12TH
NETWORK EUROPE
CONFERENCE

Current Challenges of European Integration

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NICOSIA / CYPRUS
9–10 NOVEMBER
2020

EuropaInstitut

AN DER UNIVERSITÄT ZÜRICH

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

Publisher:
Andreas Kellerhals, Tobias Baumgartner

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12th Network Europe Conference, 9 – 10 November 2020

EIZ Publishing

Editors: Andreas Kellerhals, Tobias Baumgartner – Europa Institut an der Universität Zürich
Publisher: EIZ Publishing (https://eizpublishing.ch)
Layout & Production: buch & netz (https://buchundnetz.com)
Cover: buch & netz
ISBN:
978-3-03805-406-1 (Print – Softcover)
978-3-03805-440-5 (PDF)
978-3-03805-441-2 (ePub)
DOI: https://doi.org/10.36862/eiz-406
Version: 1.01-20210819

This work is available in print and various digital formats. Additional information is available at https://eizpublishing.ch/publikationen/current-challenges-of-european-integration/.

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Preface

Crises are not a new phenomenon in the context of European integration. Additional integration steps could often only be achieved under the pressure of crises. As early as the 1970s, for example, there were talks of "Eurosclerosis" before Jacques Delors brought new dynamics to the European project with his proposal for a single European market. At present, however, the EU is characterised by multiple crises, so that the integration process as a whole is sometimes being questioned:

In 2015, the crisis in the eurozone had escalated to such an extent that for the first time a member state was threatened to leave the eurozone – and could barely be averted. This does not alter the fact that the common monetary union is a half-finished integration project; among the member staates there is disagreement on the further development of the euro zone. Furthermore, the massive influx of refugees into the EU has revealed the shortcomings of the Schengen area and the common asylum policy. Finally, with the majority vote of the British in the referendum of 23 June 2016 in favour of the Brexit, the withdrawal of a member state became a reality for the first time.

Even in the words of the European Commission, the EU has reached a crossroads. Against this background, the Commission published a White Paper on the Future of Europe in March 2017. The White Paper explored how the EU might change over the next years, taking into account the impact of new technologies on society and employment to concerns about globalisation, security issues and growing populism. At the same time, the EU's external relations with neighbouring countries in the East are subject to broad consultation processes to reflect on the future strategic direction. In particular, the crisis in Ukraine, which started in 2014, has raised doubts about the efficiency of the European Neighbourhood Policy of the last years.

The twelfth *Network Europe* conference included talks on the numerous challenges and future integration scenarios in Europe.

Zurich, July 2021

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European Integration: Historical Landmarks, Status and Future Options

Peter Christian Müller-Graff

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"European integration – historical landmarks, status and future options" is the topic of this introductory lecture assigned to me by the organisers of the 12th Network Europe Conference on "Current Challenges of European Integration".[1] Before addressing challenges the organisers have very wisely planned for cre-

[1] The text is based on the *author's* introductory lecture in the virtual 12th Network Europe Conference "Current Challenges of European Integration" on 9 November 2020. The style of speech is retained.

ating an awareness of the historical landmarks which I understand as being the structural achievements to which the status of current challenges and future options can be related.

European integration in its peak form of the European Union is a novel organism in the stream of international relations and human history. It is still a short section in the flow of time, yet the success period of our life time – beginning nearly 70 years ago with the establishment of the European Community for Coal and Steel in 1951/52 as a unique turning point in Europe's history. Why that? And what other structural achievements characterise its course until today, in which its current status and future options fit in? These are three questions to be looked at in closer detail.

I. Structural Landmark Achievements of European Integration

Beyond any doubt many events could be historically emphasized as structural landmark achievements in seven decades depending upon the professional perspective. Political examples would be the sequence of new Treaties for continuously enlarging and deepening the European Communities and later the European Union (regardless of the wavering attitude of the United Kingdom), the steps of cutting back the unanimity principle in its Council, the introduction of direct elections to the European Parliament, the stations of strengthening its powers and the creation of the status of citizenship of the Union which contains even rights of partial participation in public tasks of other Member States.[2] Economic examples include the establishment of the internal market and the common currency with its continuous welfare benefits and emerging power position in international trade. Legal examples include the many groundbreaking decisions of the Court of Justice for the rise and flourishing of a new communitarian type of transnational law, the enactment of the Charter of Fundamental Rights and the gradual triggering of the "Brussels effect" for international standard setting.[3] Sociological examples include the realisation of the prohibition of discrimination on grounds of nationality and the factual emergence of multifold transnational human connections[4] and tolerance within the European Union. Taking a more conceptual and systematic view of the legally achieved integration I suggest that in

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2 See today Art. 22 TFEU. A prominent example is the incumbent Danish Lord Mayor of the city of Rostock *Claus Ruhe Madsen*.

3 Müller-Graff (2018), 185 et seqq.; Bradford.

4 See as a writer's observation Enzensberger, 67; seen from a legal perspective Müller-Graff (2000), 280 et seqq.

particular five structural steps deserve to be mentioned: legally based political cohesion (1.), economic cohesion (2.), common global assertion (3.), civil and social cohesion (4.), and value cohesion (5.).

1. Legally Based Political Cohesion

The very first landmark was the voluntarily agreed cut back of national sovereignty in a defined and limited area as an instrument for peace – hence a break with the traditional method of peace treaties which only balanced power sovereignties for a short time. The lasting cut back was the core idea of the European Coal and Steel Community – more precisely the realization of Jean Monnet's idea of the voluntary subordination of these two economic sectors of six West European countries, in particular of France and Germany, to a supranational High Authority,[5] and by that, however limited, the beginning of a law-based institutionalized political cohesion.

2. Economic Cohesion

The second structural landmark was the realization of the idea of an overall common area of welfare (hence: of economic cohesion) as realized by the Treaty establishing the European Economic Community in 1958 in the form of the ingenious concept of a common market – not by traditional trade agreements, but by legally establishing an area in which the autonomous process of the free and competitive movement of goods, persons, services and capital is guaranteed[6]. This process is driven by the potentially millions of autonomous initiatives and preferences of private actors[7] and is protected by a common commercial policy towards the wider world.[8] This common welfare idea – called "internal market" since the Single European Act[9] – expanded *geographically* from originally six founding states to twenty-eight member states in 2013 – thereby overcoming Europe's East-West division imposed by external powers after World War II and triggering enormous economic, legal and political transformations in all East Central European states, which successively led to their membership in the Union.[10] The common welfare idea in its legally supranational content also expanded from the basic concept of the Common

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5 Monnet, 373 et seqq.

6 Today Art. 26 para. 2 TFEU.

7 Müller-Graff (1987), 26 et seqq.; Müller-Graff (2000), 280 et seq.; Müller-Graff (2001), 133 et seq.; Müller-Graff (2013), 434 et seqq.

8 Today Art. 206 TFEU et seq.

9 Ehlermann, 361 et seqq.; Müller-Graff (1989), 122 et seq.

10 Maresceau; Müller-Graff (1997).

Market to flanking areas (such as environmental protection,[11] economic, social and territorial cohesion[12] and Trans-European networks[13]) and in particular to the establishment of the Schengen Area (today the so called Area of Freedom, Security and Justice[14]) and to the Economic and Monetary Union with the single currency[15] and – later – the ESM as an solidaric auxiliary device for Euro-states.[16]

3. Common Global Assertation

The third structural landmark was realized in 1970. Although outside the supranational European Communities, it was realized by its members. This is the idea of institutionalized common global assertion, established as an intergovernmental mechanism for foreign policy coordination under the heading "European Political Co-operation".[17] Later, in 1986, it was formally linked to the Communities by the Single European Act. It became part of the Union of Maastricht as its third pillar in 1993 and is nowadays an intergovernmental part of the Union of Lisbon.[18]

4. Civil and Social Cohesion

The fourth structural achievement in European integration can be described as the citizen's status connection to the Union – with the intention of promoting civil and social cohesion even beyond the autonomous individual transnational market access initiatives and ramifications.[19] It took place in several phases. In 1979, for the first time, the members of the European Parliament were directly elected.[20] Since 1985 the border controls of persons between Member States were gradually removed[21] and in 1992/1993 the status of the citizenship of the Union was created.[22] It comprises the rights to move and reside freely, work and provide services within the territory of the Member States, to receive certain social benefits (howsoever conditioned), to vote and

11 Today Art. 191 TFEU et seqq.
12 Today Art. 174 TFEU et seqq.
13 Today Art. 170 TFEU et seqq.
14 Art. 67 TFEU et seqq.
15 Art. 127 TFEU et seqq.
16 Häde, 891 et seqq.
17 Smith, 67 et seqq.
18 Art. 23 TEU et seqq.
19 See above FN. 7.
20 Müller-Graff (1979).
21 Taschner.
22 Schönberger; Wollenschläger, 434 et seqq.

stand as a candidate in municipal elections and in elections to the European Parliament in the Member State in which the citizen resides – regardless of his nationality – and to enjoy diplomatic and consular protection in the territory of a third country in which "his" State is not represented, by any other Member State.

5. Value Cohesion

Eventually, the fifth structural landmark to be worth highlighting seems to be the gradually evolving awareness and normative fixation of the Union's values with the perspective of value cohesion. Although their gist was present from the very beginning of the diverse projects for European integration after World War II[23] and then, in particular, in the Communities, values became programmatically part in the preamble of the Single European Act (1987) and in particular in the preamble of the Maastricht Treaty (1992) after the collapse of the Soviet Union as "the principles of liberty, democracy and respect for fundamental freedoms and of the rule of law". They were elevated into the rank of "values" on which the Union is founded and which are common to the Member States by the Constitutional Treaty as drafted by the European Convention[24] which sharpened the self-image of the Union in 2003; they were legally put into force as Article 2 TEU by the Lisbon Treaty in 2009 and at the same time were declared as one of the three main objectives to be promoted by the Union (Art. 3 TEU). Also, the Charter of Fundamental Rights entered into force as primary Union law at that date.

II. The Status of European Integration

The question of the status of European integration addresses the issue of current challenges to the Union's integration concept. One can distinguish a fundamental challenge (1.) and multiple single cohesion challenges (II).

1. The Fundamental Challenge

The fundamental challenge to the supranational concept of integration is posed by tendencies of relapse into untamed national sovereignty thinking which directly negates the legally based political cohesion concept. The surge of the ideas of national self-reliance and national self-isolation is well-known.

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23 See in particular: The Congress of Europe in The Hague (7 to 10 May 1948) which eventually led to the establishment of the Council of Europe; Clemens/Reinfeldt/Wille, 87 et seqq.

24 Müller-Graff (2004), 29 et seqq.

The underlying music of Britain's withdrawal from the European Union and, by that, the jurisdiction of the Court of Justice of the European Union marks the peak of a national rejection of the described concept of a lasting cutback of national sovereignty in Europe.

It should be remembered that the concept of cutting back national sovereignty was born from the bleak experiences of centuries of wars and mutual destructions of the many sovereign states and territories within Europe's small geography, born from the insight of the loss of power of all European states on the international scene and born from the threat to their self-determination by foreign powers. Countering that miserable situation Jean Monnet's concept was not only aimed at treating casual symptoms, but also at Europe's structural healing.[25] It does not imply the abandonment of national statehood in Europe, but the ingenious, ostensibly paradoxical idea of cutting back national sovereignties in order to uphold national sovereignties by means of common sovereignty.

Is this concept outdated, as some like to claim? The answer is a clear "no". Any reasonable analysis of the powerstriving nature and aggressive potential of humans as well as the geopolitical context at present will lead to the conclusion that the concept of lawbased institutionalized political cohesion is without a meaningful alternative for realizing the Union's tripartite lead objective enshrined in Article 3 TEU. These objectives include promoting peace, its values and the well-being of its peoples.[26] The permanent firm block reaction of the 27 Union states to Britain's insular withdrawal[27] is the best proof for this assumption.

2. Multiple Single Cohesion Challenges

Beyond this currently banned fundamental challenge multiple single cohesion challenges mark the status of European integration: challenges for the economic, civil and value cohesion and the common global assertion.

a) Current Challenges to Economic Cohesion

A current challenge to the idea of a common area of welfare exists in the possible amplification of economic asymmetric developments of the Member States caused by the present COVID-19 pandemic. But already before this plague the dangers of different competitiveness and budgetary policies in the

25 Monnet, 373.

26 Müller-Graff (2017), Art. 3 EUV.

27 Müller-Graff (2019), 195 et seq.

Member States were known. Coping with them, a system of different instruments is used – with different success rates – such as the coordination of economic policies (Art. 120 TFEU), the promotion of the regional competitiveness by means of the cohesion policy (Art. 174 TFEU) and the Structural Funds (Art. 175 TFEU) as well as the promotion of sound public finances (Art. 119 par. 3, 123, 125, 126 TFEU). However perhaps potentially this is weakened by the Public Sector Purchase Programme ("PSPP") of the ECB[28] and potentially also by its current Pandemic Emergency Purchase Programme ("PEPP"). However, the economic fallout of the pandemic can potentially reinforce disparities between the national economies with unclear ramifications into national political assessments of European integration.

b) Current Challenge to Civil Cohesion

The process of civil cohesion is also under pressure from the pandemic. As a consequence of the various travel restrictions imposed by Member States with a view of preventing infections[29] the transnational movement of persons and encounters in person within the Union have drastically dwindled. Only if the pandemic is a temporary condition will this transnational distancing end.

c) Current Challenges to Value Cohesion

Independent from the pandemic-caused problems the concept of value cohesion is challenged by the continuous political attacks on the role and independence of the courts in some transformation Member States (among them the biggest one).[30] This threat must not be underestimated, since the authority of law (and, by that, the community of law – Walter Hallstein[31] – and the rule of law[32]) is one of the fundamental pillars on which the Union and many ele-

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28 See German Federal Constitutional Court in its "PSPP"-judgment of 5 May 2020, note 137.

29 See, e.g., European Commission, Communication from the Commission of 8 April 2020 to the European Parliament, the European Council and the Council on the assessment of the application of the temporary restriction of non-essential travel to the EU, COM(2020) 148 final; European Parliament resolution of 19 June 2020 on the situation in the Schengen area following the Covid-19 outbreak (2020/2640(RSP)); Council Recommendation (EU) 2020/912 of 30 June 2020 on the temporary restriction of non-essential travel into the EU and the possible lifting of such restriction, OJ LI 2020 of 1 July 2020, 1 et seqq.

30 See as an example CJEU, Decision of 24 June 2019 in Case C-619/18, ECLI:EU:2019:531 - Commission/Poland.

31 Hallstein, 51; Müller-Graff (2020), 39 et seqq.

32 Müller-Graff (2018a), 30 et seqq.

ments of its dimensions of cohesion are founded. It implies, as it is explicitly and rightly stated in Art. 2 TEU, that the rule of law is common to all Member States.

d) Current Challenges to Common Global Assertion

A fourth challenge is directed towards the concept of common global assertion. This is not a new problem, but has gained a new quality in recent years. It is not so much driven by the international self-positioning of single Member States in specific issues (such as, e.g., in 2003 the UK's support of the US-invasion of Iraq). Nowadays the Union is confronted with targeted attempts from outside actors at dividing the Member States: strategically by China's "One Road, One Belt" policy, erratically (until now) by the US-Trump administration and occasionally by Russia. While the misled approach of the US might be over with the Trump-presidency and while Russia's opportunities for making troubles may be limited, China's challenge is persistent. Its strategy has already brought East Central European members as well as Italy and Greece into respective agreements and triggered the warning of France's President to be less naïve and more united. It has even led to his request to China to respect the integrity of the Union.[33] This observation directly leads to the third and last question.

III. The Options of European Integration

Pondering options in European integration implies the task of assessing the persuasiveness of the basic concept of European integration for the medium-term future and, if affirmed, identifying tasks – imminent and permanent – for realizing it. The persuasiveness has been addressed already. In short: there seems to be no meaningful alternative to the basic concept. However, on this basis options and tasks for its development have to be identified. I submit three areas: internal cohesion (1.), external self-assertion (2.), and planetary responsibility (3.).

1. Internal Cohesion

Internal Cohesion of 27 different states, of even more cultures and of nearly half a billion individuals is a gigantic permanent task with constantly new

[33] See "Emmanuel Macron fordert Respekt vor 'Einheit der EU'", <https://www.zeit.de/politik/ausland/2019-03/xi-jinping-frankreich-emmanuel-macron-angela-merkel-eu-china>.

emerging features. It might be bundled in the overarching task of avoiding at least excessive asymmetric developments while promoting new elements of cohesion: in particular in the economy and in values.

a) Avoiding Excessive Asymmetric Developments in the Economy

In regard to the economy the current pandemic challenge contains the chance to strengthen economic cohesion by better understanding that the welfare of one member in a common market mutually depends on the welfare of the other members. There is truth, e.g., in the consideration, that if the Italian economy fails, German exports to Italy will dwindle and less jobs in Germany will be open for workers from other member states. Hence, in this pandemic crash, economic cohesion can be promoted by the option to aid the hardest hit viable economic sectors in the Union by means of Union funds – which in turn requires the increase of the budget of the Union, be it by national contributions according to the respective national capacity, or be it by a Union debt on the capital market. The latter way is nearly revolutionary, envisaged by the European Council's decision of 21 July 2020 to establish the recovery and resilience programme "Next Generation EU".[34] If realized, it will constitute a new historical landmark in the concept of European integration – in a catchphrase: *a new dimension of financial solidarity cohesion in exceptional situations.* This would prove the sociological insight that solid solidarity is not an altruistic phenomenon but motivated by own benefit interests.[35] Exactly for this reason financial solidarity should also be increased in the area of the specific "Dublin burdens" of some Member States arising from the asymmetric influx of asylum seekers, since the Dublin Regulation[36] enables and serves the absence of internal border controls for persons – which in turn is a cornerstone of the internal market that is beneficial for all member states.

b) Avoiding Excessive Asymmetric Developments in Values

Inner cohesion demands in terms of values the permanent avoidance of excessive asymmetric developments in realizing democracy. This relates not only to the Member States, but also to the Union itself. In this respect European

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34 European Council, EUCO 10/20 CO EUR 8 CONCL 4, I, 2020.

35 Albrecht "Dimensionen der Solidarität", <https://www.bapp-bonn.de>.

36 Regulation (EU) 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), OJ L 2013 of 29 June 2013, 31 et seqq.

integration policy implies the task of considering prudent options for adjusting the democratic element to reasonable demands of enhancing the legitimacy of actions along the lines of its principle of representative democracy (Art. 10 TEU). This can relate to the composition of the European Parliament or the choice of the proper option to elect the Commission's President. At the same time, it has to be kept in mind that forms of democratic legitimation in the Union as a transnational polity differ from those in a nation state and require a balance towards and integration into the chains of legitimacy of the Member States.

A particular feature of the inner value cohesion is linked to the requirement of respect for the rule of law including the independence and impartiality of courts. In countering such challenges in Member States the envisaged option of conditionality for receiving funds from the Union can promote its respect. The same device might bolster the respect for human rights of asylum seekers in all Member States.

2. Common Self-Assertion in Foreign Relations

Common External Self-Assertion of the Union States is, as already seen, a necessity in the world as it is – a world of competition of self-assertions and rival power actors.

a) Competitiveness in International Trade

Common self-assertation on the international scene demands, first of all, in economic terms in view of global trade that the Union promotes the economic competitiveness of its enterprises. This currently implies, in particular, using the option of a prudent industrial policy towards digitalisation (already put on the frontpage of the Commission's agenda[37]) and also towards biotechnology. However within the framework of a market economy with free and undistorted competition (Art.119, 173 par.3 AEUV). It also comprises the option of firmly fostering sustainable business in the sense of the careful use of scarce resources.[38]

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37 Von der Leyen, 15.

