy, that they represent the civil society and that they must be respected". <http://www.epp.eu/press-releases/prime-minister-orban-to-comply-with-eu-laws-and-epp-values-following-meeting-with-epp-presidency/>.

seekers and non-governmental organizations, and to reach an agreement with US authorities, making it possible for the Central European University to remain in Budapest as a free institution, and finally c) the European Commission to strictly monitor the use of EU funds by the Hungarian Government".[14] The Commission's Reflection Paper on the Future of EU Finances, published on 28 June 2017, states: "Respect for the rule of law is important for European citizens, but also for business initiative, innovation and investment, which will flourish most where the legal and institutional framework adheres fully to the common values of the Union. There is hence a clear relationship between the rule of law and an efficient implementation of the private and public investments supported by the EU budget."[15]

The German Government went even further regarding the latter call of the Parliament by suggesting linking receipts of EU cohesion funds to respect for democratic principles.[16] The proposal was drafted explicitly with the situation in Poland in mind, as it has been allocated a total of €86 billion from various EU cohesion funds for the period 2014-2020 and would, under normal circumstances, expect substantial funds in the next budget cycle as well.[17] Germany, together with Austria and Italy, has also repeatedly argued that spending conditionality should be used to discourage Member States' non-compliance with the EU migration and asylum acquis, in particular with the Council's refugee relocation plan.[18]

Also, Günther Öttinger, the German budget commissioner of the European Commission, said that EU funds could become conditional after 2020, depending on the respect for the rule of law.[19] Similarly, Commissioner Jourová argued

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14 <http://www.europarl.europa.eu/news/en/press-room/20170511IPR74350/fundamental-rights-in-hungary-meps-call-for-triggering-article-7>.

15 Reflection Paper on the Future of EU Finances. European Commission, 28 June 2017, <https://ec.europa.eu/commission/sites/beta-political/files/reflection-paper-eu-finances_en.pdf>.

16 <http://www.politico.eu/article/poland-rule-of-law-europe-germany-berlin-looks-into-freezing-funds-for-eu-rule-breakers/>.

17 See e.g. the data available here: <https://cohesiondata.ec.europa.eu/>. Poland has for instance beenallocated ESIF funding of €86 billion representing an average of €2,265 per person over the period2014-2020. Cited by Laurent Pech and Kim Lane Scheppele, 'Rule of Law Backsliding in the EU: Learning from Past and Present Failures to Prevent Illiberal Regimes from Consolidating within the EU', Cambridge Yearbook of European Legal Studies (2017).

18 'Germany supports cutting EU funds to countries that refuse refugee quotas', *Business Insider*, 15 September 2015; Austria Threatens EU Funding Cuts over Hungary's Hard Line on Refugees!, *The Guardian* (8 March 2017); 'Italy Threatens Hungary: EU Countries Who Reject Migrant Quota Should Have Funding Cut', *Express.co.uk* (12 October 2016).

19 <https://euobserver.com/institutional/138063>.

for such a new conditionality requirement: "We need to ensure that EU funds bring a positive impact and contribute more generally to promoting the EU's fundamental rights and values. That is why I intend to explore the possibility to strengthen the 'fundamental rights and values conditionality' of EU funding to complement the existing legal obligations of Member States to ensure the respect of the Charter when implementing EU funds."[20] In October 2017, Jourová linked again EU funds to rule of law, by saying that "[…] We need to make better use of EU funds for upholding the rule of law. […] In my personal view we should consider creating stronger conditionality between the rule of law and the cohesion funds."[21] On 23 November 2017, Hans Eichel, co-founder and former chairman of G20, former Minister of Finance of Germany, and Pascal Lamy, former European Commissioner, also on behalf of former European Commissioners Franz Fischler and Yannis Peleokrassas sent an open letter to Jean-Claude Juncker, President of the European Commission, asking the European Commission to temporarily suspend payment of all EU funding to Hungary, with the exception of funding provided directly by the Commission, i.e. without the intermediary role of the Hungarian government.[22]

Similarly, a policy paper of the Centre for European reform suggested that for more serious breaches, the Commission could suspend disbursement of funds, and step up monitoring and verification. In doing so, it would have to ensure that the poorer regions and vulnerable groups did not suffer disproportionate harm from measures designed to have an impact on governments that ignore EU values and the rule of law. Funding, the Centre recommends, could be directed away from governments and go directly to enterprises or be disbursed by civil society organizations[23] – if there are still such independent organizations, I would add.

On the other hand, former Commission President Juncker said that net recipients of EU funds may resent being penalized financially for actions that net contributors could carry out with impunity. Therefore, he expressed concerns about tying the rule of law to structural funds, which he claimed could be "poison for the continent", and "divide the European Union."[24] Even after the Commission decided to trigger Article 7 (1) procedure against Poland, which put the

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20 '10 years of the EU Fundamental Rights Agency: a call to action in defence of fundamental rights,democracy and the rule of law', Vienna, 28 February 2017, Speech/17/403.

21 <https://euobserver.com/political/139720>.

22 <http://hungarianspectrum.org/2017/11/28/open-letter-to-jean-claude-juncker/>.

23 Jasna Selih with Ian Bond and Carl Dolan, 'Can EU Funds Promote the Rule of Law in Europe?', Centre for European Reform (November 2017).

24 <http://www.politico.eu/article/juncker-german-plan-to-link-funds-and-rules-would-be-poison/>.

country on a path that could ultimately lead to sanctions, Juncker said that he preferred that the EU and Poland hold "sensible discussions with each other, without moving into threatening gestures."[25]

In mid-February 2018, the European Commission published its Communication on A New, modern Multiannual Financial Framework for a European Union that delivers efficiently on its priorities post-2020 as a contribution to the Informal Leaders' meeting.[26] The Communication points out that "as part of the public debate, it has been suggested that the disbursement of EU budget funds could be linked to the respect for the values set out in Article 2 of the EU Treaty, and in particular, to the state of the rule of law in Member States". At the same time, the German government has circulated a draft white paper to other EU Member States proposing to link cohesion funds to respect for EU solidarity principles.[27] Germany wants more of the EU's next multiannual budget to be tied to respect for core EU policies and values, including the rule of law and migration. This plan would be a big departure from traditional uses of the structural funds, which have had a heavy focus on infrastructure projects as well as education and training for EU nationals. The Polish government attacked the plan, "because it could lead to limitation of member states' rights guarded by the EU Treaty".[28]

The usual argument against such kinds of financial sanctions is that they would punish the people of Hungary (or Poland for that matter), instead of their leaders, pushing them further away from the EU and into the arms of their illiberal governments.[29] Also, academic critics point out that the proposal, if implemented, could undermine the European citizens' union by leaving behind those citizens who have the misfortune to live in a member state with an authoritarian national government.[30] But why not consider the scenario that those regions and citizens taken hostage by their own elected officials, who do

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25 <https://www.politico.eu/article/eu-commission-president-jean-claude-juncker-rejects-cutting-eu-funds-to-poland/amp/?utm_content=buffer9a7fd&utm_medium=social&utm_source=twitter.com&utm_campaign=buffer&__twitter_impression=true>.

26 <http://europa.eu/rapid/press-release_IP-18-745_en.htm>.

27 <https://www.ft.com/content/abb50ada-1664-11e8-9376-4a6390addb44>.

28 <https://www.ft.com/content/d6ef7412-157c-11e8-9376-4a6390addb44>.

29 See this argument by Danuta Hübner, Chair of the European Parliament's Committee on Constitutional Affairs. www.euronews.com/2017/12/29/view-eu-must-not-surrender-to-illiberal-forces. Similarly, former Commissioner László Andor argues that as a consequence of political conditionality, poorer regions would suffer because of their illiberal governments. <http://www.progressiveeconomy.eu/sites/default/files/LA-cohesion-final.pdf>.

30 <http://www.foederalist.eu/2017/05/kein-geld-regelbrecher-politische-bedingungen-eu-strukturfonds-ungarn-polen.html>.

not want to suffer due to the loss of EU funds because of their authoritarian leaders, will be emboldened to stand up against such governments, and vote them out of office, probably even if the election system isn't fair, as is the case in Hungary now. A recent proof that the European Union is still important for the Hungarian voters is the result of a poll conducted right after the European Parliament's vote to trigger Article 7,56% of the respondents answered "yes" when asked if the European Parliament's decision on the Sargentini report was fair, and just 24% responded "no." Some 53% of the respondents said the negative vote was only about the Hungarian government, while more than 12% saw it as being about the whole country, and 16% thought it was about both.[31]