38 Von der Leyen, 5 et seqq.

b) Promotion of Self-Sufficiency

As far as the objective of good survival is concerned the options of self-sufficiency (or in exceptional situations even autarchy) of the Union have to be examined: nutrition, pharmaceuticals, energy, information technology, prevention of pandemics – and last but not least defense.

3. Assumption of Planetary Responsibility

The perspectives and options of European integration also include the Union's assumption of planetary responsibility in its own genuine interest for the prerequisites of human life and peace. In that respect it is reasonable that the European Commission has set as its top priority of options the so called "Green Deal" with the objective of turning Europe into the first climate neutral continent in 2050[39] and substantiated this plan with many concrete projects, including the content of future trade agreements.[40] Not less important for the planetary responsibility is the international promotion of education and of the Union's values, including in view of the world as it is the promotion of respect for human dignity, e.g., in view of supply chains. All this fits neatly in the Union's task, as outlined in Art. 21 TEU, to promote an international system based on good global governance.

IV. Conclusion

These introductory observations lead to a rather simple conclusion: If all of these options will be wisely pursued, European integration will serve Europeans and the wider world.

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39 Von der Leyen, 5.

40 Von der Leyen, 7.

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Enhanced Cooperation: Implementations and Effects on the European Integration Process

André S. Berne

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I. Introduction

The EU is conceived as a common judicial area in which both the EU and the EU Member States are required to apply EU law fully and uniformly in all EU Member States.[1] Thus, a balance must always be struck between the common interests of all EU Member States and the individual interests of a few EU Member States. With the number of EU Member States increasing over time, it has become more and more difficult to achieve this balance. This has led to a call for greater flexibility in the legislative process, which shall harmonise the heterogeneity of the law in EU Member States.[2] However, this flexibility must take place in narrow limits as the common values and institutions of the EU must not be questioned. At the same time, this flexibility must not be overstretched in order to preserve the identity of the EU.[3]

Using these guidelines and as an outlet for balancing internal tensions in the legislative process, the Maastricht Treaty introduced the concept of "Enhanced Cooperation" with its entry into force in 1993.

Thus, the purpose of Enhanced Cooperation is to put a group of EU Member States in a position to advance the integration process by making use of the Union's institutional framework and legislative procedures where such progress cannot be achieved with the involvement of all EU Member States.[4] This aims to enable individual EU Member States to take faster steps towards European integration and to accomplish the aim of an "ever closer Union"[5]. At the same time, the few EU Member States that forge ahead are to exert a so-

1 CJEU, Decision of 9 March 1978 in Case C-106/77, ECLI:EU:C:1978:49 – Simmenthal-II, para. 14.

2 Regarding the different concepts of flexibility, i.e. the models of "Europe à la carte", "multi-speed Europe", "Europe of variable geometry" and of "core Europe", see Hatje, Art. 20 EUV, para. 5 et seqq. as well as Özlem Ultan, 1811 et seq.

3 Bieber/Epiney/Haag/Kotzur, § 3, para. 44.

4 Kellerbauer, Art. 20 TEU, para. 2.

5 Art. 1 second subparagraph TEU.

called "pull-effect" on the other EU Member States left behind that have not yet joined such an Enhanced Cooperation, by motivating them to join these EU Member States in the Enhanced Cooperation. Ultimately, this aims to spur on European integration as a whole.

This contribution pursues the question of how the instrument of Enhanced Cooperation has been used since its introduction and how these cases of Enhanced Cooperation have affected the European integration process so far. First of all, the principles of Enhanced Cooperation shall be presented (Chap. II). Secondly, the conditions and requirements of Enhanced Cooperation will be fleshed out and listed individually (Chap. III). In a further step, the implementations of Enhanced Cooperation will be discussed and their preliminary effects on European integration examined (Chap. IV).[6] Finally, the results will be summarised in a conclusion (Chap. V).

II. Principles of Enhanced Cooperation

Since the Treaty of Lisbon entered into force, the provisions regarding Enhanced Cooperation are laid down in Art. 20 TEU and Art. 326-334 TFEU. According to these provisions, Enhanced Cooperation is a special type of cooperation between a few EU Member States: It applies only in cases where the EU Member States are not able to reach a unanimous consensus in the Council within the usual framework of the legislative procedure laid down in the Treaties (which then would apply to all EU Member States). In such a case, at least nine EU Member States can decide among themselves to implement certain measures for the realisation of the Union's goals. In doing so, they may draw on the EU's institutions and procedures. This distinguishes Enhanced Cooperation from cooperation purely based on international law between states that are also members of the EU. However, since Art. 20 TEU states that EU Member States "may" establish Enhanced Cooperation, the Treaties clearly declare Enhanced Cooperation as an option but not an obligation in case the usual legislative process fails. Therefore, EU Member States remain entitled to advance the goals of European integration in accordance with general inter-

[6] This contribution analyses in general how the Enhanced Cooperations implemented so far have affected European integration and therefore only superficially address the substantive content of the individual Enhanced Cooperations. For further information regarding the main substantive regulatory content, reference is made to specific contributions.

national law through forms of intergovernmental cooperation or differentiated integration outside the EU's institutional or legal framework[7] as long as this does not violate any obligations arising from the Treaties.[8]

Enhanced Cooperation is to be distinguished from exemptions granted to individual EU Member States regarding the application of individual acts of EU law (so-called opting-out clauses). These are provisions anchored in primary legislation, which explicitly state that certain EU Member States are not subject to the EU's acquis in a certain policy area.[9]

In principle, the provisions on Enhanced Cooperation are applicable to all areas covered by the Treaties. Since the Lisbon Treaty entered into force, Enhanced Cooperation is also possible in the Common Foreign and Security Policy. However, special procedural provisions must be observed if Enhanced Cooperation is sought in this area.[10] As no Enhanced Cooperation has been carried out in this area so far, this type of Enhanced Cooperation will not be discussed further in this contribution, as it lacks practical relevance.

A special kind of Enhanced Cooperation is the so-called "Permanent Structured Cooperation" (abbr. "PESCO")[11] in the EU's Common Security and Defence Policy.[12] However, this type of Enhanced Cooperation is not based on Art. 20 TEU and Art. 324-334 TFEU but finds its legal basis instead in Art. 42 (6) and Art. 46 TEU as well as in Protocol No 10. Thus, it represents a separate type of Enhanced Cooperation and, correspondingly should also be dealt with separately.[13] Therefore, this contribution will not delve further into this topic.

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7 Kellerbauer, Art. 20 TEU, para. 4.

8 Hatje, Art. 20 EUV, para. 36.

9 For example, the special positions of Denmark, Ireland and of the United Kingdom (as a former EU Member State) regarding the Economic and Monetary Union, the Schengen Acquis and the area of freedom, security, and justice, Cf. Protocols No 15-17 and No 19-22.

10 Cf. Art. 328 (2), Art. 329 (2) & Art. 331 (2) TFEU.

11 Decision 2017/2315 of the Council of 11 December 2017 establishing a permanent structured cooperation (PESCO) and determining the list of participating Member States, OJ L 331 of 14 December 2017, 57 et seqq.

12 This in contrast to Art. 27b TEU (Treaty of Nice) according to which enhanced cooperation "shall not relate to matters having military or defence implications".

13 See Kyriakos Revelas, Permanent Structured Cooperation: not a panacea but an important step for consolidating EU security and defence cooperation, in: Waechter/Vérez (ed.), Europe – Between Fragility and Hope, Baden-Baden 2020.

III. Conditions and Requirements of Enhanced Cooperation

1. Overview

The principles and the main conditions and requirements of Enhanced Cooperation between EU Member States are laid down in Art. 20 TEU, which is the central Treaty provision on Enhanced Cooperation. According to Art. 20 (1) TUE, EU Member States that wish to establish Enhanced Cooperation between themselves may make use of the EU's institutions, subject to the limits and in accordance with the detailed arrangements laid down in Art. 20 TEU and in Art. 326-334 TFEU, which contain additional substantive and procedural rules. Thus, Art. 20 TEU contains the common framework elements for Enhanced Cooperation: This provision is limited to the fundamental permissibility, meaning and purpose, general conditions and some implementation principles of Enhanced Cooperation. The detailed conditions and requirements of this framework are set out in Art. 326-334 TFEU. If any of these legal requirements are not met, the authorisation to engage an Enhanced Cooperation is void and may be subject to an action of annulment before the CJEU.[14]

2. Formal Requirements: Nine EU Member States and a Council Decision

The establishment of Enhanced Cooperation requires a request from at least nine EU Member States.[15] This quorum is intended to prevent the EU from fragmenting into many small Enhanced Cooperation projects.[16] The Constitutional Treaty, which failed in 2005, also included such a quorum, but set it at one third of the EU Member States.[17] The Lisbon Treaty, however, then set this at the fixed number of nine. Thus, if the EU were to admit further states as members in the future, this threshold would in theory become lower and lower. However, the fact that currently the number of nine EU Member States represents exactly one third of the EU Member States is due to Brexit and thus is rather a coincidental circumstance. In principle, the mentioned request must be addressed to the EU Commission and specify the scope and objectives of the Enhanced Cooperation proposed.[18] An exception exists if the Enhanced

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14 CJEU, Decision of 30 April 2014 in Case C-209/13, ECLI:EU:C:2014:283 – United Kingdom/Council, para. 33 et seq.

15 Art. 20 (2) first sentence TEU.

16 Hatje, Art. 20 EUV, para. 19.

17 Art. I-44 (2) TCE.

18 Art. 329 (1) first subparagraph, first sentence TFEU.

Cooperation is to take place within the framework of the Common Foreign and Security Policy: In such a case special procedural provisions apply and the request must be addressed directly to the Council.[19]

In case the EU Commission approves the Enhanced Cooperation project, it may submit a proposal to the Council to that effect.[20] The latter may, after the European Parliament has given its consent, authorise the Enhanced Cooperation[21] (hereinafter the "Council Decision") with qualified majority.[22] An unanimous decision is only required in case the Council amends the EU Commission's proposal.[23] However, in case the EU Commission declines to submit such a proposal within the limits of its discretion, it must inform the EU Member States concerned of the reasons.[24] This means that the EU Commission also has a right of initiative pursuant to Art. 17 (2) TEU in the context of Enhanced Cooperation, which formally grants the EU Commission a *de facto* monopoly to decide on the form and content of an legislative act, if it decides to bring forward such an proposal at all. The CJEU has recently confirmed once again that this is at the discretion of the EU Commission.[25] Thereby, the EU Commission obtains a veto right, which enables it to prevent any Enhanced Cooperation (unless it would cover the Common Foreign and Security Policy[26]).[27]

Finally, it should be mentioned that the EU Commission cannot submit a request for Enhanced Cooperation on its own, but depends on at least nine member states doing so.[28] Thus, the minimum number of nine participating EU Member states and a Council Decision are the first two requirements for a valid Enhanced Cooperation.

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19 Art. 329 (2) first subparagraph, first sentence TFEU; Cf. Chap. II.

20 Art. 329 (1) first subparagraph, second sentence TFEU.

21 Art. 20 (2) TEU & Art. 329 (1) second subparagraph TFEU.

22 Art. 16 (3) TEU i.c.w. Art. 329 (1) first subparagraph TFEU

23 Art. 293 (1) TFEU.

24 Art. 329 (1) first subparagraph, third sentence TFEU.

25 CJEU, Decision of 6 September 2017 in Joined Cases C-643/15 & C-647/13, ECLI:EU:C2017:631 – Slovakia & Hungary/Council, para. 146.

26 In such a case th request is to be addressed directlx to the Council. This does not give the Commission the opportunity to exercise its discretion.

27 Heintschel von Heinegg, Art. 330 AEUV, para. 4.

28 Ruffert, Art. 329 AEUV, para. 2.

3. Non-Exclusive Competences of the European Union

Thirdly, in order to be lawful, the Enhanced Cooperation must stay within the EU's non-exclusive competences.[29] It follows that Enhanced Cooperation can only be considered in the area of shared, coordinated and supportive EU competences that are set out in Art. 4-6 TFEU. While the concept of the EU's exclusive competences is laid down in Art. 2 (1) TFEU, the EU's exclusive competences are listed in Art. 3 TFEU: i) the customs union, ii) the competition rules in the internal market, iii) the monetary policy for Euro zone countries, iv) the conservation of marine resources and v) the common commercial policy. An Enhanced Cooperation in these policy areas is therefore not possible.

4. Compliance with the Treaties and Union Law

Fourthly, the Enhanced Cooperation must comply i) with the EU primary law laid down in the Treaties and ii) with the secondary law adopted within the traditional legislative process.[30] Thus, by authorising Enhanced Cooperation, the Council cannot decide to amend secondary law it has previously adopted by simple or qualified majority or even unanimity (depending on the applicable legislative procedure). Because the Enhanced Cooperation must comply with the Treaties, it is clear that the principles of EU law, including the principles of conferral, of subsidiarity and of proportionality,[31] are fully applicable in the context of Enhanced Cooperation.

In combination with the circumstances that Enhanced Cooperation is only permitted in the area of shared, coordinated and supportive EU competences as mentioned above, it is made clear that Enhanced Cooperation must not lead to an extension of the EU's activities into areas, which are not guaranteed to the Union by the Treaties:[32] Enhanced Cooperation exclusively serves to achieve the objectives that the EU already has but cannot create new ones. Therefore, the Union acquis always take precedence over an Enhanced Cooperation enacted by a group of EU Member States and the principles of *lex specialis derogat legi generali* and *lex posterior derogat legi priori* cannot be invoked.[33]

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29 Art. 20 (1) TEU & Art. 329 (1) TFEU.

30 Art. 326 (1) TFEU.

31 Art. 5 (1) TEU.

32 Hatje, Art. 20 EUV, para. 22.

33 Kellerbauer, 2004.

5. No Undermining of Cohesion

In direct systematic correlation with the previous requirement, Enhanced Cooperation shall fifthly "not undermine the internal market or the economic, social and territorial cohesion".[34] The Treaties emphasise this provision by explicitly stating the logical conclusions of this prohibition by adding that the Enhanced Cooperation must not constitute i) a barrier to or ii) discrimination in trade between EU Member States or iii) distort competition between them.[35] Several opinions criticise that this addition would be superfluous.[36] However, these views overlook that this addition expresses the great concern of the EU Member States about a disintegrating effect of Enhanced Cooperation. This is underlined by the fact that the Lisbon Treaty introduced the protection of the territorial cohesion, while Enhanced Cooperation and the protection of the economic and social cohesion were already introduced with the Treaty of Maastricht. Ultimately, it is a matter of protecting the rules of free trade and thus in particular the fundamental freedoms of the internal market.[37]

Indeed, the aim of the prohibition of undermining of cohesion is to protect the central objectives of the Union against a creeping erosion by Enhanced Cooperation(s).[38] Art. 334 TFEU must be seen in this context: It states that "the Council and the EU Commission shall ensure the consistency of activities undertaken in the context of Enhanced Cooperation and the consistency of such activities with the policies of the Union, and shall cooperate to that end"[39] and aims to ensure the coherence of the Union's activities.[40] Thus, while Art. 326 (2) TFEU states the objective that the Enhanced Cooperation shall not undermine the Union's cohesion, Art. 334 TFEU sets out the procedure to achieve this objective by assigning the EU Commission and the Council a monitoring competence. Both are obliged to cooperate. The fact that not only the EU Commission, as the "guardian of the Treaties"[41], but also the Council, i.e. the EU Member States, perform this monitoring function, again expresses the great concern of the EU Member States about a potential disintegrating effect of Enhanced Cooperation.

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34 Art. 326 (2) first sentence TFEU; the concrete design of this cohesion is laid down in Art. 174-178 TFEU.

35 Art. 326 (2) second sentence TFEU.

36 C.f. Thym, 250.

37 Wernsmann/Zirkl, 171.

38 Hatje, Art. 20 EUV, para. 13 & Art. 326 AEUV, para. 4.

39 Art. 334 TFEU.

40 Blanke, Art. 334 AEUV, para. 2 et seq.; Hatje, Art. 334 AEUV; Ruffert, Art. 334 AEUV, para. 1.

41 Art. 17 (1) TEU.

6. Promotion of the Union's Objectives and Strengthening of the Integration Process

Sixthly, Enhanced Cooperation "shall aim to further the objectives of the EU, protect its interests and reinforce the integration process"[42]. On the one hand, this states that Enhanced Cooperation does not permit any deviation from the integration programme (in the sense of an "ever closer union"[43]). Thus, Enhanced Cooperation does not make any Treaty changes possible.[44] On the other hand, Enhanced Cooperation is only intended as a means of making faster integration progress, and not as a procedure permitting the reversal of integration steps that have already been taken.[45] Enhanced Cooperation is therefore to be understood as a one way road.

7. Consideration of Not Participating EU Member State

Seventhly, any Enhanced Cooperation "shall respect the competences, rights and obligations of those EU Member States, which do not participate in it"[46]. On the other side, the latter "shall not impede [the Enhanced Cooperation's] implementation"[47]. That means that participating and non-participating EU Member States are obliged to mutual respect and consideration, which is also to be seen as a reminder of the duty of sincere cooperation pursuant to Art. 4 (3) TEU.[48] Art. 327 (2) TFEU applies this general obligation to the specific scope of Enhanced Cooperation. By doing so, it shall ensure the functionality of both integration circles.[49]

8. Possibility for Other EU Member States to Participate

Eighthly, Art. 20 TEU states that the Enhanced Cooperation must be in principle open to all EU Member States.[50] However, Art. 328 TFEU limits this principle by specifying that a participation is subject to compliance with the conditions of participation laid down by the authorising Council Decision.[51] The

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42 Art. 20 (1) first subparagraph, first sentence TEU.

43 Art. 1 second subparagraph TEU.

44 Hatje, Art. 20 EUV, para. 23.

45 Blanke, Art. 20 EUV, para. 51; Ehlermann, 372.

46 Art. 327 first sentence TFEU.

47 Art. 327 second sentence TFEU.

48 Kellerbauer, Art. 327 TFEU, para. 1.

49 Hatje, Art. 327 AEUV.

50 Art. 20 (1) second subparagraph, second sentence TEU.

51 Art. 328 (1) first sentence TFEU.

same applies if an Enhanced Cooperation is already in progress: It shall also be open at any time to EU Member States which do not participate in it yet, subject to compliance with the acts that have already been adopted in the meantime within that framework.[52] This is to ensure that only those EU Member States pursue Enhanced Cooperation that are not only united in the aim of moving forward in European integration, but that also have the resources and capabilities to do so.[53] The possibility for EU Member States to participate in Enhanced Cooperation at a later stage is particularly emphasised by the repeated mention of "at any time" both in the TEU and the TFEU. Non-participating EU Members are thus in principle entitled to participate at a later stage in an Enhanced Cooperation if they meet all its requirements, i.e. if they implement all the acts adopted within its framework.

Thereby, the Treaties intend to avoid that an Enhanced Cooperation may result in a closed circle of certain EU Member States.[54] This objective shall also be achieved by imposing a special obligation on the EU Member States participating in the Enhanced Cooperation and on the EU Commission: They shall promote participation in the Enhanced Cooperation so that as many EU Member States as possible participate in it.[55] On the basis of this rule one recognises that Enhanced Cooperation is intended to have an (already mentioned) "pull-effect" on non-participating EU Member States: By leading the integration process with a few EU Member States, an implicit pressure should be exerted on the other States so that the latter decide to follow suit and thus are "pulled" into the Enhanced Cooperation. This shall advance European integration as a whole in the sense of "creating an ever closer Union"[56].[57] In order to amplify this attraction, the Treaties provide that non-participating EU Member States may participate in deliberations regarding an Enhanced Cooperation even though they do not have any voting rights.[58]

The procedural rules and substantive requirements by which an EU Member State may join an Enhanced Cooperation in progress are laid down in Art. 331 TFEU.