Outside the scope of an Article 7 procedure, Prime Minister Orbán claims that linking EU funds to political conditions goes against the EU treaties.[32] But one can argue that the Common Provision Regulation[33] that regulates the European Structural and Investment Funds (which combines five funds, including the Cohesion Fund) requires governments to respect the rule of law as a condition for receiving money.[34] Article 6 of the Regulation requires governments to ensure that funds are spent in accordance with EU and national law. The provision reads: "Operations supported by the ESI Funds shall comply with applicable Union law and the national law relating to its application." Some scholars argue that the Regulation should expressly specify the rule of law as forming part of "applicable Union law".[35] Of course the Regulation can relatively easily be amended, but I do not think that it is even necessary to acknowledge that the rule of law, as part of Article 2 TEU, is applicable primary Union law. In my view, if a member state does meet these requirements, it does not fulfill the legal conditions of the funds and consequently cannot get them. Independent courts can be considered as essential institutions conditions, and one could certainly raise the question of whether the captured courts in Hungary (or

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31 <https://www.euronews.com/2018/09/13/exclusive-poll-what-do-hungarians-think-of-the-european-parliament-s-vote-to-trigger-artic>.

32 "The EU is based on treaties, and there is nothing in there that would create this possibility [of linking funds to the rule of law]," Viktor Orbán said in an interview. See <https://berlin-policyjournal.com/trouble-ahead/>.

33 Regulation (EU) No. 1303/2013 of the European Parliament and of the Council of 17 December 2013. <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32013R1303>.

34 See a similar argument Israel Butler, 'To Halt Poland's PiS, Go for the Euros', *LibertiesEU*, August 2, 2017. <https://www.liberties.eu/en/news/to-halt-polands-pis-go-for-euros>.

35 See Michel Waelbroeck and Peter Oliver, 'Enforcing the Rule of Law in the EU: What Can be done about Hungary and Poland?', <https://blogdroiteuropeen.com/2018/02/09/enforcing-the-rule-of-law-in-the-eu-what-can-be-done-about-hungary-and-poland-part-ii-michel-waelbroeck-and-peter-oliver/>.

again in Poland for that matter) qualify as 'courts' under Article 19 TEU.[36] Article 30 of the EU's Financial Regulation (966/2012) states, among other things, that EU "funds shall be used in accordance with the principle of sound financial management, namely in accordance with the principles of economy, efficiency and effectiveness." Also, according to this regulation, "The principle of efficiency concerns the best relationship between resources employed and results achieved." Furthermore, according to Financial Regulations, "The principle of effectiveness concerns the attainment of the specific objectives set and the achievement of the intended results". Finally, according to Article 59 (2) of the Financial Regulation, "When executing tasks relating to the implementation of the budget, Member States shall take all the necessary measures, including legislative, regulatory and administrative measures, to protect the Union's financial interests…"

According to the EU's Regulation on European code of conducts on partnership in the framework of the European Structural and Investment Funds (240/2014), the governments of the member states must closely cooperate with "bodies representing civil society at national, regional and local levels throughout the whole programme cycle consisting of preparation, implementation, monitoring and evaluation." They should also "examine the need to make use of technical assistance in order to support the strengthening of the institutional capacity of partners, in particular as regards small local authorities, economic and social partners and non-governmental organisations, in order to help them so that they can effectively participate in the preparation, implementation, monitoring and evaluation of the programmes."[37]

Finally, in May 2018 the European Commission proposed a new Conditionality Regulation[38] for the Parliament and the Council with the purpose to condition the distribution of EU money on compliance with the rule of law, so that EU money no longer funded national authoritarian governments such as Hungary's. But the law-making process changed the regulation to become much

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36 The judgment of the Grand Chamber of the Court of Justice of the EU from 27 February 2018 in Associação Sindical dos Juízes Portugueses v Tribunal de Contas suggests that the EU principle of judicial independence may be relied upon irrespective of whether the relevant national measure implements EU law. About the innovative nature of the judgment see Michal Ovádek, 'Has the CJEU Reconfigured the EU Constitutional Order?', Verfassungsblog (28 February 2018). <https://verfassungsblog.de/has-the-cjeu-just-reconfigured-the-eu-constitutional-order/>.

37 <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0240&from=EN>.