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52 Art. 328 (1) first sentence TFEU and Art. 20 (1) second subparagraph, second sentence TEU.

53 Heintschel von Heinegg, Art. 328 AEUV, para. 2.

54 Kellerbauer, Art. 328 TFEU, para. 1.

55 Art. 328 (1) second subparagraph TFEU.

56 Art. 1 second subparagraph TEU.

57 Geiger, 328 AEUV, para. 3; Hatje, Art. 328 AEUV, para. 4.

58 Art. 330 of the TFEU; The possibility of a later participation and the transparency that goes with it is one of the two reasons why this participation rights exist. The other reason is that it allows the non-participating EU Member States to exercise some control over the EU Member States participating in the Enhanced Cooperation.

9. Last Resort

Pursuant to the Treaties, Enhanced Cooperation shall be adopted "as a last resort, when it has [been] established that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole".[59] The application and control of this requirement is likely to pose some difficulties. It demonstrates the scepticism and reluctance of EU Member States to take up Enhanced Cooperation. This rule emphasises that Enhanced Cooperation shall remain an exception and that it shall not reduce the pressure in the Council to find a common solution by political means.[60] On the contrary, this requirement that Enhanced Cooperation shall be established only as a last resort (*ultima ratio*) intends to ensure that this form of differentiated integration does not become a substitute for searching for a compromise involving all EU Member States[61] and in doing so setting a high bar to fall back on Enhanced Cooperation.[62]

The Council is competent to determine when the objectives of a cooperation cannot be attained by the Union as a whole within a reasonable period. However, it is questionable on which criteria the Council must base this determination.[63] It can be assumed that a joint action must at least have been attempted. The doctrine in part requires that the EU Commission must at least have made a formal legislative proposal, which has been rejected.[64] Although, since the EU Commission also has the right of initiative in the area of Enhanced Cooperation as described above,[65] the EU Commission must present a legislative proposal anyway so that all requirements of Enhanced Cooperation are fulfilled. However, the author agrees with the result of this doctrine: Only when a legislative proposal of the EU Commission has been rejected in the Council, and if there is no other possibility to find a common political solution in the Council, should a few EU Member States be allowed to proceed with Enhanced Cooperation.

10. Remaining Within the Scope of Enhanced Cooperation

As already mentioned above, EU Member States wishing to establish an Enhanced Cooperation must submit a request to the EU Commission speci-

59 Art. 20 (2) first sentence TEU.
60 Hatje, Art. 20 EUV, para. 26.
61 Kellerbauer, Art. 20 TEU, para. 6.
62 Özlem Ultan, 1817.
63 See Ehlermann, 373.
64 Becker, 49; Fischer-Lescano/Kommer, 9.
65 See Chap. III.2.

fying the scope and objectives of the proposed Enhanced Cooperation.[66] The purpose of this provision is to ensure that these EU Member States do not get a *carte blanche* enabling them to use the EU's institutional and legal framework at their own discretion.[67] The consequence of this rule is that – once established – the Enhanced Cooperation must remain within the scope of the Council's Decision. This creates another requirement for Enhanced Cooperation[68] – i.e. the tenth – which is at the same time the only requirement for Enhanced Cooperation not explicitly laid down in the Treaties. However, this results from application of the rule of law.

Finally, Art. 20 (4) TEU clarifies that acts adopted within the framework of Enhanced Cooperation only bind EU Member States participating in such an Enhanced Cooperation and that such acts are not part of the Union acquis. Therefore, such acts must not be implemented by states seeking EU Membership. This prevents Union law from being changed by the activities of a few EU Member States participating in an Enhanced Cooperation.[69] On the other side, this also means that the provisions adopted in Enhanced Cooperation towards the EU Member States participating in this Enhanced Cooperation have the same legal effect as regular EU law: These EU Member States do not have an "opting out" right that would allow them to not comply with acts and decisions arising from this Enhanced Cooperation.[70] Thus, failure to comply with a legal act implementing Enhanced Cooperation might be followed by the opening of infringement proceedings.[71]

In accordance with this splitting of the legal situation, the Treaties statute that a differentiation shall also apply to the expenditure of an Enhanced Cooperation.[72]

66 Art. 329 (1) first subparagraph, first sentence TFEU.

67 Kellerbauer, Art. 20 TEU, para. 5.

68 Same opinion: Kellerbauer, Art. 20 TEU, para. 7.

69 Heinstschel von Heinegg, Art. 20 EUV, para. 10.

70 Hatje, Art. 20 EUV, para. 33.

71 Pursuant to Art. 258 TFEU et seq.

72 Art. 332 TFEU.

IV. The implementation of Enhanced Cooperation So Far

1. The Rome-III Regulation on Divorce and Legal Separation (Reg. 1259/2010)

a) Background

Although Enhanced Cooperation was already included in the Maastricht Treaty as described above, it has not played a role for a long time. It was only in 2010 that Enhanced Cooperation was applied for the first time. It concerned family law and much more precisely divorce and legal separation. Family law and divorce law are not in themselves European law issues, at least not if both spouses have the nationality of the same EU Member State and reside and live in that very same state. However, out of 122 million marriages in the entire EU in the year 2007, 16 million were so-called "mixed" marriages, i.e. i) marriages involving citizens of different EU Member States, ii) marriages where the spouses live in different EU Member States or iii) where they live together in a third EU Member State. In view of 140'000 divorces of such cross-border marriages in 2007 alone, there is a European law component.[73] Until then, the rules of international private law provided that the spouse who was the fastest in filing an action for divorce could *de facto* choose the applicable divorce law. Usually, this was the one which, in his or her view, was best suitable to protect his or her interests to the detriment of the other spouse. This regularly led to a "rush to the court" by one spouse,[74] which, to protect the other spouse, sought a uniform European regulation by harmonising conflict-of-law rules.

On EU level, family law is part of the judicial cooperation in civil matters pursuant to Art. 81 TFEU. While the ordinary legislative procedure is usually applicable in these matters,[75] the Treaties provide that measures concerning family law with cross-border implications shall be established by the Council in a special legislative procedure: The Council shall act unanimously, and the European Parliament shall only be consulted.[76]

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73 Zeitsmann, 88.

74 Proposal for a regulation of the Council implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, of 24 March 2010, COM (2010) 105 final, 4.

75 Art. 81 (2) TFEU.

76 Art. 81 (3) TFEU.

b) *The Implementation*

Against this backdrop, the EU Commission adopted in July 2006 a proposal for a Council Regulation amending Regulation 2201/2003 and introducing rules concerning the applicable law in matrimonial matters. However, the unanimity requirement in the Council could not be achieved during two years due to "the existence of insurmountable difficulties".[77] Therefore, ten EU Member States[78] wished to establish an Enhanced Cooperation and requested the EU Commission to submit a proposal to that effect. Five other EU Member States also made such a request,[79] while Greece – as one of the first ten – withdrew its request. In July 2010, the Council thus authorised with its Decision 2010/405 a total of fourteen EU Member States to engage in Enhanced Cooperation in the area of the law applicable to divorce and legal separation.[80]

A few months later, in December 2010, the Council adopted the Regulation 1259/2010 that implemented Enhanced Cooperation in the area of the law applicable to divorce and legal separation, which came into force on 21 June 2012.[81] It allows international couples to decide on the law applicable to their divorce or their legal separation[82] and, in absence of such choice, sets a subsidiary common procedure to determine the applicable law.[83] Sometime later, also Lithuania (in 2014), Greece (in 2015) and Estonia (in 2018) joined in, bringing the number of EU Member States participating in this Enhanced Cooperation to seventeen.

c) *Effects on the Integration Process*

Already under normal circumstances without cross-border marriages, divorce law is a complex area of law. As the EU Member States are extremely sensitive to their national sovereignty in this area, it can probably already be considered as a success that the Enhanced Cooperation procedure has been applied in

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77 COM (2010) 105 final, 2.

78 Bulgaria, Greece, Spain, France, Italy, Luxemburg, Hungary, Austria, Romania, and Slovenia.

79 Belgium, Germany, Latvia, Malta, and Portugal.

80 Council Decision 2010/405/EU of 12 July 2010 authorising enhanced cooperation in the area of the law applicable of divorce and legal separation, OJ L 189 of 22 July 2010, 12 et seqq.

81 Regulation (EU) 1259/2010 of the Council of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, OJ L 343/10 of 29 December 2010, 10.

82 Art. 5 Regulation (EU) 1259/2010.

83 Art. 8 Regulation (EU) 1259/2010; For an analysis of the substantive content see Jan-Jaap Kuipers, The Law Applicable to Divorce as Test Ground for Enhanced Cooperation, ELJ 2012, p. 201 et seqq.

this area at all – especially since this was the first time this procedure has been applied. However, it must be taken into account that this Enhanced Cooperation was not about substantive family law, but about rules for determining the applicable family law and thus, international private law.

However, the hoped-for pull-effect did not really happen yet: Since this Enhanced Cooperation entered into force, only Lithuania, Greece and Estonia have joined this Enhanced Cooperation. Thus, the Enhanced Cooperation could only (but still) reduce the number of rules determining the applicable law in divorce and legal separation cases (according to today's counting method) from twenty-seven to eleven. This also means that the problem of variety of conflict-of-law rules applicable to divorce and legal separation is still not solved: In ten EU Member States there is still a risk that one spouse "rushes to the court" to the detriment of the other. The patchwork may be smaller, which is a first step in the right direction, though it is still there – 15 years after the attempt to solve it has started.

2. The Creation of a European Unitary Patent Protection

a) Background

Nevertheless, it seems the EU Member States saw potential in the instrument of Enhanced Cooperation. In December 2010 not only did the Enhanced Cooperation on Divorce and Legal Separation begin, but in the same month the EU Commission also presented a proposal for another Enhanced Cooperation. This time the proposal was in the area of unitary European patent protection. Since August 2000, there have been efforts for a uniform protection of patents when the EU Commission presented a corresponding proposal.[84] Because of the high costs occurring by translations in patent filings, the proposed regulation provided that the languages for patents shall only be English, French and German and thereby adopt the trilingual regime of the European Patent Convention. Because their own national languages were not considered, Spain and Italy opposed to the regulation draft during these years.

Since the Lisbon Treaty, Art. 118 TFEU is the legal basis for the protection of intellectual property. It is true that pursuant to Art. 118 (1) TFEU regulations can in principle be adopted in the ordinary legislative procedure[85] and thus with a qualified majority in the Council. However, in relation to "language

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84 Proposal for a Council Regulation on the Community Patent of 1 August 2000, COM (2000) 412 final.

85 Art. 118 (1) TFEU i.c.w. Art. 16 (3) TEU & Art. 294 TFEU.

arrangements" Art. 118 (2) TFEU states that the Council shall act unanimously after consulting the European Parliament.[86] After years of fruitless debate, the EU Commission presented a revised proposal in June 2010,[87] but no unanimous agreement was reached on this either. Italy and Spain refused to agree.

b) Beginning of the Implementation and Clarifications from Luxemburg

To come along with the European Unitary Patent Protection, the other 25 EU Member States at the time requested to launch an Enhanced Cooperation. Against this backdrop the Council adopted in March 2011 Decision 2011/167 authorising Enhanced Cooperation in the area of the creation of unitary patent protection.[88] Italy and Spain challenged this decision by way of an action for annulment. [89]

The applicants argued that the competences conferred by Art. 118 TFEU would fall within the competences of "the establishing of the competition rules necessary for the functioning of the internal market" and thus within the EU's exclusive competence as provided for in Art. 3 (1) (b) TFEU.[90] This would have violated the third requirement according to which Enhanced Cooperation must stay within the EU's non-exclusive competences.[91] The Court rejected this view and held that Art. 118 TFEU falls within the internal market competence and that Art. 118 (2) TFEU was thus directly related to this.[92] As the internal market competence is a shared one, there would have been no violation of the requirement that Enhanced Cooperation must stay within the EU's non-exclusive competences.[93]

Secondly, the applicants alleged that the authorisation for Enhanced Cooperation would have circumvented the unanimity requirement of Art. 118 (2) TFEU, which would constitute a misuse of powers within the meaning of Art. 263

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86 Art. 118 (2) TFEU.

87 Proposal for a Council Regulation on the translation arrangements for the European Union patent of 30 June 2010, COM (2010) 350 final.

88 Council Decision 2011/167/EU of 10 March 2010 authorising enhanced cooperation in the area of the creation of unitary patent protection, OJ L 76 of 22 March 2011, 53 et seqq.

89 CJEU, Decision of 16 April 2013 in Joined Cases C-274/11 and C-295/11, ECLI:EU:C:2013:240 – Spain and Italy/Council.

90 Ibid., para. 10.

91 See Chap. III.3.

92 Critical statement to the CJEU's view: Jaeger, 1999.

93 CJEU, Decision of 16 April 2013 in Joined Cases C-274/11 and C-295/11, ECLI:EU:C:2013:240 – Spain and Italy/Council, para. 24-26.

(2) TFEU.[94] This is a surprising plea in law, especially when one considers that a few months before Spain and Italy decided to participate in the Enhanced Cooperation on Divorce and Legal Separation. The CJEU consistently denied such a misuse of power because Enhanced Cooperation shall precisely be applied when the unanimity principle blocks solutions in the Council. In particular, the Court emphasised that unanimity in the Council's Decision, provided that the Council has not decided to act by qualified majority, refers only to the votes of the EU Member States participating in this Enhanced Cooperation.[95]

Finally, the applicants argued that it had not been sufficiently substantiated why a consensual settlement has not been possible. This would have violated the principle that Enhanced Cooperation shall only be adopted as a last resort.[96] Indeed, there could be a risk for the EU and those EU Member States opposing to legislative proposals that the search for compromise is abandoned too early in favour of Enhanced Cooperation. The CJEU counters this fear by stating that "the expression 'as a last resort' highlights the fact that only those situations in which it is impossible to adopt such legislation in the foreseeable future may give rise to the adoption of a decision authorising enhanced cooperation."[97] The Court therefore placed the prospect of a compromise in the foreseeable future at the centre of its assessment of whether the requirement of last resort is met. Whether this is the case may best be judged by the Council itself according to the Court so that the Council would have a prerogative to assess this question.[98] The Court should therefore only ascertain "whether the Council has carefully and impartially examined those aspects that are relevant to this point and whether adequate reasons have been given for the conclusion reached by the Council."[99] This would have been done in the present case, especially when taking into account the efforts to find a compromise that had been ongoing for more than ten years.[100] Since the CJEU also rejected other pleas in law,[101] it dismissed the action.

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94 Ibid., para. 27.

95 Ibid., para. 35.

96 See Chap. III.9.

97 CJEU, Decision of 16 April 2013 in Joined Cases C-274/11 and C-295/11, ECLI:EU:C:2013:240 – Spain and Italy/Council, para. 50.

98 Ibid., para. 52-57.

99 Ibid., para. 52-54.

100 Ibid., para. 55.

101 Ibid., para. 60 et seqq.

c) *The Ruling's Consequences for future Enhanced Cooperations*

The value of the CJEU's ruling in this case should not be underestimated for future projects of Enhanced Cooperation. In general, the judgement indicates that an impact on cohesion, internal market, trade, or competition within the EU that is inherent to the limited scope of Enhanced Cooperation does not suffice for incompatibility with Art. 326 (2) TFEU.[102]

In particular, the Court's comments on the requirement of the last resort are of great significance. In his opinion, GA Bot already emphasised that judicial review only permits a "limited examination" of the Council's discretion in authorising Enhanced Cooperation.[103] The CJEU followed this view and held that the authorisation of cooperation is only subject to a rough scrutiny for intentional abuse of the decision-making power. This would be the case if it appears or at the very least chiefly appears, to serve the sole or at least predominant purpose of circumventing the unanimity requirement.[104] This underlines that the use of the last resort is essentially a political one, which is likely to be used as a bargaining chip in the Council.[105]

This could however provide an incentive for EU Member States critical of integration to agree in the Council to a compromise on a legislative proposal, especially in the case of strong majorities. This would mean that the proposal opposed by integration-critical EU Member States would be implemented in one way or another. However, by showing a willingness to compromise, the opposing EU Member States could weaken a legislative proposal in their sense. However, this would only be worthwhile if agreeing on Enhanced Cooperation would force the hand of these oppositional EU Member States. And this is precisely what may be doubted at present.

d) *The (still) ongoing Implementation and Interjections from Karlsruhe*

The ruling of the CJEU has an important signal effect for further projects of Enhanced Cooperation, but for the project for the creation of unitary patent protection it was only a partial victory. Assuming that the action for annulment would be rejected by the CJEU, the other EU Member States participating in the Enhanced Cooperation adopted i) the Regulation 1257/2012 on the cre-

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102 Kellerbauer, 2005.

103 CJEU, Opinion of the AG of 11 December 2012 in Case C-274/11, para. 27.

104 CJEU, Decision of 16 April 2013 in Joined Cases C-274/11 and C-295/11, ECLI:EU:C:2013:240 – Spain and Italy/Council, para. 33.

105 Jaeger, 1999 et seq.

ation of unitary patent protection[106], ii) Regulation 1260/2012 on the applicable translation agreements[107] and iii) agreed on an Agreement on a Unified Patent Court.[108]

This Unified Patent Court would have jurisdiction for actions for annulment of European Patents, for actions for infringements and for actions against the European Patent Office. To become operational, the Agreement must be ratified by at least 13 EU Member States, including France and Germany as well as the United Kingdom as a former EU Member State. The reason behind this prerequisite is that the countries which had the highest number of valid European patents in the year preceding the year in which the Convention was signed must have ratified the Agreement in order that the latter might enter into force. To date, there have been 16 ratifications, but the one from Germany is still missing. This is because the German law on ratification, which was adopted in the year 2017 was repealed by the German Federal Constitutional Court on 13 February 2020.[109] According to the Court, the law should have been passed by the German Parliament with a two-third majority in order to be compliant with the German Constitution, but only 40 of 700 members of Parliament were present in the plenary session that decided on the ratification.

e) Effects on the Integration Process

Germany needed nearly a year to pass the law with the necessary majority through its Parliament, which occurred on 26 November 2020. This purely formal and substantively undisputed question of German constitutional law thus finally prevented the implementation of European unitary patent protection and thus the entire European integration in this field for four years. Ten years after the beginning of the Enhanced Cooperation, it is still not implemented. Twenty years have been going by since the debates to create a European unitary patent protection have begun. The stalemate of the first 10 years was due to the opposition of Spain and Italy, which is why the Enhanced Cooperation became necessary. Before its implementation, the EU Member States

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106 Regulation (EU) 1257/2012 of the European Parliament and the of Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection, OJ L 361 of 31 December 2012, 1 et seqq.

107 Regulation (EU) 1260/2012 of the of Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements, OJ L 361 of 31 December 2012, 89 et seqq.

108 Agreement on a Unified Patent Court, OJ C 175 of 20 June 2013, 1 et seqq.

109 BVerfG, Decision of 13 February 2020 in Case 2 BvR 739/17, ECLI:DE:BVerfG:2020:rs20200213.2bvr073917.

were interdependent because of the unanimity requirement in the Council. But in the Enhanced Cooperation the participating EU Member States agreed to be dependent on France and Germany instead (the United Kingdom withdrew from the Enhanced Cooperation due to Brexit[110]). Therefore, the unanimity problem resulting from the Treaties has just shifted to an unanimity problem resulting from the Enhanced Cooperation.