38 <https://ec.europa.eu/transparency/documents-register/detail?ref=COM(2018)324&lang=EN>.

harder to trigger and more limited in what it can reach. In fact, the term 'rule of law' is not even included in the regulation's current title. This first 'compromise'[39] in September 2020 was a consequence of Germany's effort to protect Fidesz member of the European People's Party's (EPP) fraction in the European Parliament, partly because of the strong economic interests of Germany in Hungary, such as the German car industry. The Hungarian and the Polish governments wanted to get rid of the conditionality regulation altogether and threatened to veto the EU's Multiannual Financial Framework—the next seven-year budget of the Union—and the Recovery plan package, which aimed at healing the damages caused by the COVID-19 pandemic. The threat of veto changed the political mood in the EU; the determined position of the Netherlands, the Nordic countries, and the European Parliament pushed the German presidency to soften its initial conciliatory attitude towards Hungary (and Poland). Thanks to this push, the budgetary conditionality was adopted. Even though it does not explicitly protect the rule of law, it does protect the Union budget in cases when funds have already been misspent.

Although the subject of blackmail through veto has disappeared with the adoption of the Conditionality Regulation, the European Council made another compromise on December 10, 2020 by adopting the EUCO Conclusion,[40] again brokered by the German Presidency with the Hungarian and the Polish government. Even though the Conclusion is non-binding, it certainly has effects, practically suspending the application of the Regulation by allowing Member States to challenge it before the Court of Justice of the European Union. On March 10, 2021 as expected, the Hungarian government (along with its Polish counterpart) challenged the Regulation.[41] This provided the opportunity for the Hungarian 'mafia state' to keep misusing EU funds for the benefit of Orbán's oligarchs and his own family and avoid triggering the Regulation before the 2022 parliamentary elections.

Indeed, although on 16 February 2022 the CJEU dismissed all the claims of the Hungarian (and the Polish) government(s), and in early March also the European Concil also finalised the guideline binding the Commission as to how to apply the Regulation, the Commission only triggered the conditionality mechanism on 27 April 2022, after Fidesz won its fourth consecutive parliamentary election, again with a two-third majority. Surprisingly, on 18 September 2022 the Commission proposed to suspend 65% of three targeted cohesion funds, and also requested the implementation of 17 key measures regarding compli-

39 <https://twitter.com/ProfPech/status/1310854116919463936?s=20>.

40 <https://data.consilium.europa.eu/doc/document/ST-22-2020-INIT/en/pdf>.

41 <https://www.politico.eu/article/hungary-poland-to-brussels-see-you-in-court/>.

ance with important correuption and rule of law requirements. Additionally, Hungary has to meet 10 conditions, partly on judicial independence on order to receive the allocated money under the Recovery Fund (RRF). This meant that the Hungarian government would have lost all recovery money for good should no agreement have been reached with the Commission by the end of 2022 about the implementation of these 27 'super milestones'. On 30 November the Commission assessed that the Hungarian government had not fulfilled its promise to implement the 17 anti-corruption measures, hence it recommended to the Council to suspend 7.5 billion Euros of the country's Cohesion Funds. Although the Hungarian government has not complied with the 10 rule of law requirements, the Commission approved Hungary's Recovery Plan, but proposed to the Council to put a freeze on an additional 5.8 billion Euros from Hungary's 2022 allocation under the RFF, due to the remaining concerns.[42] On 12 December 2022 the Council with a qualified majority blocked 6.3 billion Euros of the three Cohesion Funds to Hungary instead of the 7.5 billion proposed by the Commission, and has approved the RFF money on the condition of satisfying the milestones later.

III. The Use of the Charter of Fundamental Rights

In this part I raise the question, whether the EU Charter of Fundamental Rights in general, and its Article 47 in particular can impose obligations on authorities of Member States, which, as Hungary (and Poland) otherwise are reluctant to guarantee effective judicial protection, the right to effective remedy and to a fair trial. In other words, whether the Charter provision can act as a limit to the national procedural autonomy[43] of Member States, in which this autonomy is misused for the sake of disrespecting judicial independence[44] and the rule of law altogether. Can Article 47 CFREU help where national ordinary and constitutional courts fail to provide effective judicial protection, and are reluctant or unwilling to engage in dialogue with European courts?

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42 Kim Lane Scheppele, R. Daniel Kelemen, John Morijn, *The Good, the Bad and the Ugly: The Commission Proposes Freezing Funds to Hungary*, *VerfBlog*, 2022/12/01, <https://verfassungsblog.de/the-good-the-bad-and-the-ugly-2/>.