At the beginning of the project, Spain and Italy were the bottlenecks, afterwards it was Germany. The cause of the problem may have changed, but the problem itself remains: There is still no European unitary patent protection and an Enhanced Cooperation entered into in this area could not yet change anything after more than ten years. It is currently expected that the Enhanced Cooperation will start in early 2022, i.e. 22 years after the start of the first negotiations and 12 years after the start of Enhanced Cooperation in this area.

Italy, by the way, has since changed its mind and joined the Enhanced Cooperation on a European unitary patent protection. Against this background, the question arises whether the years of political blockade in the Council were necessary at all and whether Spain – alone against the Council and all other EU Member States – would have brought the same proceedings before the CJEU. However, Spain remained true to its line and filed actions for annulment against the two above-mentioned regulations of Enhanced Cooperation. The CJEU dismissed these as well.[111]

3. Property Regimes of International Couples (Council Decision 2016/954)

a) Background

The third Enhanced Cooperation should be seen against the background of the first Enhanced Cooperation, i.e. the Rome-III Regulation 1259/2010 on divorce and legal separation. As a reminder, this regulation sets a common procedure to determine the applicable law in case of divorce or legal separation of international couples.[112] This led to finding a uniform conflict-of-law solution for cross-border matrimonial property regimes.

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110 See <https://www.unified-patent-court.org/news/uk-withdrawal-upca>.

111 CJEU, Decision of 5 May 2015 in Case C-146/13, ECLI:EU:C:2015:298 – Spain/Parliament and Council; CJEU, Decision of 5 May 2015 in Case C-147/13, ECLI:EU:C:2015:299 – Spain/Council.

112 See Chap. IV.1.

In March 2011, the EU Commission adopted a proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions concerning matrimonial property regimes, as well as a proposal for a Council Regulation concerning the same aspects of law in property regimes of registered partnerships. However, at its meeting in December 2015, the Council once more concluded that it would not be possible to reach an agreement within a reasonable time period for the entire EU.[113]

b) Implementation

Subsequently in December 2015, 12 EU Member States[114] addressed requests to establish an Enhanced Cooperation in these matters, followed by six others between January and March 2016.[115] This led to a total of 18 EU Member States wishing for an Enhanced Cooperation in these matters, which was authorised by the Council Decision 2016/954 on Enhanced Cooperation in June 2016.[116]

This Enhanced Cooperation aims to provide a legal framework which is clear and comprehensive in the matters of matrimonial property regimes and the property consequences of registered partnerships. In consequence, the participating EU Member States adopted two regulations on the applicable law, i) the Council Regulation 2016/1103[117] regarding the applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes and ii) the Council Regulation 2016/1104 regarding the applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships.[118] Both regulations aim to facilitate

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113 Council Decision (EU) 2016/954 of 9 June 2016, authorising enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions on the property regimes of international couples, covering both matters of matrimonial property regimes and the property consequences of registered partnerships, OJ L 159 of 16 June 2016, 16 et seqq. Consid. 3 et seq.

114 Malta, Croatia, Belgium, Germany, Greece, Spain, France, Italy, Luxembourg, Portugal, Slovenia and Sweden.

115 Czech Republic, the Netherlands, Bulgaria, Austria, Finland and Cyprus; Council Decision (EU) 2016/954 of 9 June 2016, Consid. 5.

116 Council Decision (EU) 2016/954 of 9 June 2016, *in fine*.

117 Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, OJ L 183 of 8 July 2016, 1 et seqq.

118 Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships, OJ L 183 of 8 July 2016, 30 et seqq.

managing property on a daily basis, dividing it in case of separation or in the event of one of the partners' deaths for international married couples or international couples in a registered partnership.[119]

c) Effects on the Integration Process

On the one hand, the Baltic States, Slovakia, Hungary and Romania participated in the Enhanced Cooperation on divorce and legal separation, but do not take part in the Enhanced Cooperation on property regimes. On the other hand, Sweden and Finland participate in the Enhanced Cooperation on property regimes, but do not take part in the Enhanced Cooperation on divorce and legal separation. This leads to the unfortunate situation of an uneven application of Enhanced Cooperation in neighbouring areas and even in the same EU Member States. This again results in the search for a conflict-of-law solution to determine the jurisdiction and applicable law for the area of divorce and legal separation and for the division of property in States which have adopted only one of the two Enhanced Cooperations. Furthermore, the Rome-III Regulation on divorce and legal separation is only applicable to matrimonial matters and not to registered partnerships, which leads to the search for a conflict-of-law solution in any case involving both the dissolution of a registered partnership and property matters.

Subsequently, this solution only aggravates the existing patchwork of applicable family and property law in these States, instead of connecting the pieces. Even though one Enhanced Cooperation has been adopted, no facilitation ensues when both divorce or legal separation and division of property need to be settled, which is almost always the case. In addition, no other EU Member States have joined this Enhanced Cooperation since its implementation. It might yet come to the attention of these States that only a combination of both Enhanced Cooperations is the most effective. As the abovementioned States and in general no other EU Member States have joined this second Enhanced Cooperation since its implementation, the intended pull-effect has yet to come into effect.

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[119] Art. 1 ff. Regulation (EU) 2016/1103; Art. 1 ff. Regulation (EU) 2016/1104.

4. The Establishment of the European Public Prosecutor's Office (Reg. 2017/1939)

a) Background

To combat crimes affecting the financial interests of the Union against criminal offences, Art. 86 TFEU created by the Lisbon Treaty states that the Council may establish a European Public Prosecutor's Office (hereinafter "EPPO"). The provision further states that the Council shall act unanimously when adopting a regulation creating an EPPO.[120] In case of disagreement, and if the European Council may not come to a unanimous decision, at least nine EU Member States that wish to establish an Enhanced Cooperation in the area of an EPPO on the basis of the draft regulation concerned may notify the European Parliament, the Council and the EU Commission accordingly.[121] Therefore, no initiative of the EU Commission is needed. The Treaties further state that such notification shall be deemed as an authorisation to establish an Enhanced Cooperation and that the provisions on Enhanced Cooperation shall apply.[122] This very detailed provision and the direct reference to the institution of Enhanced Cooperation is due to the fact that the introduction of an EPPO was already extremely controversial during the negotiations for a Treaty establishing a Constitution for Europe.[123] Therefore, the negotiators of the Lisbon Treaty assumed that the establishment of the EPPO could only succeed within the framework of Enhanced Cooperation due to the lack of unanimity in the Council.

b) Implementation

Criminal offences generate significant financial damages every year to the EU's financial interests. Yet, the national criminal justice authorities have not always been sufficiently investigated and prosecuted these offences. Based on Art. 86 TFEU, the EU Commission adopted in July 2013 a proposal for a Council Regulation on the establishment of the EPPO.[124] In February 2017, the Council concluded that the necessary unanimity could not be reached. After no agree-

120 Art. 86 (1) first subparagraph, second sentence TFEU.

121 Art. 86 (1) third subparagraph, first sentence TFEU.

122 Art. 86 (1) third subparagraph, second sentence TFEU.

123 The concept of the EPPO in Art. 86 TFEU s based on a proposal made by the EU Commission in 2000, COM (2000) 608 final.

124 Proposal for a Council Regulation on the establishment f the European Public Prosecutor's Office of 17 July 2013, COM (2013) 534 final.

ment could be reached in the European Council either, 16 EU Member States[125] notified the other institutions in April 2017 in accordance with Art. 86 TFEU so that the authorisation to proceed with Enhanced Cooperation was deemed to be granted. Within a few weeks, four more EU Member States joined in.[126]

In October 2017, the 20 EU Member States participating in the Enhanced Cooperation adopted the Regulation 2017/1939 on the EPPO.[127] However, as the establishment of the new European Public Prosecutor's Office takes time, the new authority could only start its work at a later date. It is scheduled to begin its operations in the course of the year 2021. Since two more EU Member States joined the Enhanced Cooperation in the meantime,[128] 22 of the 27 EU Member States are now participating.

c) Effects on the Integration Process

The EPPO is competent to investigate, prosecute and bring to trial persons who have committed offences against the EU's financial interests as perpetrators or accomplices. The specific offences are set out in the EPPO Regulation. The EPPO performs the functions of the public prosecution offices of the EU Member States before the competent courts of the EU Member States. Here, the European prosecutors replace their national colleagues. This is associated with far-reaching losses of sovereignty of the EU Member States.

Such far-reaching competences of an EU institution can of course come into conflict with the competences of the EU Member States and their national sovereignty. For this reason, there was no unanimous agreement on the creation of an EPPO, neither in the negotiations on the Lisbon Treaty nor in the Council. Likewise, Ireland and Denmark do not participate in this Enhanced Cooperation as both states claim constitutional constraints, which would impede closer or greater integration in the field of judicial cooperation in criminal matters. Sweden does not participate either but has indicated its intention to participate at some point. In the case of Poland and Hungary, it is probably due to the fact that both EU Member States generally tended to pursue national interests in recent years and therefore have a lower interest in Enhanced Cooperation.

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125 Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Finland, France, Germany, Greece, Lithuania, Luxembourg, Portugal, Romania, Slovakia, Slovenia, and Spain.

126 Latvia, Estonia, Austria, and Italy.

127 Regulation (EU) 2017/1939 of the Council of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ("the EPPO"), OJ L 283 of 31 October 2017, 10.

128 The Netherlands in 2017 and Malta in 2018.

As the implementation of the EPPO is still in progress, an assessment of this Enhanced Cooperation and its impact on European integration is currently not possible. The easier way to implement this Enhanced Cooperation differentiates it from the other Enhanced Cooperations. The Treaties provide here in detail how Enhanced Cooperation on the establishment of the EPPO can be implemented if the unanimity requirement cannot be achieved by the Council. The implementation procedure according to primary law has proven to be an effective and quick instrument to circumvent a blockage of the Council. However, it would not be possible to add such an easier set-up possibility in every single policy area of the Treaties where unanimous decisions of the Council are required.

5. The Introduction of a Financial Transaction Tax (Council Decision 2013/52)

a) Background

After the 2008-2009 financial crisis, questions arose as to whether the financial sector should contribute to the cost of bank bailouts. In particular, the EU Commission pointed out that the financial sector, which would be lightly taxed, received EUR 4'600 billion in support during the financial crisis.[129] For this reason, the EU Commission proposed the adoption of a Directive on a Financial Transaction Tax (hereinafter "FTT") in September 2011.[130] The FTT would have been levied on all transactions on financial instruments between financial institutions when at least one party to the transaction is located in the EU. The exchange of shares and bonds would have been taxed at a rate of 0.1% and derivative contracts at a rate of 0.01%. According to the EU Commission, this would have raised approximately EUR 57 billion every year that would have largely accrued to the EU Member States.[131]

The EU Commission's proposal relied on Art. 113 TFEU as a legal basis for enacting an FTT. Here again the Council shall agree unanimously. However, the proposal for the FTT Directive failed in the summer of the year 2012 due to the opposition of the United Kingdom and Sweden – *nota bene* two EU Member States not belonging to the Eurozone and that were therefore much less

129 Press release of the European Commission of 28 September 2011, IP/11/1085.

130 Proposal for a Council Directive on a common system of financial transaction tax and amending Directive 2008/7/EC of 28 September 2011, COM (2011) 594 final.

131 IP/11/1085.

affected by the Eurozone crisis that emerged in the aftermath of the financial crisis. The alternative of introducing the FTT only in the Eurozone failed again due to the resistance of Luxembourg and the Netherlands.

b) Implementation and the UK's Action for Annulment

To get the FTT off the ground anyway, Enhanced Cooperation was a logical choice. However, with seven participating EU Member States,[132] the minimum number of participating EU Member States had not yet been reached. It was not until October 2012 that two more EU Member States could be won for the project.[133] Shortly afterwards, two more joined.[134] Against this backdrop the Council adopted in January 2013 the Decision 2013/52 authorising Enhanced Cooperation in the area of the FTT by eleven EU Member States.[135] As with the second Enhanced Cooperation, this decision was challenged by means of an action for annulment – this time by the United Kingdom.

The United Kingdom claimed that a FTT between only a few EU Member States would have an extraterritorial effect and thus affect the United Kingdom even though the latter would not participate in the Enhanced Cooperation. And because an Enhanced Cooperation shall respect the competences, rights and obligations of those EU Member States, which do not participate, such an extraterritorial effect would violate the obligation to consider non-participating EU member states.[136] However, the CJEU emphasised in its judgment that the Council's authorisation to conduct an Enhanced Cooperation is not to be confused with the measures subsequently adopted for the purpose of its implementation. Both would be amenable to judicial review in the context of actions for annulment.[137] Basically, the CJEU stated that the United Kingdom would only be able to file an action for annulment claiming that the FTT would have an extraterritorial effect, once this Enhanced Cooperation really entered into force. Consequently, the CJEU dismissed the action.

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132 Belgium, Germany, France, Greece, Austria, Portugal, and Slovenia.

133 Italy and Spain.

134 Estonia and Slovakia.

135 Council Decision 2013/52/EU of 22 January 2013 authorising enhanced cooperation in the area of financial transaction tax, OJ L 22 of 25 January 2013, 11 et seqq.

136 Art. 327 first sentence TFEU; See also Chap. III.7.

137 CJEU, Decision of 30 April 2014 in Case C-209/13, ECLI:EU:C:2014:283 – United Kingdom/Council, para. 34-36.

c) *Last Developments and Effects on the Integration Process*

In the meantime, the EU Commission submitted in February 2013 a new proposal for a Directive on the implementation of Enhanced Cooperation in the area of FTT, which was largely based on the content of the first draft.[138] Negotiations between the eleven participating EU Member States were extensively held in the year 2014, but decreased afterwards. In 2015 and 2016, the Council only dealt with the project once each year. In the years 2017 and 2018 the Council did not deal with the matter at all. However, short negotiations took place in the year 2019. Since then, there has been no progress in the Council. After Estonia withdrew from the Enhanced Cooperation in the year 2015, the remaining 10 EU Member States have not yet been able to reach an agreement. This despite the circumstances that the political will to introduce a FTT obviously exists among these EU Member States, otherwise they would not (or, like Estonia, no longer) participate in this Enhanced Cooperation. This leads to the conclusion that, even when there is a political will, negotiations in the legislative process to implement an Enhanced Cooperation with ten or eleven participants are not necessarily easier and/or more promising than those with twenty-seven.

This Enhanced Cooperation already had this problem at its beginning. Already at that time, reaching the minimum number of nine EU Member States was difficult. This suggests that achieving the minimum number of participating EU Member States and to implement a project with a smaller number of participants might be very difficult in politically contentious issues, even in the context of Enhanced Cooperation. French President Emmanuel Macron supported the introduction of an FTT in his speech on the EU at the Sorbonne in September 2017 in principle.[139] However, he indicated that he wants to apply it only to equities and not to derivatives. Since this is not politically feasible in the EU, it can be assumed that the FTT has been dealt a death blow.[140]

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138 Proposal for a Council Directive implementing enhanced cooperation in the area of financial transaction tax of 14 February 2013, COM (2013) 71 final.

139 <http://international.blogs.ouest-france.fr/archive/2017/09/29/macron-sorbonne-verbatim-europe-18583.html>.

140 See corresponding comments Handelsblatt, <https://app.handelsblatt.com/politik/international/finanztransaktionssteuer-finaler-todesstoss-durch-macron/20521018.html>; Euractiv, <https://www.euractiv.com/section/future-eu/news/macron-relaunches-financial-transaction-tax-project-including-the-uk/>.

V. Conclusion

Due to the increase in the number of Members in the EU, it has become more difficult for all EU Member States to reach unanimity in the Council in every policy area which presupposes unanimity. At this point in time, it seems premature to judge if the Enhanced Cooperation mechanism has facilitated the EU's decision-making mechanism or not. This is because there have only been a few cases of Enhanced Cooperation so far. However, positive effects on European integration have been observed only to a limited extent.

The requirement for unanimity in the Council in certain policy areas is in principle more difficult to achieve than a qualified majority. Therefore, the lower the requirements for adoption in the regular legislative procedure are, the less likely it is that Enhanced Cooperation will be needed. If, however, the adoption of a legal act fails due to the lack of unanimity, the idea of Enhanced Cooperation is evident. It might therefore serve as door opener in the legislative process, but only in areas with unanimity requirement in the Council. Thus, it is welcome that all EU Member States are involved in at least one Enhanced Cooperation. This shows that whatever the subject there is a general consensus among the EU Member States on the fundamental need for Enhanced Cooperation in the EU. However, it appears that some EU Member States are generally more interested in participating in Enhanced Cooperation, while this interest is sparse among other EU Member States.

It can also be stated that the pull-effect that had been hoped for did not really happen. Only in one out of five cases did EU Member States join an Enhanced Cooperation after it was implemented. All other later participations occurred during the legislative process, i.e. before an Enhanced Cooperation entered into force. On the contrary, it has even been the case that an EU Member State left an Enhanced Cooperation during its legislative process. Enhanced Cooperation therefore is not an absolute one-way road to a better European Integration just because some EU Member States declare to be willing to join such a project.

Finally, it can be observed that Enhanced Cooperation does not necessarily solve problems resulting from the unanimity requirement or legal patchworks but may only shift them into another areas. There are also constitutional constraints on a national level to be considered, which can complicate or even impede an Enhanced Cooperation. Furthermore, it should not be forgotten that the notion of "last resort" is essentially a political one according to the CJEU and therefore subject to a limited judicial review. It might cause individual EU Member States to stop trying to reach a consensus among all members and thus weaken the EU's cohesion.

In 2017, the EU Commission presented in its White Paper on the Future of Europe[141] five possible scenarios for the 27 EU Member States in order to move forward as a Union. In one of these scenarios, "those who want more do more", so that "one or several 'coalitions of the willing' [would] emerge to work together in specific policy areas."[142] Although the EU Commission left open whether this scenario would have recourse to Enhanced Cooperation or other forms of differentiated integration,[143] it can be concluded that the EU Commission meant the instrument of Enhanced Cooperation.

In particular, the experience gained with the Enhanced Cooperation in the area of FTT clearly shows that it is not enough for a "coalition of the willing" to move forward in order to improve the European integration process. It is also necessary that this "coalition of the willing" is also willing to find a common solution within the framework of this Enhanced Cooperation. In an overall view, it can be deducted that Enhanced Cooperation has not yet demonstrated its suitability to accomplish the aim of an "ever closer Union". In its current form, it cannot be assumed that Enhanced Cooperation will have major effects on the European integration.

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142 Ibid., 11.

143 Kellerbauer, 190.

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Democracy, Rule of Law and Human Rights as Essentials for European Integration?

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I. Introduction: different answers to a simple questions

Intuitively, one would answer the question affirmatively. Art. 2 TEU clearly states that the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States. As in modern, secular societies constitutional texts substitute for sacred texts, and one would take this provision to be sacrosanct and say that these values are essential for our European integration.[1]

Nonetheless historically it is also evident that the European integration was not explicitly built on these values, but rather was much more of an economic integration, which in line with the predictions of the neo-functional political theory[2] expanded and deepened. Further it was necessary to include some politically sensitive questions, among which are those of the basic values of a political identity. From a comparative perspective, there are many forms of international (economic) cooperation (e.g. NAFTA or the WTO) which work on the basis of intergovernamentalism without referring to or necessarily sharing

1 Terchechte Art. 2, in: Pechstein/Nowak/Häde.
2 Cf. Wiener/Börzel/Risse.

basic values. This shows not only that the EU had a past without these values, but also that there are forms of loose coordination which are also viable irrespective of the conviction of their members. From this perspective sharing common values is less necessary than the sharing of common interests is. If one wants to classify this scenario, this would be scenario 2 of those five scenarios proposed by the European Commission in the White Paper on the Future of Europe. This scenario is a gradually re-centring and re-focusing on the single market. This scenario does not require sharing common values, as for example it does not count on a single migration or asylum policy and reduces the budget and finances for the essential functions needed for the single market. All in all, it means a renationalization in many issues and I would dare to say that some national leaders would be happy with such an outcome. A further question is of course whether a reduction of the integration is viable and whether the re-nationalization brings some fruit in the form of smoother cooperation. Trade policy and internal market and foreign policy are interconnected enough that they may disturb the harmony that is thought to be achievable.[3] The deepening of the integration was exactly caused by this interconnectedness, and in a world where financial and economic sanctions are proxies for war, it is more than difficult to cooperate on the issues of the internal market without also cooperating in external policy. Moreover, the example of the WTO shows quite convincingly that common interests do not always suffice: the emergence of the so called "trade and…" issues goes back to unsolved common values and public sentiment in environmental, social, labour, and human rights issues. So there is a way back to a kind of European integration without common fundamental values (which of course would contradict the concept of an ever closer union), and would rather look like a free-trade agreement than a supranational body.

Corruption, a weak judicial system and the non-enforcement of human rights are not necessarily bad for doing business. Crony capitalism is built on a close nexus between the business and the political elite:[4] The political elite narrow the field of the real market economy and tilt the conditions in order to build monopolies or oligopolies, and the rent-seeking[5] business elite profiteer from these conditions. They are a generous partner of the political class and support the political struggle. Many say that Hungary has shifted to a model where "business success is intertwined with political power" and Hungary is "becoming a miniature version of Vladimir Putin's Russia".[6] A country where

3 Cremona.

4 Rubin.

5 The concept of rent-seeking is basically an invention of Tullock, see Rowley/Houser.

6 Buckley/Byrne.

industrial actions have been made virtually impossible, where access to justice of exploited employees is not easy, and where legislation can be bent to the wishes of a business elite might also attract investment as these conditions might lower production costs and increase profits.

On the other hand, there is massive case law showing that some specific forms of co-operation, especially police and judicial cooperation in criminal matters, do require common fundaments: Aranyosi and Căldăraru,[7] LM[8] or Melloni[9] are vivid and well-known examples how important common fundamental values might be. This can also be extended, and one might also suggest that mutual recognition relies on these common values as well.[10] Namely, how decisions of administrative bodies could be mutually recognized if there are no independent courts to offer remedies against them, if basic requirements of a fair trial are not offered, if property is ridiculed by legislation, if the rule of law is mocked, or if the bureaucracy is corrupted. In other words: mutual recognition requires full faith and credit, and hence mutual recognition relies on mutual trust, and trust as a basically non- legal but a social phenomenon roots itself in common cultural beliefs.[11] These cultural beliefs are commonly shared values, which help to construct imagined communities.[12] Identity is built upon symbolic issues amalgamating a bunch of people into a society, which ties their bond to one another. Much like "*liberté*, *égalité*, *fraternité*" *was the program and description of the French revolutionary society, the* fundamental values of the EU were also codified prescriptively and descriptively. They serve as a normative yardstick for future actions and they portray an actual society of an "ever closer Union".

If we can agree that at least some kind value homogeneity is required for the deepening of the European integration, the question sounds as such: what are these common fundamental values and what actions should be taken if a Member State misbehaves?

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7 CJEU, Decision of 5 April 2016 in Case C-404/15 and C-659/15 PPU, EU:C:2016:198; Cf. Dietz.

8 CJEU, Decision of 25 July 2018 in Case C-216/18 PPU, LM, ECLI:EU:C:2018:586; Cf. Wendel (2019); Konstadinides.

9 CJEU, Decision of 26 February 2013 in Case C-399/11 ECLI:EU:C:2013:107 - Stefano Melloni/ Ministerio Fiscal; Cf. De Visser.

10 This is not an extravagant argumentation: even foreign private law is not applied and foreign court decisions in private matters are recognised and enforced, if the result would be contrary to public policy (ordre public). the same is also applicable for administrative law: Ohler, 160 et seq.

11 von Bogdandy.

12 Anderson.

II. The Common Fundamental Values of the EU[13]

The codification of the common values is rather recent and was introduced by the Treaty of Amsterdam. The list encompassed in Article 2 TEU consists of a number of open-ended, value loaded expressions which oscillate within a very broad repertoire of possible interpretations. The terminology of the EU-Treaty (freedom, democracy and equality, etc.) is more of an invocation than a definition. The vocabulary does not only evoke different meanings in different languages,[14] but it also depends on political attitudes and thinking,[15] which makes attributing one's own individual concept to these values very easy.

These fundamental values are like the Ten Commandments: a very condensed expression of a conviction. Nonetheless, the Ten Commandments can also be read in different ways. For example *thou shall not commit adultery* (*Exod.* 20: 14), may be interpreted extensively as a prohibition of any extra-marital sexual relationships, or one might look into the Leviticus (Chapter 20) and find out that only an extra-matrimonial relationship with another man's wife is actually punished.[16] The very same happened in the EU. Nobody defies or challenges the fundamental values of the EU, but it is rather a question of what these values mean practically. Not only freedom, democracy and equality but also the rule of law have very contested connotations,[17] even if we can agree on what their core might be. There is a common understanding that rule of law is an antithesis of arbitrariness,[18] but there is an ongoing debate about what arbitrariness means, as well as how determinate and precise legal rules must be in order to avoid arbitrariness, what the limits of the discretion of any administration are, and how these requirements are to be reconciled with other compelling principles such as checks and balances and parliamentary government.[19] The discussion as to whether rule of law is more than just obeying the black letter of the law is very lively, too. If yes, it is important to look at what inherent values it contains, which should have also been protected

13 Cf. Vincze in Lorenz / Anders.

14 von Bogdandy/Ioannidis.

15 Fekete.

16 For different interpretations see Dozeman; Dohmen in Dozeman/Craig/Lohr, 200.

17 See instructively Tamanaha; regarding its meaning in the EU-Treaty, see von Bogdandy/Ioannidis, 288 et seqq.

18 Silkenat/Hickey Jr./Barenboim.

19 Substantially the very same debate goes on in European administrative law without however the emotional slips, see Franchini.

against constitutional amendments.[20] If rule of law means simply obeying the black letter of the law, it is not contrary to the EU fundamental values if a government is supported by a parliamentary majority capable of amending the constitution, which then enacts legal rules according to the taste of the government, which the government happily obeys.

Similarly, one could understand democracy as a government of the people, but one might easily disagree as to whether democracy would require a certain form of direct or indirect involvement of the people. For example in the form of referenda (which in some Member States does not exist) or a special kind of electoral system (proportional or majoritarian), each having advantages and disadvantages.[21] The same way that there are many forms of democracy, there are also many forms of the rule of law too. The most obvious of these include both the formal and the material (embodying some ethical requirements as well). There are a number of valid and serious arguments in favour of a limited judicial or constitutional review, just as there are arguments in favour of broader judicial powers[22] depending largely on the concept of checks and balances.

Moreover, there is some plurality in the EU and different national legal orders embody different understandings of the substance of these values.[23] Hence there is no complete value unity or value uniformity in the Union despite the fact that Member States share some fundamental constitutional values.[24]

It is necessary to pinpoint this circumstance as a nasty government might easily find a definition of the rule of law which would comply with its own preferences. Hence the alleged violations of the rule of law can simply be presented as cultural questions resulting from different (but basically equally acceptable) understandings of these values. Or, more blatantly, they can blame other countries for cultural imperialism. If the Hungarian Government is to blame for violating fundamental values of the EU because of allegedly usurping the

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20 Without going into details is the Rechtstaatlichkeit (the German equivalent of the rule of law) is part of the Austrian and German constitutional thinking having a more formalistic content in the first and more substantial in the second case, cf. Jakab (2009). Di *Gregorio* points out persuasively how the rule of law was very differently understood in the different Central and Eastern European countries during the democratic transition. The different understandings of the common constitutional values appear vividly in the administrative law which effectuates the constitutional values at a very operational level, and the Member States seem to have several permutations of the same values; Di Gregorio.

21 Morison.

22 Griffith; Tomkins; Itzcovich in: Jakab/Kochenov, 28 et seqq.

23 Kombos.

24 Avbelj in: Jakab/Kochenov, 51.

parliamentary majority to pass any laws, how to qualify the French political practice of enacting vital legislation e.g. labour law reform via *ordnonnances* meaning without parliamentary debate?[25] Very similar arguments were put forward in the debate around the design of constitutional review: it is demanding to challenge the cutting back of powers of a constitutional court as long as many Member States have no such institutions at all.[26] Precisely because of this particularity there should have been much more emphasis placed on what exactly is contrary to the common European core of the rule of law: the alleged lack of independence, the precise ambit of powers, or the governmental bullying?[27]

More generally one could suggest that there is some plurality in the EU and that different national legal orders embody different understandings of the substance of these values.[28] Hence there is no value unity or uniformity in the Union despite the fact that Member States share fundamental constitutional values.[29] It is necessary to pinpoint this circumstance as a nasty government might easily find a definition of rule of law which would comply with its own preference, and the alleged violations of the rule of law can simply be presented as cultural questions resulting from different (but basically equally acceptable) understandings of these values.

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25 Damgé.

26 Scheppele, 559 et seqq.; Vincze (2014), 86 et seqq.; This argument emerged in Hungary in 2019 during the Finnish presidency of the EU, as among others the Prime Minister put forward that Finland should not criticize Hungary for the adopted model of the Constitutional Court because Finland has no such institution. This argument is a very primitive comparative one, not taking into account the contextual differences between Central European and Scandinavian countries, but precisely because of its primitivism it might be a very effective populist argument. *Müller*, for instance, offers serious counter-arguments; Müller, 141 et seqq.

27 This is not an easy undertaking if for example the European Court of Human Rights declares the remedies available at the Hungarian Constitutional Court to be an effective one, cf. ECtHR, Decision of 12 March 2019 in Case No. 71327/13 - Szalontay/Hungary. A similar question arose in case of Poland, as an Irish court questioned generally the independence of Polish courts and the effectivness of judicial protection because of a reasoned proposal of the European Commission adopted pursuant to Article 7(1) TEU, indicating that there is a real risk of breach of the fundamental right to a fair trial in Poland; see CJEU, Decision of 25 July 2018, in Case C-216/18 PPU, ECLI:EU:C:2018:586; as *Lenaert*s points out instructively, the CJEU crystallized many aspects of the rule of law, especially regarding the judiciary during the last decade, Lenaerts, 29 et seqq.

28 Kombos.

29 Avbelj, 51

Therefore some obvious questions arise: (III) is there a consensus regarding the meaning of European values, (IV) what room remains for national constitutional values, differences and peculiarities, and (V) how can the constitutional values be protected?

III. The meaning and definition of European values

Those who follow the European Commission on social media platforms might be aware of the hashtags #ThisIsTheEU, #RuleofLaw, and #EuropeanUnion.

A very short description is also added to this picture, and it will be explained that "the rule of law" is a fundamental value, and "a democratic principle that makes us united" and that "all members of the society are equally subject to the law" and are protected by impartial and independent courts. This to some extent correct description also shows the ambiguities and the weaknesses.

Nonetheless it is irritating how the Commission blurs the contours of the rule of law by saying that it is a "democratic principle". The rule of law might be democratic but it is not necessary. Democracy is a quality of law making and not that of application of the law. An undemocratic society, e.g. a constitutional monarchy, might also be subject to the rule of law. This would be the case if the enacted legal prescriptions are equally applicable for everyone and the courts enforce them impartially.[30] Moreover, a democratic society might also disregard the rule of law. It is simply not effective to mix and match the

[30] Great Britain of the late XIX century as Albert Venn Dicey wrote his famous Introdctuion to the Study of Constituional Law was not a democratic sociatey, but a constiutional monarchy which nonetheless respected the rule of law.

fundamental values in order to put them into a fashionable hashtag, because the resulting fuzziness of this mixing and matching is exactly what illiberal regimes are ready to exploit.

Highlighting these fine differences might seem like a hypersensitivity from a legal scholar, but the experiences of the last decade of illiberalism show that illiberal regimes are more than happy to pinpoint that definitions applied by the European Commission or the European Parliament are fuzzy and ambiguous. Therefore no meaningful discussion is possible and/or the differences are simply the consequences of different political tastes and preferences.

This shows again the necessity for a clear definition of the fundamental values of the EU, and their consistent enforcement. The United Kingdom could have been involved in a war against Iraq which was later shown to be a clear violation of international law. It could have gotten away with it without standing in the pillory; deportation of Roma migrants from France was called a "disgrace" by the Commission but nobody questioned the commitment of France to Human Rights.[31] Berlusconi's mockery of democracy and the rule of law had no consequences at all, and the EU did not condemn Hungary's former socialist Prime Minister, Ferenc Gyurcsány for admitting that he knowingly lied during the election campaign in 2006 and falsified data of the state budget in order to win these very elections.[32] The participation of the FPÖ in the Austrian Government provoked an action from the 14 other Member States. Nonetheless the actual corruption affairs of Jörg Haider or the humiliation of the Slovene minority[33] did not reach the sensibility of the EU. Therefore, it is no surprise that the Hungarian government is more than happy to point out that there is no equal standard for the rule of law, and that the critique is nothing else but a political witch-hunt. This is also the reason why the Hungarian government is determined to point out violations of the rights of the Hungarian ethnic minority in Ukraine,[34] because the neighbourhood policy is one of the few articles mentioning the values of the EU.[35] If the EU does not care about alleged violations of minority rights (which are also mentioned in Article 2 TEU), Hungary can easily point out that the EU is not even handed and that the alleged violations of the rule of law in Hungary are nothing else but double standards.

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31 BBC news, "EU may take legal action against France over Roma" 14 September 2010.

32 The Guardian, Hungary PM: we lied to win election; BBC, "We lied to win" says Hungary PM.

33 Lachmayer in: Jakab/Kochenov, 449 et seqq.

34 McLaughlin.

35 Bachmann; Kellerhals/Baumgartner.

Exactly because there is some ambiguity it is imperative to point out what constitutes a serious breach of the EU's foundational values. Methodologically, it raises the question of quantifying the law, and the quantifiability of the law. Even if there is some pioneering legal scholarship in this field,[36] it is still hard to quantify and to compare how many and what kind of breaches of EU law (including the ECHR which is also binding as a general principle of EU law) count as a serious breach. Is there a minimum number of breaches? What counts in this context: a non-imposition of a directive or an illegal state-aid? How many and what kind of violations count for being a rogue state? This again sounds like an unimportant detail, but taking into account that the forced retirement of judges in Hungary was qualified by the Commission as a mere violation of the anti-discrimination directive[37] (the judicial independence was not even mentioned), the reorganization of the data protection ombudsman as an infringement of data protection directive,[38] the vexation of the NGOs as a violation of the freedom of capital,[39] the dismissal of the President of the former Supreme Court of Hungary being deemed to be no reason for undertaking any measures whatsoever, and the former President seeking remedy before the ECtHR himself,[40] one seriously doubts whether Hungary worries about the Commission at all. If Germany also infringes the same anti-discrimination directive in the case of prosecutors as Hungary did in the case of judges,[41] and also violates the independence of the data protection authorities,[42] should Germany be worried about being an illiberal state? Are these the same kind of breaches of EU law? If no why not, if yes, why is Germany not being condemned? These are questions one cannot answer based on the behaviour and communication of the Commission.

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36 Jakab/Dyevre/Itzcovich; Petersen/Chatziathanasiou.

37 Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, 16).

38 CJEU, Decision of 8 April 2014 in Case C-288/12, ECLI:EU:C:2014:237 - Commission/Hungary.

39 CJEU, Decision of 18 June 2020 in Case C-78/18, ECLI:EU:C:2020:476 - Commission/Hungary.

40 ECtHR, Decisions of 23 June 2016 in Case No. 20261/12 - Baka/Hungary; Cf. Kosař/Šipulová; Vincze (2015).

41 CJEU, Decision of 21 July 2010 in Case C-159/10 and C-160/10 ECLI:EU:C:2011:508- Gerhard Fuchs and Peter Köhler/Land Hessen.

42 CJEU, Decision of 9 March 2010 in Case C-518/07 - Commission/Federal Republic of Germany.

IV. National Understandings of Fundamental Values: Tensions Between Homogeneity and Heterogeneity

"For political reasons we cannot allow for governments to undermine their legal systems, only for them to hide political choices behind legal arguments later".[43] This sentence was written about Poland as the Polish government was asking its constitutional court to examine the Istanbul Convention on violence against women. It is popular to condemn Poland and Hungary for having their own peculiar understanding of the rule of law and human rights, but this sentence could have also been written about Germany, after the Federal Constitutional Court examined the Public Sector Purchase Programme (PSPP) of the ECB and found it contrary to the German constitution because it violated the principle of proportionality. The decision of the CJEU was qualified as being incomprehensible (*nachvollziehbar*); and the judgment of the CJEU was rendered *ultra vires*.

The question here is why if the German Federal Constitutional Court may classify a judgement of the CJEU as incomprehensible and therefore feel free not to comply with it, other constitutional courts should not do the same? Why is the German understanding of proportionality better and more adequate than the European? Who decides as to whether a national version is better or worse than the European version? Analytically, defiance or non-compliance simply means that a rule, a judgement or a norm is not followed. One knows that we do not know that it is not followed because the rebel has a better or a worse solution.

As follows from Art 4(2) TEU, fundamental political and constitutional structures belong to the identity of the Member States which are to be respected. The very uneasy piece is to define the limits of the constitutional identity referred to in Art 4(2) TEU, because this is an essentially contested and disputed concept.[44] Nonetheless it is a very proper ideological tool to express defiance as pluralism and non-compliance as identity.[45] It is easy to do so precisely because the phrase was not coined by the rebellious rogue states to protect their disobedience from overwhelming power of the EU law, but by the German Constitutional Court in order to protect the allegedly higher German constitutional standards from the European ones.[46]

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43 Verhofstadt.

44 Rosenfeld; Jacobsohn; van der Schyff.

45 Mader.

46 Mayer.

If the German courts are allowed to disobey, why shouldn't the Hungarian and Polish Constitutional Courts be inspired by this idea, and, in doing so, stylize the protection of illiberalism as national identity and condemn a European decision as incomprehensible?[47] Defiance and disobedience of EU law has always had short term and long term benefits and costs.[48] If large Member States and their constitutional courts openly defy European law, there may be some short term benefits to this but they would lower the cost of defiance for other Member States. On the one hand there could be some future costs due to this (e.g. a German undertaking cannot fully enjoy the economic benefits of the European integration because another member state defies EU law). On the other hand, it has some benefits. For example, if national constitutional courts back each other mutually in order to counter-balance the ECJ.[49] Nonetheless if defiance becomes legitimate, one should not be surprised if violations of fundamental values are labelled as pure political outcry.

V. Protection of Fundamental Values

From very early on, the European Parliament was especially keen to point out that the Orbán government violates the basic values of the EU. As the new Hungarian media legislation was to be passed in 2011, many members of the European Parliament protested against it by taping their mouths with band aids and holding up signs reading "censored", suggesting that the modifications were evidence of an "authoritarian decay".[50] Two years later Rui Tavares, a Portuguese MEP, put forward a detailed report on Hungarian constitutional developments, which was approved by the European Parliament on 3 July 2013. The Hungarian government claimed that the report was merely a conspiracy of the left, and one may add that the (factual) shortcomings of the report supported this narrative. In 2017, Judith Sargentini submitted a detailed report about Hungary and a proposal to call on the Council to determine the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded.[51] Although this was a bit better prepared than the report of Tavares, it lacked proper factual basics which again helped the Hungarian Government to point out that the condemnations are baseless allegations

47 Vincze (2018).
48 Garrett (1995).
49 So Wendel (2013), 358.
50 Schult.
51 Sargentini.

stemming from a lack of knowledge or from prejudice. The adoption of the report was not flawless either, and juggling with the majority (counting and no-counting of abstentions) did not contribute to wider acceptance.