43 See Matteo Bonelli, Article 47 of the Charter, Effective Judicial Protection and the (Procedural)Autonomy of the Member States, in Matteo Bonelli,Mariolina Eliantonio and Giulia Gentile (eds.),Article 47 of the EU Charter and Effective Judicial Protection, Volume 1. The Court of Justice's Perspective, (Hart 2022) (hereafter Bonelli, Article 47') 79-96.

44 See Michal Krajewski, The EU Right to an Independent Judge: How Much Consensus Across the EU?, in Bonelli, Article 47' (note 43) 59-78.

First I investigate the original and the changed aim of the Charter's Article 51 to make sure that Member States respect fundamental right. According to the literal, rather restrictive interpretation of Article 51(1) CFR, the Charter does not apply to cases, where Member States do not implement EU law, but act in a purly domestic matter: "[t]he provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law." Article 51(2) further stresses that the "Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties." This means that the Charter is predominantly applicable to EU institutions, and does not want to protect fundamental rights provided by the Member States' constitutions. This interpretation has been confirmed by the current President of the European Court of Justice (ECJ), Koen Lenaerts as well: "[f]rom the fact that the Charter is now legally binding it does not follow that the EU has become a 'human rights organisation' or that the ECJ has become 'a second European Court on Human Rights' (ECtHR)."[45]

This narrow interpretation has firstly been challenged by Advocate General Miguel Maduro in his 2008 opinion in the case Centro Europa. Maduro indicated that a citizen of a Member State, in response to a substantial breach of the rights, laid down in the Charter of Fundamental Rights may invoke against his/her state the protection of the Charter on the basis of European citizenship.[46] After the newly elected government of Viktor Orbán enacted a new media law dismantling freedom of the media in Hungary in 2010, Armin von Bogdandy and his colleagues published the so-called 'reverse Solange' academic proposal.[47] The line of thought advanced in the proposal argues that commitment to protect fundamental rights expressed in Article 2 of the Treaty on European Union may be invoked by any citizen in the court of a member state in opposition to such measures by the given member state that substantially violate fundamental rights. This right, which stems from Union citizenship, is derived by the authors from the practice of the European Court of Justice, especially the Ruiz Zambrano judgment, which stated that any measures by a

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45 Cf. Koen Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights' (2012) 8(3) European Constitutional Law Review, 375, 377.

46 See: Opinion of Advocate General Poiares Maduro, delivered on 12 September 2007, Case C-380/05 Centro Europa 7 Srl v Ministero delle Comunicazioni e Autorità per le Garanzie nelle Comunicazioniand Direzione Generale Autorizzazioni e Concessioni Ministero delle Comunicazioni.

47 A. von Bogdandy, & M. Kottmann & C. Antpöhler & J. Dickschen & S. Hentrei & M. Smrkolj, 'Reverse Solange. Protecting European Media Freedom Against EU Member States' (2012), Common Market Law Review, Volume 49.

member state "[w]hich have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union violate Article 20 of the Treaty on the Functioning of the European Union (TFEU), which creates Union citizenship and its component rights."[48] The Åkerberg Fransson judgment[49] from 2013 also made it clear that the ECJ has moved away from the former literal interpretation by arguing that any material link and potential law-making are sufficient for the application of the Charter, provided that the case comes under the scope of EU law underpinned by certain EU regulation.[50]

Those arguing against the literal interpretation of Article 51 of the Charter, taking into account that a Treaty change is not a viable solution favour the creative reinterpretation of

Article 51(1), which can make the Charter also applicable in purely domestic cases.[51]

The CJEU's jurisprudence of Article 47 CFREU has impacted domestic asylum and migration procedures before Hungarian national authorities. In 2020, the CJEU dealt with a situation of de facto detention of asylum seekers in the transit zone at the border between Hungary and Serbia.[52] Unlike the European Court of Human Rights in an earlier judgment (Judgment of 21 November 2019 in Case No 47287/1 Ilias and Ahmed v Hungary) that the stay of third-country nationals in these transit zones constitutes a deprivation of liberty

48 C-34/09. Ruiz Zambrano, paragraph 42.

49 Case C-617/10 Åkerberg Fransson, ECLI:EU:C:2013:105, judgement of 26 February 2013.

50 In the case Sándor Nagy and others,[50] decided in the same year the ECJ found the case to be inadmissible. The case concerned the Hungarian law, which permitted the dismissal of civil servants without justification. Despite the fact that this was clearly irreconcilable with Article 30 of the Charter, which provides that "[e]very worker has the right to protection against unjustified dismissal, in accordance with Union law and national laws and practices", the ECJ found that the impugned legislation was not part of Hungary's implementing EU law, and thus, Article 51 precluded the application of the Charter.