The Commission, on the contrary, was much more restrained: it did not push the procedure according to Article 7 TEU too much, and one is under the impression that the infringement procedures initiated by the Commission were half-hearted responses.[52]

As it is well-known the Commission prepared in 2020 a comprehensive Rule of Law report,[53] and monitored each and every member state of the EU. The report encompassed a chapter on the judicial system, one on media pluralism, one on the anti-corruption framework, and a fourth one on further diverse issues.[54] The report is the most comprehensive and best- prepared report since 2010, and pinpoints many important issues. Nonetheless, the report has its flaws.

Firstly, it is not clear why the media landscape is part of a rule of law report, and why this fundamental freedom is referred to while others are not (such as freedom of assembly, freedom of association or organized labour). Secondly, the report praises the efficiency of the Hungarian justice system regarding "the estimated time needed to resolve administrative cases at first instance and the number of pending administrative cases at first instance courts". It is however not mentioned how the Hungarian justice system achieves these numbers, especially the problems with access to justice.[55] Thirdly, the Anti-corruption framework seems to miscalibrate its focus as petty bribery and lobbying are not the main source of the problem (even if they are a problem). The focus should be however on a state capture where influential circles require tailor-made lamaking according to their actual wishes. The two-thirds majority of the governing party enables the enactment of anything and everything in the form of legal rules, and the usage of law as a means to an end.[56] Fourthly, the section on media pluralism is concerning because of the establishment of

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52 Bogdanowicz/Schmidt argue also that the Commission has not made best use of the available remedies.

53 Stöbener de Mora.

54 Commission Staff Working Document 2020 Rule of Law Report Country Chapter on the rule of law situation in Hungary Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2020 Rule of Law Report The rule of law situation in the European Union, SWD/2020/316 final.

55 There is a well-known contradiction between time pressure and proper judicial protection Münchbach.

56 Tamanaha (2006).

KESMA (*Közép-Európai Sajtó és Média Alapítvány – Central European Press and Media Foundation*) in 2018 via the merger of more than 470 different media outlets. The report describes it as a real threat to media pluralism in Hungary. The report is also shocked that the Government was able to override the Media Authority. The Commission does not seem to be able to understand how a state capture functions, and moreover makes the impression that these developments are absolutely new, and that it had no power to counter them. This leads one to wonder why the Commission understands this kind of media concentration simply as a question of media plurality but did not try to be a little bit innovative in qualifying it as a question of competition law. In such a case the Commission could have had a say and initiated scrutiny. The uneven distribution of governmental advertisements and the media campaign in the Hungarian media landscape can also be qualified as a state aidwhich is an area where the Commission has meaningful investigative powers.

The Commission seems to be happy with reporting and shadowboxing around the basic values of the EU, nonetheless it is less keen to make use of its actual power to stop the Hungarian government (if it needs to be disciplined). The Hungarian sport subsidizing tax scheme (a pet project of the Government), through which, as many suggest, the business and political elite are very well connected, was investigated by the Commission because under normal circumstances professional sport teams are business undertakings, and to them the rules of the internal market are applicable.[57] However the Hungarian rules were found to be compatible with state aid rules of the EU.[58] Very suspicious was the Hungarian Golden Visa scheme,[59] which not only enabled persons to get permanent residence in a Schengen-country, but also profited handsomely with some close friends of the regime. The new Hungarian nuclear power plant to be built in the town of Paks could have raised not only environmental concern but also competition and security policy concerns as well. Instead of being very scrupulous with the intention of Hungary to involve Russian nuclear technology, the Commission, according to some sources, lent a hand to the Hungary Government in how to find a loophole in the EU public procurement regime.[60] It also approved Hungary's financial support for the construction of them.[61]

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57 Parrish.

58 European Commission, C(2011)7287 final.

59 Martini.

60 Valero.

61 European Commission, IP/17/464, State Aid.

At the end of the day one has to wonder why the Commission does not make use of the powers that are actually available to it such as state aid, competition law and infringement procedures. As if there were no real intention to contest illiberalism.

VI. Conclusions

Democracy, human rights, and the rule of law are only necessary for a deeper European integration. However a loose economic cooperation like that within the WTO might also work without them.

Democracy, human rights, and the rule of law are value-loaded open-textured expressions which therefore provoke conflicts. Because many member states emphasize their own constitutional idiosyncrasies these conflicts become sharper and sharper.

Therefore, it is shocking that the Commission does not make use of its powers regarding the internal market which could enable it to reach the same goal without risking ideological fights.

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Experiences and Challenges of Croatia as EU Member State

Ivana Kunda

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I. Introduction

While Croatia became a European Union Member State on 1 July 2013, and as such remains the last state hereto to be integrated in it, the EU topics had already become a significant part of the political discourse in Croatia a quarter of century prior to this along with the growing importance of ideas on Croatian democracy and independence. During the first multiparty elections held in spring 1990 while Croatia was still a republic within the Socialist Federative Republic of Yugoslavia (SFRY),[1] the most important topics were the end of the communist regime and Croatia's future in relation to what was then Yugoslavia, each of which entailed the overall transformation of the existing social and political system.[2] Irrespective of whether they put an emphasis on one or the other topic, the political parties loudly evoked European democratic values, market economy and freedom to join or leave state integrations. Those in favour of Croatia's independence pointed to the then European Economic Community (EEC) as an example of a free integration model which Croatia should aspire to join. This orientation was symbolically expressed by decorating their pre-election meetings not only with Croatian flags, but also with the then EEC flag.[3]

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1 Among the six federal republics, Croatia and Slovenia held their first multiparty elections in spring 1990, while the other four republics did so half a year later.

2 Zakošek (2002), 11.

3 Picula/Žnidarić, 10.

The Croatian ambition to become one of the yellow stars on that flag was articulated clearly also in the political speeches at the highest government levels from the early starts of the new country. Thus, on 30 May 1990 in his speech at the Croatian Parliament after being elected the first Croatian President, Franjo Tuđman stated that in parallel with the internal democratic transformation, steps needed to be taken to join Croatia to the then EEC. Thus, the Croatian path towards the EU was politically determined at the first session of the Croatian Parliament following the independence.[4] As much as this was the determination at the time, it was of course not a completely new idea in Croatia or even the former Yugoslavia. The path towards the EU, however, was a "thorny"[5] one for Croatia due to many factors, some of which were shared with other countries undergoing democratic transitions and some of which were very peculiar to the Croatian situation. In the following chapter the analysis is focused on the developments in the period preceding the Croatian accession to the EU, which need to be briefly addressed in order to enable better understanding its delay in accession and to appreciate the later effects of it.

II. Transformation prior to the accession to the EU

Important to stress at the outset is the essential difference between the process of social modernisation which led to the development of the liberal democracies in West Europe and the process of democratic transition in the postcomunist societies. Whereas the former process entails gradual and systematic evolution of values, social structures and political institutions, the latter one brings about an abrupt discontinuity in the social, political and economic development. Despite the three main shared tasks within the transition process in postcomunist societies (constituting political community, establishing democracy and establishing market economy),[6] there remains a huge difference from one society to another in the degree to which the actual transformation has taken place. The fastest in the process were the Eastern European countries included in the fifth wave in 2004, followed by those in the 2007 extension, with Croatia catching up in 2013 as a single acceding state in the sixth EU integration wave. Despite an excellent starting position as a very economically developed country and as one that was not nearly as suppressed as the countries behind the Iron Curtain,[7] Croatia nevertheless ended up low on the entrance list.

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4 Vukas, 183 et seqq.

5 Vukas/Dagen, 425.

6 Maldini, 380.

7 See Vukas/Dagen, 427; Jurčić/Vojnić, 800.

Circumstances in which Croatia commenced its transition in 1990 were exceptionally difficult. Unlike in nearly all other postcommunist countries, the transition in Croatia was occurring in parallel with becoming an independent state as a result of the dissolution of the former Yugoslavia,[8] and fighting the Homeland War caused by Serbian aggression disguised under the then Yugoslav Army forces.[9] The first decade was hence intensely affected by complexities connected to leaving the former Yugoslavia, including the five years of war which brought about human losses, refugees, and material damage. Instead of taking steps to democratise the political system, the political government in that period was preoccupied with building a national state and national integration, as a precondition of democratisation.[10] Domination of national over democratic elements in social transition enabled concentration of political power in the hands of one party, which won the first democratic elections (Croatian Democratic Union, *Hrvatska demokratska zajednica – HDZ*), the inability to apply democratic control over the government, the neutralisation of opposition, and the political intolerance and political influence over the economic transformation, all of which leading to authoritarian regression.[11] Although constituted on a normative and institutional level,[12] the democratic system was not materialised in practice. The institutional structures were tailored to uphold the authoritarian and populist features of the political system,[13] including the "Cesar-like character of the government system"[14] with prevailing powers of the President of the Republic,[15] gerrymandering and a frequently changing electoral system.[16] The self-governing socialism was replaced by another ideological mixture consisting of nationalism, and social conservatism with authoritarian elements, while liberalism was present mainly in the economic aspects (privatisation and market economy) and in the moderate political multiparty system.[17] Viewed through the lens of the traditional

8 For analysis of an extensive early literature on the causes of the dissolution of the former Yugoslavia and the resulting wars see Ramet.

9 Maldini, 65 et seq.

10 Maldini, 85.

11 Maldini, 67.

12 This was first established by the so-called Christmas Constitution. Ustav Republike Hrvatske, Narodne novine 56/1990. The Constitutions was amended in several occasions: Narodne novine 135/1997, 08/1998, 113/2000, 124/2000, 28/2001, 41/2001, 55/2001, 76/2010, 85/2010, 05/2014.

13 Zakošek (1992), 90 et seq.

14 Boban, 163.

15 Puhovski, 20.

16 Kasapović, 777 et seqq.

17 Sekulić, 211; see also Zakošek (2008), 588 et seqq. when drawing comparisons between democratisation processed in Croatia and Serbia.

ideal identity models, the first decade of independency in Croatia thus produced strong primordial ethnic identity among the Croatian citizens as an antipode to the civic identity reflecting also the Croatian/European dichotomy.[18]

At the end of the second decade following the Croatian independence and turbulent changes to its political system,[19] the genuine social transition finally materialised. In 2000, the coalition of opposition parties (Social Democratic Party, *Socijalnodemokratska partija Hrvatske* – SDP and Croatian Social Liberal Party, *Hrvatska socijalno-liberalna stranka* – *HSLS*) won the elections which put an end to the most acute non-democratic elements in the political system.[20] The Constitution was amended to lessen the powers of the President of the Republic, altering the system from a semi-presidential into a parliamentary one,[21] but due to this political moment the "duckbilled constitutional platypus"[22] was created leaving some functions shared between the President of the Republic and the President of the Government.[23] With the gradual reduction of the authoritarian tendencies and detotalisation, the democratic system was stabilised.[24] Maldini described the Croatian political culture of that period as one of a mixed type with parochial, submissive and participative elements. He notes that, despite the presence of values of individualism, liberalism, postmaterialism and openness, collectivism, egalitarism, religiousness and authoritarian inclinations still dominate the society as a whole.[25]

The Croatian economic transition was yet another stumbling block, inextricably linked to the political, social and cultural aspects thereof. In order to build the liberal democratic system, it was necessary to switch from state control to market economy and from social to private ownership. State control

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18 Sekulić, 88 et seqq.

19 Smerdel (2011), 7 et seqq.

20 For an analysis of the formation, functioning and termination of the first coalition see Kasapović, 52 et seqq.

21 Promjena Ustava Republike Hrvatske, Narodne novine 113/2000.

22 Simonetti, 3 and 22.

23 These functions are co-creation of the foreign policy and care for orderly and harmonious functioning and stability of the state government. This is still the source of debates in Croatia and political calls for the amendments to finally reduce the functions of the President of the Republic are ongoing. See Toma Ivanka, Šeks: "Treba smanjiti ovlasti predsjedniku i birati ga u Saboru, po njemačkom modelu", Jutarnji list of 23 December 2020, <https://www.jutarnji.hr/vijesti/hrvatska/seks-treba-smanjiti-ovlasti-predsjedniku-i-birati-ga-u-saboru-po-njemackom-modelu-15038646>.

24 Sekulić, 211.

25 Maldini, 388.

and social ownership were formative elements of not only the economic but also the political and social system in the period before 1990.[26] Timid changes already started in the 1980s, including the 1988 amendments to the Constitution of the former Yugoslavia which laid bases for later introduction of private ownership.[27] Despite actual preconditions for a socially fair privatisation in the form of distribution among workers of the socially owned companies, the privatisation model was fully state-controlled, i.e. politically controlled. The aftermath of the ownership transformation and privatisation model in Croatia with its politically selected "two hundred families" was deindustrialisation and destruction of a major part of the production by bankrupting hundreds of companies, and the devastation of human capital by lay-offs causing a large increase in the unemployment rate and early retirements.[28] Consequently, a threefold monopoly had been instituted: over the ownership, over the market and over the politics.[29] Although it was disappointing for most Croatians, this process could not have been reversed without further social and political disturbances. Before accession to the EU, the country's economy was additionally hit by the 2008 crisis and was on a very slow recovery path. During the protracted recession which ended only in 2015, the general government debt more than doubled, driven by deficits and costs related to state-owned enterprises. Croatia's net liabilities to foreign creditors and investors peaked in 2011, well above the sustainable level.[30] The ability to make use of the EU funding available to Croatia at the time was in huge part hindered by the "lack of a well-trained and experienced administration to cope with time-consuming tasks, stringent and rigid EU procedures".[31]

Under the above-described circumstances a low significance was ascribed to the development of the judiciary, which in the early 1990s suffered from a sudden reduction of human capacities caused by the decisions of many judges to change their career path for various reasons including extremely low wages

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26 Čepulo, 314 et seqq.

27 Simonetti, 3 and 22.

28 See Županov, 27 et seqq.

29 Vojnić, 41.

30 Commission Staff Working Document: Country Report Croatia 2019 Including an In-Depth Review on the prevention and correction of macroeconomic imbalances Accompanying the document Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank and the Eurogroup 2019 European Semester: Assessment of progress on structural reforms, prevention and correction of macroeconomic imbalances, and results of in-depth reviews under Regulation (EU) No 1176/2011, Brussels, 27 February 2019, SWD/2019/1010 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019SC1010&from=EN>, 5 et seq.

31 Ott, 21.

in the public sector. The War also contributed to huge case backlogs which remained largely unresolved up to the present time, while the political system facilitated stagnation in judiciary reorganisation. With Croatia's exit from insolation at the verge of the millennia, its judiciary was kept under the careful watch of the EU which resulted in continuous assessment reports and recommendations as to its reforms. A diligent assessment on the part of the EU revealed a number of ruptures in the system, the important one being the judiciary which is – all at once – the ultimate foundation of the rule of law and democracy and the weakest branch of government. Hence, the EU had to hammer home the need for judicial reforms to the Croatian government, as the problems were not easily mended. The judiciary demonstrated particular resilience to modernisation and reforms to both organisational and legislative aspects of the judiciary which were not sufficiently precise, properly financed, politically supported or consistent, as indicated in the 2007 Screening Report. The critical points were closely connected to the values already rooted in a sufficiently large part of Croatian society to create an overall system failure, manifesting in: proneness to corruption due to the lack of (clear) standards for appointment and evaluation of judges; cases demonstrating inefficiency of the judiciary unable to guarantee fair trial (resulting in lengthily criminal and civil proceedings) or protection from discrimination; instances of racist and xenophobic sentiment and intolerance towards some minorities without proper responses on the legislative or enforcement levels; situations of inadequate conditions and supervision of social institutions and prison system; delays in returning the possession of property to refugees; occasional political pressure over the public television and incomplete privatisation of local media.[32]

III. Setting the stage for accession

The path to the EU consists of many stages, Croatia being a prominent example. Although the crisis in the former Yugoslavia was not the EEC's priority given the partial dissolution of the Soviet Union, unification of Germany and crisis in the Persian Gulf region, it is submitted that the then EEC was following and was well-acquainted with the situation there and with the critical issues on the rise.[33] While the former Yugoslavia had established diplomatic relations with the EEC in the later 1960s, the international recognition of Croatia by all EU Member States in January 1992 marked the official com-

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32 Screening report, Croatia, Chapter 23 – Judiciary and fundamental rights, 27 June 2007, <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/croatia/screening_reports/screening_report_23_hr_internet_en.pdf>.

33 Vukas/Dagen, 440.

mencement of their international relations. The relationship since has been one of an delicate balance or of a "carrot and stick" strategy which the EU exercised towards Croatia. A case in point is the inclusion of Croatia in the PHARE programme. In its 1992 opinion, the Council, agreeing with the European Parliament, held that Croatia could not sufficiently guarantee the respect of human rights and thus the European Commission's proposal to include Croatia in the PHARE programme was rejected. Because Croatia subsequently demonstrated its constructive approach towards improving the political situation, in particular the respect of human and minority rights, and assuring progress in economic reforms, and because it cooperated in the resolution of the war in Bosnia and Herzegovina, the opinions were reversed to extend the PHARE programme to Croatia in 1994. This was a positive political message sent to the Croatian authorities. In 1996 Croatia joined the Council of Europe, which was an important step on the road to the EU.

The turn of the millennia was also a turn in the position which the EU had vis-à-vis Croatia. In June 2000 the Council decided that Croatia fulfiled the requirements of a potential candidate[34] and Croatia responded right away by establishing the Parliamentary Committee for European Integration and the Ministry of European Integration. In October 2001 the Stabilisation and Association Agreement (SAA) between Croatia and the EU[35] was signed leading to the 21 February 2003 Croatian application for membership in the EU presented at the Athens meeting. The following year the European Commission issued a positive *avis* on this application and recommended the opening of accession negotiations.[36] This recommendation was endorsed by the June 2004 European Council who decided that Croatia was a candidate country and that the accession process should be launched. The accession negotiations were opened with Croatia in 2005 following checks as to the full cooperation with the International Criminal Tribunal for the former Yugoslavia (ICTY). The Commission adopted an overall enlargement strategy applicable to Croatia, which meant applying a fair and rigorous conditionality – the Copenhagen criteria. In 2005, the SAA entered into force, and pre-accession negotiation com-

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34 European Council - Presidency Conclusions, Santa Maria da Feira, 19 and 20 June 2000, <https://www.cvce.eu/en/obj/conclusions_of_the_santa_maria_da_feira_european_council_19_20_june_2000-en-042a8da3-def7-44ac-9011-130fed885052.html>.

35 Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Croatia, of the other part, OJ L 26 of 28 January 2005, 1 et seqq.

36 See European Commission, Croatia: Commission recommends opening of accession negotiations, IP/04/507, Brussels 20 April 2004, <https://ec.europa.eu/commission/presscorner/detail/en/IP_04_507>.

menced consisting of 35 chapters. By the end of 2006, the screening process was completed. However, negotiations on several chapters were blocked by Slovenia because of the unresolved border dispute between the two countries and by the Netherlands and the UK who believed that there was no full cooperation with the ICTY on the part of Croatia. In April 2009 Croatia joins NATO,[37] raising its international rating and making an important step on the way to EU. In November 2009, the Arbitration Agreement between Croatia and Slovenia was signed[38] enabling closure of the pre-accession negotiations on 30 June 2011, a decade after the SAA was signed. On 9 December 2011, the Treaty of Accession was signed between Croatia and the EU,[39] and was followed by the January 2012 referendum on Croatia's accession to the EU, with 66% of the votes in favour. On 1 July 2013 Croatia acceded to the EU.

IV. Post-accession developments

The accession of Croatia to the EU is perceived by the Croatian public as being a "good thing", much more so at the end of 2020 (63%) than it was at the time of accession (50%).[40] Many Croatians have understood the accession to the EU as returning to where they belong. This was not only one of the first messages from the EU officials addressed to Croatians,[41] but was also part of the political, even doctrinal discourse in Croatia.[42] It was of course intended to appeal to the sense of European identity in Croatians, with Europe being perceived in Croatia mainly in positive terms and the European identity being seen as an expansion of the national one.[43] The sense of belonging to Europe was further pushed with the benefits that Croatians started enjoying as a consequence of the accession. It was perceived as generating benefits to Croa-

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37 Zakon o potvrđivanju sjevernoatlantskog ugovora, Narodne novine – međunarodni govori, 3/2009.

38 Zakon o potvrđivanju Sporazuma o arbitraži između Vlade Republike Hrvatske i Vlade Republike Slovenije, Narodne novine – međunarodni ugovori, 12/2009.

39 Treaty between the Member States of the European Union and the Republic of Croatia concerning the accession of the Republic of Croatia to the European Union, OJ L 112 of 24 April 2012, 10 et seqq.

40 Eurobarometer, Socio-demographic trends in national public opinion – Edition 7, <https://www.europarl.europa.eu/at-your-service/hr/be-heard/eurobarometer/socio-demographic-trends-edition-7>, 16.

41 In his speech in Zagreb on 1 July 2013, President of the European Parliament Martin Schulz stated: "Welcome to European Union, welcome home!".

42 See Vukas/Dagen, 426.

43 On the perception of European Union see Sekulić, 113 et seq. and 346.

tia by 78% of the public, somewhat strongly by those below 40 years old.[44] The immediate effects were felt at several levels, yet the public has mostly recognised the economic benefits in new work opportunities (55%), economic growth (34%), and in an improved standard of living (31%). This is not surprising given that, according to the 2014 public opinion survey, the majority of respondents in Croatia (51%) felt that their household's financial situation was "bad" and they were convinced that their job situation was "totally bad" (48%), while their most pressing concern was unemployment (28%).[45] In the most recent pre-epidemic public opinion survey in November 2019, Croatians were most worried about issues of rising prices, cost of living and inflation (36%), while their second most pressing concern is the financial situation in their household (22%) about which they are also the third most concerned nation in EU.[46] These percentages largely correspond to the actual figures.

Prior to the COVID-19 crisis, Croatia documented a stable economic growth of close to 3%,[47] and its GDP has been steadily growing. In 2018, Croatia finally reached its pre-crisis GDP although still quite low under the EU average,[48] which means that the economic transformation was not particularly successful. Exports increased each year since the accession until 2019, especially to the EU Member States; while it fell somewhat in 2020 due to the outbreak of the COVID-19 epidemic.[49] Furthermore, an already quite successful tourism industry which prospered since 2013 reached its peak in 2019[50] and dropped in 2020 consistently with global trends. Accession also enabled access to various sources of funding private investment and, even more so, public development, mainly though structural and investment funds. It opened opportuni-

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44 Eurobarometer, Socio-demographic trends in national public opinion – Edition 7, 20 et seqq.

45 Standard Eurobarometer 81, Public opinion in the European Union, Spring 2014 Report, <https://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/Survey/getSurveyDetail/instruments/standard/yearFrom/1974/yearTo/2014/surveyKy/2040>, 17 and 21.

46 Standard Eurobarometer 92, Public opinion in the European Union, November 2019 Report, <https://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/Survey/getSurveyDetail/instruments/standard/yearFrom/1974/yearTo/2020/surveyKy/2255>, 24.

47 World Bank, GDP growth – Croatia, <https://data.worldbank.org/indicator/NY.GDP.MKTP.KD.ZG?locations=HR>.

48 World Bank, GDP – Croatia, <https://data.worldbank.org/indicator/NY.GDP.MKTP.KD?locations=HR>.

49 See yearly figures presented at the Government web pages according to the State Statistics Institute. O hrvatskom izvozu, <https://izvoz.gov.hr/o-hrvatskom-izvozu/9>.

50 See, for instance, figures and comparison for 2019, Croatian Bureau of Statistics, Tourist arrivals and nights in 2019, <https://www.dzs.hr/Hrv_Eng/publication/2019/04-03-02_01_2019.htm> .

ties for, *inter alia*, investment in innovative research and for the development and intensification EU-wide of international research collaborations, an an increased participation in labour markets and a rise in the quality of education and training, reform of the public administration including digitalisation of the public sector and services for citizens, the preservation of cultural heritage and natural resources, building and equipping student dormitories and health institutions, and carrying out large infrastructural projects for the development of the road, railway, ports and communal infrastructure.[51] Despite ample opportunities, Croatia failed to take much advantage in joining the EU internal market. Some of the causes of this failure derive from the unfair and state-controlled type of privatisation producing the above-described detrimental aftereffects of an evaporating industry, reducing agricultural production and increasing the need to import goods, as well as the lack of diversification with tourism as the main revenue-generating sector.

However, a couple of projects will bring about the desired economic effects: the EU is co-funding a huge energy project related to LNG Terminal Omišalj and the building of the Pelješac Bridge.[52] Besides greatly benefiting tourism and trade as well as the everyday life of the population in the region, by significantly reducing the need to use the Neum corridor, the latter will reinforce the territorial cohesion of the most southern parts of Croatia with the rest of the country. As such, this Commission decision has also a symbolic value for many Croatian citizens. According to the available data, it may be concluded that the benefits which Croatia is realising from these EU funds could indeed

51 Vlada Republike Hrvatske, Ministarstvo regionalnog razvoja i fondova Europske unije, EU fondovi mijenjaju Hrvatsku, <https://razvoj.gov.hr/eu-fondovi-mijenjaju-hrvatsku/4212>.

52 European Commission, Commission approves EU financing of the Pelješac bridge in Croatia, 7 June 2017, <https://ec.europa.eu/regional_policy/en/newsroom/news/2017/06/06-07-2017-commission-approves-eu-financing-of-the-peljesac-bridge-in-croatia>.

be much higher,[53] which may be explained by the fact that Croatian applicants have lesser experience and may further improve the respective administrative and management capacities which should raise the chances of a more effective use of the funds.

Important improvements were made with regard to unemployment. The unemployment rate was 6.4% in November 2019[54] which was slightly better than the EU average and way better than the 17.4% rate in 2013. The youth unemployment rate (from 15 to 24 years) was 16.6% in December 2019, which is a remarkable improvement in comparison to December 2013 when it reached a record high of 50%.[55] Without a doubt, the EU accession brought about a considerable decrease in the unemployment rate, especially in the youth segment. As much as one would asume this to be a consequence of improvement of business conditions in Croatia, the reality is that the decrease in the unemployment rates is actually resulting from the massive emigration from Croatia to several other Member States, especially of the young population. What seems to be a sad reality for Croatian society as a whole, especially its demographic prospects and growth potential, is in fact a window of opportunity for individual Croatian emigrants exercising their freedom of movement to Germany, Austria, Ireland etc.

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53 From the pre-accession funds available in the period of 2007–2013, Croatia contracted for 1,27 billion EUR, or 99,70% of the allocated funds, while payments until the end of 2018 were in the amount of 1,12 billion EUR which equals 88,33% of the allocated funds. With respect to the EU funds available for the period of 2014–2020, Croatian Government reported that Croatia contracted for the total of 6,63 billion EUR (61,85% of the total funds allocated to Croatia) until the end of 2018, and payments in the same period were made to the end users in the amount of 1,98 billion EUR which equals 18,48% of the total allocated funds. Vlada Republike Hrvatske, Izvješće o korištenju europskih strukturnih i investicijskih fondova i pretpristupnih programa pomoći Europske unije za razdoblje od 1. srpnja do 31. prosinca 2018. godine, Zagreb, 2 May 2019. The updated figures from the EU show that by the end of 2020, Croatia realised 15,43 billion EUR decided funding, out of 12,65 million EUR allocated funds (122%). The amount spent is nearly half – 6,67 million EUR. Thus, in nearly all aspects Croatia's performance is below EU average. See European Commission, European Structural and Investment Funds, Country Data for: Croatia, <https://cohesiondata.ec.europa.eu/countries/HR>.

54 Table Seasonally adjusted unemployment, totals, in Eurostat, News Release – Euroindicators, 4/2021 – 8 January 2021, <https://ec.europa.eu/eurostat/documents/portlet_file_entry/2995521/3-08012021-AP-EN.pdf/fc360f72-ff0d-ecc0-df77-2bd9c7549825>.

55 Trading Economics, Croatia - Unemployment rate: From 15 to 24 years (last updated from the Eurostat on March of 2021), <https://tradingeconomics.com/croatia/unemployment-rate-all-isced-2011-levels-from-15-to-24-years-eurostat-data.html>.

The possibility to increase employment chances or improve employment status by immigrating to another Member State is both an advantage and a challenge. Manifested in the lack of quality labour of certain qualifications (such as workers in health, construction and tourist sectors[56]), challenges threaten the Croatian business sector, but also affect its demographic structure and ability to cope with the effects of an abruptly aging population. Positive effects should transpire in the form of higher wages for the workers who remained in Croatia as the demand for employees of their qualifications increases.[57] It should be remembered that the relatively recent mass emigration wave from Croatia had already occurred in the 1990s and continued since due to emigration as well as to natural depopulation. Studies show that emigration patterns from Croatia intensified significantly as of 2014, due to the perception of Croatians about the higher economic development and better quality of life in destination Member States.[58] It has also been in strong correlation with the lifting of the temporary derogations from EU rules on free access of Croatian workers to the labour markets of the other Member States that were inserted in the Annex V of the Accession Treaty.[59] Meanwhile, estimates for the total number of Croatian citizens who have emigrated are still uncertain. According to the Croatian Bureau of Statistics, subsequent to accession to the EU the annual number of emigrants grew from 15,262 in 2013 to 40,148 in 2019, peaking with 47,532 in 2017.[60] Some research demonstrates that the official figures do not represent the true magnitude of emigration from Croatia which is actually 62% higher than officially reported.[61] A valuable tool to collect reliable data would be the public census, the last of which dating back to 2011 and the new one planned for 2021.

Next to the economic motives, the Croatians see the greatest advantage of joining the EU in maintaining peace and strengthening stability (25%) and improved international relations between Croatia and other Member States (25%).[62] One of the certainly positive effects of accession is the improved political positioning of Croatia, both internationally and even more so in a regional context. In 2020, Croatia presided over the Council of the EU for the first time.

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56 Jerić, 28.

57 Along these lines see also Knežević.

58 Vidovic/Mara, 13.

59 Draženović/Kunovac/Pripužić, 433.

60 Croatian Bureau of Statistics, Migration of Population of the Republic of Croatia, 2019, <https://www.dzs.hr/Hrv_Eng/publication/2020/07-01-02_01_2020.htm>, in particular table 1. International Migration of Population of the Republic Of Croatia.

61 Jerić, 26.

62 Eurobarometer, Socio-demographic trends in national public opinion – Edition 7, 24.

Unable to fully proceed as planned due to the COVID-19 epidemic, its activities nevertheless resulted in the adoption of 33 legal acts, 27 trialogues and 54 Council's conclusions, where the progress in the implementation of the agenda is measured by the document output. This was the opportunity for Croatia to take a stand in the regional enlargement process and to bring the Western Balkan enlargement up on the EU agenda. Important steps taken in that respect were: the launch of the accession talks with Albania and North Macedonia, the adoption of the May 2020 Zagreb Declaration at the Zagreb Summit, and the opening of the last negotiating chapter on competition law with Montenegro. On a purely EU level, the presidency was crucial in the setting up of joint crisis response mechanisms and in orderly proceedings with Brexit.

A long and meticulous accession negotiation within Chapter 23: Judiciary and Fundamental Rights, reflected many of the difficulties encountered in the social transition explained above.[63] Despite closing the chapter, some inadequacies were pointed out immediately before the accession was decided on.[64] One of the weaknesses related to the lack of a convincing track record of recruiting and appointing judges and state prosecutors based on the application of uniform, transparent, objective and nationally applicable criteria. Under the strategic documents,[65] in 2018 Croatia amended its substantive and procedural rules on the appointment of judges and state attorneys[66] with the aim of strengthening objectivity and transparency regarding the former and improving the quality of their service, their professionalism and accountability. Failing

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63 Judiciary and state administration remain weak points in Croatia, as is repeatedly stressed in the various Commission reports, see Communication from the Commission, Opinion on Croatia's Application for Membership of the European Union Brussels, 20 April 2004, COM(2004) 257 final, <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2004:0257:FIN:EN:PDF>, 18 et seqq.; European Commission, Croatia 2007 Progress Report, Brussels, 6 November 2007, SEC(2007) 1431, <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2007/nov/croatia_progress_reports_en.pdf>, 7 et seqq.

64 European Commission, Interim Report from the Commission to the Council and the European Parliament on Reforms in Croatia in the Field of Judiciary and Fundamental Rights (Negotiation Chapter 23), Brussels, 2 March 2011, COM(2011) 110, <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/hp/interim_report_hr_ch23_en.pdf>.

65 See Strategija razvoja pravosuđa, za razdoblje od 2013. do 2018. godine, Narodne novine 144/2012.

66 See Zakon o izmjenama i dopunama Zakona o sudovima, Narodne novine 67/2018; Zakon o izmjenama i dopunama Zakona o Državnom sudbenom vijeću, Narodne novine 67/2018; Zakon o državnom odvjetništvu, Narodne novine 67/2018; Zakon o Državnoodvjetničkom vijeću, Narodne novine broj 67/2018.

to properly address the question of their appointment which is decided on by the councils made up partially of members of the Croatian Parliament, Croatia is ignoring the obvious objections which may be raised with respect to the impartiality of the thus appointed judges and state attorneys.[67]

A long record of cosmetic rather than fundamental reforms of judiciary without tangible and substantial effects on its efficiency and transparency is reflected in the tendency of Croatians not to trust their judiciary. It thus equally appalling as it is expected that only 20% of Croatians trust their judiciary and legal system, which is by far the lowest rate among the EU Member States.[68] As this paper was being completed, the National Development Strategy 2030[69] was passed at the Parliament. Absent any actual activities, projects, finances or parameters, the Strategy 2030 was described by the opposition parties as a wish list and lacked their support in the Parliament receiving only a tight majority vote. It lists 13 goals, one of which being "an efficient judiciary, public administration and state property management". Among important reform measures that need to be taken, which are essential for the protection of the fundamental right to a fair trial, are those to deal with protracted court proceedings and inefficient remedies against courts in these situations. As the European Court of Human Rights (ECtHR) recently confirmed in three cases against Croatia,[70] Croatia has neither efficient guarantees to prevent trials taking longer than reasonable time under Article 6(1) of the European Convention on Human Rights and Fundamental Freedoms (ECHR) nor an efficient legal remedy to protect that right pursuant to Article 13 of the ECHR. In reaction to this, the Constitutional Court of the Republic of Croatia issued a Report on the Protection of the Right to a Trial within the Reasonable Period of Time Regulated under Articles 63-70 of the Courts Act,[71] to urge the legislator to amend the respective provisions. Not only does this "courtroom episode" clearly reveal insufficiencies in the legislation, but it also serves as a reminder

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67 Vasiljević, 111.

68 Standard Eurobarometer 92, Public opinion in the European Union, November 2019 Report, <https://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/Survey/getSurveyDetail/instruments/standard/yearFrom/1974/yearTo/2020/surveyKy/2255>, 60.

69 Nacionalna razvojna strategija Republike Hrvatske do 2030. godine, Narodne novine 13/2021.

70 ECtHR, Decision of 30 July 2020 in Case No. 9849/15 - Mirjana Marić/Croatia; ECtHR, Decision of 30 July 2020 in Case No. 11388/15 and 25605/15 - Glavinić and Marković/Croatia; ECtHR, Decision of 30 July 2020 in Case No. 31386/17 - Kirinčić and others/Croatia.

71 Izvješće o zaštiti prava na suđenje u razumnom roku uređenoj člancima 63. - 70. Zakona o sudovima ("Narodne novine" broj 28/13., 33/15., 82/15. i 67/18.), Narodne novine 21/2001 of 1 March 2021.

of the chronic disease of the Croatian judiciary – the overlong proceedings.[72] In our view, another important step towards the transparency would be of a different nature and would entail the creation of a single database in which all court decisions (at least those of the Supreme Court and the second instance courts) would be accessible to the public by means of an efficiently searchable database available free of charge. At this point in time, the existing databases are either equipped with "lost engine" instead of the search engine, or contain a selection of decisions without transparent criteria and are accessible on a subscription basis.[73]

With respect to the capacity of the Croatian judiciary to properly enforce EU law, a 2017 evaluation study commissioned by the European Commission revealed that "Croatian courts, including the Supreme Court still do not see themselves as European courts."[74] Siding mainly with this assessment, a study published two years later analysing the requests for a preliminary ruling which Croatian courts referred to the Court of Justice of the European Union (CJEU), concludes that "Croatian courts started to take responsibility for enforcement of Union law".[75] Noted prevalence of lowest instance courts in communicating with CJEU (which may also partially be due to the time needed for a case to reach the highest instance), has recently been counterbalanced by the first request from the Supreme Court of the Republic of Croatia.[76] Entrusting selected judges with the function of monitoring the developments in EU law, including the CJEU case law (along with case law of the European Court of Human Rights), is intended to institutionalise the continuous updating of judges in the most important areas.[77] However, not all risks of misapplication of

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72 On this and some other problems see Vasiljević, 110 et seqq.

73 See database of the Supreme Court of the Republic of Croatia available at <https://sudskapraksa.csp.vsrh.hr/home>, which basically has to be browsed if anything is to be accidentally found, while the other databases are available for a charge but their selection of cases is subject to non-transparent policy and their search engines are also very basis (without categories or alike), <https://www.iusinfo.hr/>.

74 European Commission, An evaluation study of national procedural laws and practices in terms of their impact on the free circulation of judgments and on the equivalence and effectiveness of the procedural protection of consumers under EU consumer law, Report prepared by a Consortium of European universities led by the MPI Luxembourg for Procedural Law as commissioned by the European Commission, JUST/2014/RCON/PR/CIVI/0082, Strand 2, Procedural Protection of Consumers, Bruxelles 2017, 61, FN 106.

75 Materljan, 264.

76 See Request for a preliminary ruling from the Vrhovni sud Republike Hrvatske (Croatia) lodged on 30 September 2020 in *I.D. v Z. b. d.d.*, Z., C-474/20.

77 See Article 41a of the Courts Act, intoduced by the 2018 Amendments to the Courts Act. Zakon o izmjenama i dopunama Zakona o sudovima, Narodne novine 67/2018.

EU law are borne by the national courts. The EU needs to make its own efforts towards assuring better translation given the complications which arise therefrom. A case in point was the erroneous translation of the Regulation 1/2003,[78] which misled the High Administrative Court to render decisions in contravention of the EU competition law, when judicially reviewing the decisions of the Croatian Competition Agency in 2016. Instead of deciding that there were no grounds for action on the part of the national competition agency where the conditions for prohibition are not met and consequently suspending the proceedings, the High Commercial Court insisted that a decision to the merits always has to be made, even when no violation of the law took place. In view of the reluctance of the Court to interpret the erroneous wording to allow for the *effet utile* of the EU law as established in the case law, the only solution was to request that the Commission issues a corrigendum.[79] There are a number of other such instances craving for corrections,[80] however, the Commission is not inclined to do so on a regular basis.