51 András Jakab, 'The EU Charter of Fundamental Rights as the Most Promising Way of Enforcing the Rule of Law against EU Member States', in C. Closa and D. Kochenov (eds.), Reinforcing Rule of Law Oversight in the European Union CUP 2016). Also more recently A. Jakab and L. Kirchmair, Two Ways of Completing the European undamental Rights Union: Amendment to vs. Reinterpretation of Article 51 of the EU Charter of Fundamental Rights, Cambridge Yearbook of European Studies (2022) 1-23.

52 See Marcelle Reneman, No Turning Back? The Empowerment of National Asylum and MigrationCourts under Article 47 of the Charter, in Matteo Bonelli Mariolina Eliantonio and Giulia Gentile (eds.), Article 47 of the EU Charter and Effective Judicial Protection, Volume 1. The Court of Justice's Perspective, (Hart 2022) 137-154, at 141-142.

(FMS and others, para 231; See also Case C-808/18 Commission v Hungary EU:C:2020:1029). Moreover, the CJEU also stated that national legislation, which does not guarantee any judicial review of the lawfulness of an administrative decision ordering the detention of an asylum seeker or an illegally resident third-country national not only constitutes an infringement of Articles 9(3) Reception Conditions Directive and 15(2) Return Directive but also undermines the essential content of the right to effective judicial protection, guaranteed in Article 47 of the Charter. As a consequence of the CJEU judgments the Hungarian Parliament hasn't been amended the legislation, and the authorities continue to implement the law and summarily remove asylum seekers to Serbia, denying them the opportunity to apply for asylum in Hungary.[53] However, in February 2021, the Minister of Justice asked the Constitutional Court to rule that the judgment could not be enforced as its implementation would breach Hungary's constitutional identity. Although the Constitutional Court refrained from expressly taking a stance on the implementation question in its 10 December 2021 decision, it offered a lifeline for the government by ruling that when the "fundamental right to self-determination stemming from one's traditional social environment" is violated, Hungary should have the right to temporarily not apply EU law.[54] On 12 November, the Commission referred Hungary to the CJEU over its failure to comply with Court judgment.[55]

All in all, while Article 47 CFREU played a limited role in guaranteeing effective judicial protection, but as we could see with an even more reduced impact in backsliding Member States, such as Hungary (or Poland for that matter).

Suddenly on 22 December 2022 the EU Commission announced that all money, around 22 billion Euros from the Cohesion Fund will not be paid to Hungary, because of its violations of the EU Charter of Fundamental Rights.[56] The violations concerned Hungary's discriminatory laws that affect the judicial system, rights of LGBT persons, academic freedoms and the rights of refugees. The EU Commission sees this as a violation of the Common Provisions Regulation. The

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53 COMMUNICATION In accordance with Rule 9.2. of the Rules of the Committee of Ministers regarding the supervision of the execution of judgments and of terms of friendly settlements by the Hungarian Helsinki Committee.

54 For a detailed discussion of the judgment see: Zsolt Szekeres, Don't be fooled: Hungarian court ruling didn't allow pushbacks, <https://www.euronews.com/2021/12/16/don-t-be-fooled-hungarian-court-ruling-didn-t-allow-pushbacks-view>.

55 <https://ec.europa.eu/commission/presscorner/detail/EN/IP_21_5801>.

56 The EU Commission's communication can be found at the following link: <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7801>.

procedure is independent of the 6.3 billion already frozen ten days earlier under the rule of law mechanism to be discussed next in this paper.

IV. Counterarguments to Value Conditionality

Not everyone in the European constitutional law literature agrees with the desirability of the EU rule of law conditionality measures. In his contribution to a debate at the Rule of Law in the EU, Armin von Bogdandy counseled caution[57]. He argues that although the Treaty on European Union may have included legally operative fundamental principles that are the 'true foundations of the common European house,' but enforcing these principles strictly could bring the house down. Von Bogdandy darkly recalls Carl Schmitt's warning about a 'tyranny of values' which, he reminds us, is 'a defense of values which destroys the very values it aims to protect.'

As von Bogdandy argues, there are important values on the other side. Under Article 4(2) TEU, the EU must respect domestic democracy and constitutional identity – and this commitment requires the EU to tolerate normative pluralism. Moreover, the EU has always stood for peace, and attempting to enforce a common set of values too strongly at a delicate moment may lead to explosive conflict. While von Bogdandy recognizes that the EU cannot exist without a common foundation of values and he acknowledges that Article 7 TEU is a cumbersome mechanism for enforcement of those values that requires supplementation, the thought of the EU pressing a Member State to conform to EU values when it is determined to head in a different direction nonetheless makes him queasy.

As we argued in a response co-authored by Kim Lane Scheppele[58], von Bogdandy's arguments are wise in normal times. But we no longer live in normal times. The current governments of at least two Member States, Hungary and Poland, are engaged in normative freelancing with the explicit aim of making future democratic rotation impossible, so the self-correction mechanisms on which previous 'normal times' have relied will no longer work.

Take Hungary, which is no longer a democratic state because its citizens can no longer change the government when they so desire. In 2010, Prime Min-

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57 A. von Bogdandy, Fundamentals on Defending European Values, verfassungsblog, 12 November, 2019. <https://verfassungsblog.de/fundamentals-on-defending-european-values/>.

58 K.L. Scheppele and G. Halmai, The Tyranny of Values or the Tyranny of One-Party State, verfassungsblog, 25 November, 2019. <https://verfassungsblog.de/the-tyranny-of-values-or-the-tyranny-of-one-party-states/>.

ister Viktor Orbán's Fidesz party came to power with an absolute majority of the votes in a free and fair election, but due to the inherited disproportionate election system, the 53% of the vote gained by Fidesz turned into 67% of the parliamentary seats. Under the Hungarian constitution that Orbán also inherited, a single two-thirds vote in the unicameral parliament could change the constitution as well as the so-called 'two-thirds laws' that governed important aspects of Hungary's basic governmental structure and human rights. Orbán's constitutional majority allowed him to govern without legal constraint, and he won this constitutional majority again in 2014 and 2018. But Orbán has won such overwhelming victories through election law tricks. In December 2011, the Parliament enacted a controversial election law that gerrymandered all-new electoral districts. In 2013, another new election law made the electoral system even more disproportionate, by increasing the proportion of single-member constituency mandates and eliminating the second round run-off in these constituencies so that the seats could be won by much less than a majority vote. The law also introduced 'winner-compensation,' which favored the governing party in the tallying of party list votes and managed to suppress the vote of ex-pats who had left under pressures from Orbán's tightening control while allowing in the votes of new citizens in the neighboring states who backed Orbán. With this rigged electoral system Fidesz was able to renew its two-thirds majority both in 2014 and 2018 with less than a majority of the popular vote.

The OSCE election observers were very critical of both the 2014 and 2018 elections, noting that "overlap between state and ruling party resources," as well as opaque campaign finance, media bias, and "intimidating and xenophobic rhetoric" also hampered voters' ability to make informed choices[59].

Beyond rigging the electoral law, Fidesz made the playing field even more uneven by dismantling independent media and threatening civil society, as well as opposition parties As Steven Levitsky and Lucan Way have argued: "Clearly, Hungary is not a democracy… Orbán's Hungary is a prime example of a competitive autocracy with an uneven playing field."[60]

Rousseau may have inspired Carl Schmitt's concept of democracy, but the mysterious 'general will' is now used by autocratic nationalists like Viktor Orbán to build an 'illiberal democracy' that he claims Hungarians support. Illiberalism is highly critical towards all democratic values, including those currently enshired in Article 2 TEU as well as in Article 4(2) TEU. Orbán's isn't merely il-

59 <https://www.osce.org/odihr/elections/hungary>.

60 <https://www.washingtonpost.com/news/monkey-cage/wp/2019/01/04/how-do-you-know-when-a-democracy-has-slipped-over-into-autocracy/>.

liberal in not respecting human dignity, minorities' and individual's rights, the rule of law and separation of powers, but he isn't democratic either, because the outcome of the elections are foreordained.

Orbán's Hungary isn't only a 'pseudo-democracy', but it also abuses the concept of national identity protected in Article 4(2) TEU. From the very beginning, the government of Viktor Orbán has justified non-compliance with the values enshrined in Article 2 TEU by referring to national sovereignty. Nowhere has this been clearer than when the government refused to accept refugees in the giant migration of 2015, and also refused to cooperate with the European relocation plan for refugees after that. After a failed referendum in which the Hungarian public refused to support the Orbán government in sufficient numbers as it sought a public rubber-stamp for its rejection of refugees, the packed Constitutional Court came to the rescue of Hungary's policies on migration by asserting that they were part of the country's constitutional identity.

The Constitutional Court in its decision held that 'the constitutional self-identity of Hungary is a fundamental value not created by the Fundamental Law – it is merely acknowledged by the Fundamental Law, consequently constitutional identity cannot be waived by way of an international treaty'.[61] Therefore, the Court argued, "the protection of the constitutional identity shall remain the duty of the Constitutional Court as long as Hungary is a sovereign State".[62] This abuse of constitutional identity was aimed at rejecting the joint European solution to the refugee crisis and clearly flouted common European values, such as solidarity.

V. Conclusion

This paper tried to prove that the rule of law backsliding in Hungary happens in a non-democratic system with authoritarian tendencies. The last almost fifteen years of this development have shown that EU's the traditional mechanism of the infringement procedure did not work, and neither the triggered Article 7 procedure.

I think that to keep the vision of Europe as a value community, makes it inevitable to enforce the joint values of the rule of law, democracy and funda-

[61] Decision 22/2016 AB of the Constitutional Court of Hungary, para [68]. For a detailed analysis of the decision, see Gábor Halmai, Abuse of Constitutional Identity. The Hungarian Constitutional Court on Interpretation of Article E) (2) of the Fundamental Law, 43 Review of Central and East European Law (2018) 23-42.

[62] Ibid.

mental rights in every Member States. For this reason, the more consequent use of certain traditional tools, such as infringement procedures also for the breach of values enshrined in Article 2 TEU, or even triggering Article 7 for that matter are important, because if democracy is hijacked, courts are captured, rights are threatened and the EU is disrespected by a Member State government, the sincere cooperation guaranteed in Article 4(3) cannot be guaranteed. But at the same time, new means of value conditionality discussed here should also be activated, such as cutting funds for member states that do not comply with certain basic institutional requirements of the rule of law. Unfortunately, the newly introduced economic conditionality mechanism has still not changed the authoritarian regime in Hungary, but this and the use of the Charter of Fundamental Rights of the EU seem to provide the only way for the discontinuation of the previous unprincipled protection of Hungary's autocratic government and the start of serious enforcement of the values of democracy, the rule of law, and fundamental rights that makes up the EU's ideological foundation. The consequential use of value conditionality is also the EU's interest, because otherwise it is doomed to fail as a value community, and may fall apart altogether as a result. But this isn't only in the EU's interest, but also that of Hungary, where also due to the worsening economic situation partly caused by the EU sanctions sooner or later the population may realize the disadvantages of the use of the value conditionality for their own country.

The European Commission's "Enlargement Package 2023" proposed opening accession negotiations with Ukraine, Moldova, and Bosnia and Herzegovina while granting candidate status to Georgia, bringing the total to seven candidate states and two potential candidates. Ensuring compliance with the Copenhagen criteria remains a key challenge, alongside necessary institutional reforms, particularly regarding EU decision-making and unanimity rules. In migration policy, the adoption of the "New Pact on Migration and Asylum" in December 2023 marked a major step toward a unified approach. Based on solidarity, shared responsibility, and human rights, it aims to improve long-term migration management, though implementation remains a challenge. Meanwhile, the EU continues to navigate its digital and green transitions. A milestone in 2023 was the adoption of the world's first legal framework for AI regulation, reflecting the EU's ambition to set global standards, though its impact on the digital economy remains uncertain. This publication explores these key developments, highlighting the interplay between policy-making and societal engagement in a shifting geopolitical landscape. It features contributions from Fatlum Ademi, Jelena Ceranic Perisic, Viorel Cibotaru, Iris Goldner Lang, Christos V. Gortsos, Gabor Halmai, Dorian Jano, Andreas Kellerhals, Maroje Lang, Lee McGowan, Roman Petrov, Clara Portela, and Juan Santos Vara.

Network Europe was founded in 2003 by the Europa Institute at the University of Zurich with support from the Swiss government. It serves as a forum for scholarly exchange on legal and political aspects of European integration, bringing together researchers from across Europe.

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