The situation in the judiciary is mirroring the overall situation in which Croatian institutions find themselves right now, including the large and inefficient public administration sector. The reform of public administration is constantly being delayed, whereas the entirely "new administrative paradigm" is considered indispensable.[81] The institutions in general are in need of modernisation and professionalization, while anti-corruption tools ought to be implemented with a true political will, not to formally satisfy the expectations of external actors. Functioning democratic institutions and the market economy built in the last three decades, along with the external actors, both the international community and the EU, keep on being crucial factors in assuring that the value system and overall political culture in Croatia continue developing. Croatia is still largely an "immature democracy"[82] and democratisation is an ongoing process, as is apparent from the recent developments, such as the crisis of constitutionalism which almost paralysed the functioning of the Consti-

78 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Text with EEA relevance), OJ L 1, 4 January 2003, 1 et seqq.

79 This corrigendum contains many corrections to the translated text in addition to the one mentioned. See Ispravak Uredbe Vijeća (EZ) br. 1/2003 from 16.12.2002 on the implementation of the competition rules laid down in Art. 81 and 82; Ugovora o EZ-u (SL L 1, 4.1.2003); Special Edition of the Official Journal of European Communities 08/Sv. 01 od 13. veljače 2013; OJ L 173, 30 June 2016, 108 et seqq.

80 See Kunda, 13 et seqq.

81 Koprić, 1 et seqq.

82 Smerdel (2019), 5 et seqq.

tutional Court of the Republic of Croatia[83] and the disputes surrounding the constitutionality of the measures introduced by the government as a response to the epidemic caused by COVID-19.[84] It is thus not surprising to learn that Croatians are still utterly distrustful towards their government: with 82% of population tending not to trust the Croatian Government is on the very bottom of the EU Member State list.[85]

Challenges for Croatia also remain in respect to the Schengen area and Eurozone. Admission to the Schengen area is one of the integrative elements which has the potential to positively affect many individuals and business sectors. Croatia still remaining outside the Schengen system is largely owed to the unresolved territorial dispute with Slovenia, yet attributable also to the migration crisis which revealed the complexities in surveillance of the long Croatian border with Bosnia and Herzegovina. Furthermore, entering the Eurozone could assure economic benefits such as reduced currency and credit risk, cheaper borrowing, and liquidity of mandatory pension funds assets. So far Croatia has been successful in participating in the Exchange Rate Mechanism (ERM-II). It has to maintain the record of fulfilment of the Maastricht convergence criteria, implementation of anti-money laundering measures, and take further efforts in improving the business climate and the management of the public sector and the judiciary. Whereas the Government has announced that Croatia will join the Eurozone with the commencement of 2023, the achievement of this goal, now that the COVID-19 epidemic coupled with severe earthquakes hit the country's economy and public finances hard, reversing the economic growth, will depend on many circumstances some of which are unforeseeable at the present time.

Despite the hopes for a better future which many Croatians sensed when Croatia acceded to EU, the overall sentiment at the end of 2019 is rather depressing as Croatia again hits the bottom of the list of with the highest percentage (72%) of population among EU Member States believing that "things

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83 Smerdel (2016), 1 et seqq.; Smerdel (2017), 1 et seqq.

84 The unconstitutionality of some of the measures rendered by the Headquarters for Civil Protection has been raised in the political debates and supported in the statements by the President of the Republic of Croatia thus directly opposing the positions of the Government. The legal issue was resolved in favour of the Government position by the Constitutional Court of the Republic of Croatia Decree number U-I-1372/2020 et al. of 14 September 2020, with three judges adopting the opposing views and the Constitutional Court of the Republic of Croatia Decree number U-II-2379/2020 of 14 September 2019, with five judges expressing different opinions. See Smerdel (2020), 129.

85 Standard Eurobarometer 92, Public opinion in the European Union, November 2019 Report, 63.

are going in the wrong direction in our country".[86] Negative events dominated the political arena. In 2019, a long and exhausting teacher's strike caused huge problems to children and parents threatening the education aims and results. Furthermore, the same year no less than five ministers from HDZ were ousted from the Government because they were exposed in the media to be associated with possible clientelism and corruption. In addition, ideological and obsolete political discourse during the EU parliamentary elections campaign resulting in only 29.9% voter turnout, which was topped in 2020 by an abuse of position by the newly elected President of the Republic of Croatia when engaging in an awfully inappropriate discourse, especially with the co-habitee, the President of the Government. Furthermore, the Government and the Civil Protection Headquarters' loss of their political and professional credibility due to inconsistencies in implementing the COVID-19 restriction measures when certain political interests were at stake, such as with regard to the intra-party elections or the incident with violation of measures by the hospital personnel. Likewise, a couple of SDP prominent members or candidates in the local elections left the party upon suspicion of criminal offences. These instances demonstrate that many high-positioned Croatian politicians are still inclined to maintain low levels of responsibility towards citizens. Despite few moderately positive events in the political life in Croatia, the mentioned ones stay strongly imprinted in the people's minds, damaging their appreciation for politics. The overall feeling will be hard to improve especially following various detriments sustained as a consequence of the COVID-19 epidemic with huge uncertainty about the future. The earthquakes have made things even more desperate for many families, businesses and municipalities, and people in general tend to be disillusioned about the honest intentions of the government and present-day political elites. As the local elections are under way, the situation will unfold to reveal whether and to what extent Croatians are prepared and willing to assume risk by replacing the long-established and dominating political parties and for what, if at all.

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[86] Ibid., 85.

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EU Eastern Partnership and Neighbourhood Policy from Moldova's Perspective: Current Status and Outlook

Viorel Cibotaru

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European integration has dominated the domestic and foreign policy agenda of the Republic of Moldova for the last 20 years. However, the pace of the democratic transformation and broader Europeanization process often stalled. Since 2009, European Union-Moldova relations have been shaped by the EU's Eastern Partnership framework. In 2014, Moldova concluded and began the AA implementation, which also includes the setting up of the Deep and Comprehensive free Trade Area (DCFTA) with the EU.

The Association Agreement with the EU (AA) offers the possibility for modernization of the entire society. It is the roadmap towards democratization and development of the Republic of Moldova (hereinafter Moldova). The values that are enshrined in the Association Agreement, such as the rule of law, freedom of speech, human dignity and democracy, are generally accepted by the Moldovan society. But political elites continue to drive the polarization of society and nurture the geopolitical divisions over East versus West. By focusing on geopolitics and divergent foreign policy aspirations rather than on domestic policies and pressing issues, elites exploit existing differences and further deepen ethnic and linguistic fragmentation in the country. This allows elites to detract societal attention from mainstream grievances and lets them focus on the pursuit of narrow private interests rather than having to address practical policy issues that could improve the dire socio-economic situation in the country. Moldova's Europeanization is an opportunity to close the gap of division along ethnic lines. Europeanization has achieved this in many European

countries, first and foremost because it is a tool of transformation based on values of democracy and human rights. The time has come for politicians to debate and offer solutions that will increase citizens' trust in the country's future, irrespective of their ethnic origin or of the language that they speak.

According the Moldovan experts[1], during the sixth year of implementation of the Association Agreement (1 September 2019 – 1 September 2020), while summarising the results and constraints identified, there is progress in those areas and sectors of the EU-Moldova Association Agreement, which have been conditioned by the budget support and macro-financial assistance programmes offered by the EU. The EU remains the most important economic partner of the Republic of Moldova, with over 63% of Moldovan exports oriented to the European market and almost 50% of imports that are of EU origin. No tangible progress was attained in the implementation of the values part of the Association Agreement.

At the same time, the EU has diversified the support framework for various actors of change, strengthening dialogue and cooperation with civil society, local authorities, SMEs and local communities. The EU's image among citizens continued to improve. Thus, over 63% of Moldovans say they trust the European Union, according to a recent survey conducted in the Republic of Moldova and other Eastern Partnership countries. The process of implementation of the Association Agreement has been hampered by the lack of a new national planning document for the year 2020. For the most part, national authorities have focused their efforts on gaining on the 2017-2019 NAPIAA arrears and on the priority actions provided for in the 2017 Memorandum of Understanding on EU Macro-Financial Assistance, as well as the eight additional general requirements set by the EU in February 2020. Priorities relevant to the commitments in the Association Agreement were reflected in the Government Action Plan. The COVID-19 pandemic affected the efficiency of the coordination and enforcement process of legislative and implementing measures planned for 2020. At the same time, on 1 July 2020, the Governmental Commission for European Integration approved the Calendar on monitoring the implementation of the backlogs of the 2017-2019 NAPIAA for the period 2020-2023, a Government internal planning document that has not been made public.

The Eastern Partnership as a regional dimension of the Eastern Neighborhood is one of the most successful initiatives that have brought positive dynamic

[1] Shadow report: EU-Moldova Association Agreement. Six years of implementation: Progress. Constraints. Priorities. - The Institute for European Policies and Reforms (IPRE), 2020, Chisinau, Republic of Moldova.

transformations in a wider region. Moldova has essentially changed over the past decade due to the excellent platform of the EaP, building a sustainable network between the EU and the partner countries. The collective efforts have brought considerable benefits, including to the Moldovan citizens in different areas. The future context of the EaP countries' development depends on the quality of the lessons learned during the last ten years and on the capabilities to resist the challenges that lay ahead.

The future scenarios for the Eastern Partnership 2030 reflect the possible ways of changes, based on the narratives of global politics transformation. The socio-political modeling of developments in the region are respectively framed in four EaP scenarios: Pragmatic Integration, Russian Hegemony Revisited, an EU Pivot to Moscow, and a Civic Emancipation scenario[2]. Therefore, the country-specific scenarios were elaborated according to the above-mentioned set ups aimed at enhancing the usefulness of scenario narratives through the political and socio-economic development paths. Moldova's future within these scenarios is defined by the main tendencies based on the situation on the ground. Also, found on the identification of major driving forces that represent key factors and processes that influence the subsequent development and building images of the future, taking into account the specifics of the links between the driving forces: political, institutional, economic, social, cultural, technological, educational and demographic.

The Pragmatic Integration scenario for Moldova assumes no essential change in terms of geopolitical tensions and general domestic policy's parameters, except for the continued implementation of the Association Agreement and DCFTA with the EU, improvement of the foreign trade performance and progression of economic development, especially the agricultural and agro-food sector. This scenario is based on the realistic view of Moldova's future and can be regarded as an illustration of the pragmatic integration and concentration on the economic interdependence between the EaP countries.

Russian Hegemony Revisited – this scenario suggests the strengthening of Russian influence in Moldova. A lack of good governance, transparency and a low level of democracy, increased corruption at all levels, and a high dependence on major foreign actors' policy, lead towards the subversion of Moldova's sovereignty and territorial integrity. The settlement of the Transnistrian conflict is artificially prolonged. At the same time, the high concentration of state power in the narrow political interests of a small oligarchic group affects the entire economic, political and social development of the country. Subse-

[2] For more details see Eastern Europe: Four Scenarios, in: Visegrad, Insight, Special Edition, 1(16)2020.

quently, the Moldovan citizens continue to leave the country in search of a better life and the population is clearly reducing, while the country is losing its main work forces. In a zero-sum process, Moldova comes under pressure, with destructive tendencies of domestic development and governance. This is the most pessimistic scenario for Moldova, which reflects the possible way of long-term stagnation with dire consequences.

EU Pivot to Moscow – illustrates the situation when many within Moldova's political class are supportive of partnering with Russia and new parties emerge which take a pragmatic approach towards the changed external situation. While there is some optimism about closer economic cooperation, Moldova's main political and socio-economic problems continue to prevail. Moldova's dependence of the Russian energy resources represents an obvious internal vulnerability of the state. In the framework of this being not the worst-case scenario, instability remains the central issue. At the same time, this scenario can be understood as a plausible description of a possible Moldova's future. This is an alternative image about the choice of Moldovan development we face today.

Civic Emancipation – this scenario develops practical foresight by identifying the general trends as a result of growth of the activism and reformist sentiments of civil society. There is an understanding that the ability to change the political situation in the country directly depends on the level of political literacy of the population. More attention is focused on education, strengthening the civic position of the younger generation and the activism of civil society. Electoral literacy is improving. The legal foundation of the democratic state is gradually being strengthened in Moldova. Meanwhile, the country maintains an apparent neutral position in terms of foreign policy. The scenario is more oriented on the youth consolidation through education and on raising the active civic position among the young generation that might change the pessimistic outlook on the country's future.

These scenarios examine the different trajectories that the Republic of Moldova could take over the next decade. In addition, they reveal that inertia will not bring about preferred outcomes for Moldova. In these conditions of considerable uncertainty, forecast analyses such as these scenarios are critical for policy-makers. The vision of how the future of the country may unfold is important for taking measures and action to draw the optimal further development course. Which scenario will win out? The most likely scenario is not the key question, but improving the incentive-based mechanism by building deep and pragmatic cooperation between the EaP countries is the answer. The synergy and convergence of activities would become the keystone to succeed

in achieving the sustainable development of the entire region according to the European standards and values. As a result, the EaP countries can maximize its benefits and advantages and best compete in a rapidly changing world.

One of the best examples of it may be considered the initiative of the group of CSO experts from the three EaP countries to build up a common position and approach. On 30 October 2020, I have co-signed, along with 32 colleagues, experts from Moldova, Georgia and Ukraine a non-paper "Post-2020 Eastern Partnership Deliverables for the three EU Associated Countries – Georgia, Republic of Moldova and Ukraine".

We affirm, in the paper, that the EU's Eastern Partnership policy, officially launched in 2009, achieved several successful outcomes. The EU has signed Association Agreements, started to implement deep and comprehensive free trade areas and agreed on visa-free travel regimes with Georgia, Republic of Moldova and Ukraine. It also helped these countries to modernize their economies, diversify trade flows, improve their energy security, and to strengthen civil society and political pluralism throughout the region. However, the political, geopolitical and security situation in the EaP region remains fragile and volatile. This is further complicated by the COVID-19 pandemic and its economic and social impact. Despite these challenges, the EU demonstrated continued commitment to deepening its relationship in particular with the three EaP partners that are currently implementing Association Agreements. Nevertheless, the consolidation of the ongoing progress and the setting of new ambitious objectives for the next 5 to 10 years need further sustained commitment from both the EU and its EaP partners.

Considering the lessons learned from the previous decade, we believe that for the next 5 to 10 years key deliverables for the EU and its three associated EaP states require advancement in the following key priorities:

- The EU should use the occasion of the next 2021 EaP Summit *to reconfirm its clear acknowledgement of the European aspirations of the three associated EaP countries*, pursuant to Article 49 of the Treaty on European Union, which sets out that any European state may apply to become a member of the EU provided that it adheres to the EU standards of democracy and rule of law.
- The three associated EaP partners should further strengthen their strategic dialogue with the EU over desirable policy and systemic developments. *The associated EaP partners should be invited to selected meetings of the EU Council and EU working parties.*

- Consolidate the existing EaP achievements and *aim at full implementation of the Association Agreements and comprehensive integration of Georgia, Moldova and Ukraine into the EU's Single Marked based on the four freedoms.*
- Redouble efforts on the unfinished business of *strengthening institutions of democracy, the rule of law and the fight against corruption throughout the EaP area, in line with societiy's aspirations.*
- Take the EaP into policy areas which it covered less so far, but which are absolutely *key to the future of the Eastern Partnership states in areas such as security and the environment.*
- The EU has dispatched in 2020 a timely emergency response to the COVID-19 pandemic in the Eastern Partnership amounting to over 1 *billion EUR* in the framework of the EU's "*Team Europe*" package support. *The EU should consider a flexible, tailored and comprehensive Investment and Economic Recovery Plan for the EaP countries.*

While implementation of necessary reforms requires a consistent and strong political will of the pro-reform elites in the partner countries, the EU's role in supporting those reforms is indispensable by offering incentives of trade liberalisation, providing assessments of the draft legislation and supporting the creation of functional institutions. *The Europeanisation is a shared strategic goal of the EU and aspiring EaP partners.*

I. KEY POST 2020 EAP DELIVERABLES

1. Security: A Stronger, more Geopolitical Europe

- **We endorse the launching of an EaP Security Compact:** an initiative bringing together EU funds and institutions with the capabilities of the EU member states willing to boost security cooperation with the EU's neighbours. Such an initiative would only be open to willing and interested EaP states.
- The EU member states with EU institutions' support can advance *capacity-building programmes, structural coordination on threats, technical support (particularly on cross-border SIGINT), and military intelligence for in-depth reform of these services.*

  Creating an Eastern Neighbourhood Intelligence Support and Coordination Cell within EEAS, that will operate as both a group to coordinate assistance (like the support group) to the EaP countries, but also to facilitate practical exchange of intelligence between the EU and EaP countries. *Creating intelligence-liaison offices in Tbilisi and Chisinau would be important.*

- The other field in need of attention is *cyber-security*. All EaP countries have reformed or created new cyber-security institutions (cyber-incident response teams – CERT, cyber-forensic departments and specialised departments within police and intelligence agencies) in the past years. However, these institutions remain under-resourced. The EU should help to build capacity and develop cooperation with these institutions. Such cooperation could include mutual intelligence sharing and learning on cyber threats, assistance in the areas of securing governmental communications and critical infrastructure, as well as joint cyber exercises. In this regards, we welcome the launching of the EU-Ukraine cyber dialogue and call on the EU to launch similar platforms with Georgia and Moldova.
- *The EU should strengthen and deepen its security dialogue formats with Georgia, Moldova and Ukraine.* The EU should complement its CSDP missions in Georgia and Ukraine with CSDP operations and further support the EUBAM Mission to Moldova and Ukraine. An EU Advisory Mission (EUAM) in Moldova should also be launched. This will boost the EU's prestige as a formidable geopolitical actor and strengthen the resilience and risk-mitigation capacities of local societies.
- Opening the way for interested EaP partners to work within the European Union Agency for Network and Information (ENISA) and the EU Rapid Alert could be a significant step forward for the cooperation between the EU and interested EaP countries.
- Counterterrorism is another area where the EU and the EaP countries have ample common interests. Preventing illicit acquisition of weapons, ammunition, and explosives (particularly in warzones and uncontrolled areas), preventing their smuggling abroad, foiling financing and money laundering on behalf of terrorists and other illegal armed groups is still an uphill task for the EaP states. They require cooperation as described above under the EaP Security Compact.
- Certain EaP states remain interested in joining the Permanent Structured Cooperation (PESCO) program. In this respect, the EU legal basis should be amended to allow partners to join the program with equal rights and opportunities.
- The EU and selected EaP partners could also develop "soft" military cooperation – changing education, training, organisational procedures, military planning, doctrine, tactics, etc. Many EU member states would be interested to boost such "soft cooperation", but these efforts could be significantly scaled up if the EU could dedicate parts of its neighbourhood funding to such "soft" defence cooperation: admitting officers from EaP countries to the military Erasmus programme, offering EU funding for

Eastern Partnership officers to study in military academies across the EU at various stages of their careers, and providing experts to revise military education and training in EaP countries, are relatively cheap measures.
- The EU could fund 50 scholarships each year for mid-career security, defence, intelligence or law-enforcement personnel from Moldova, Georgia and Ukraine.
- The EU could launch a specialised joint EU-EaP security platform dedicated to countering hybrid threats. The EU should support EaP partners in developing and implementing national mechanisms for an effective early-warning and early-response to security hybrid threats.

2. Environmental and climate resilience: Green Deal for Eastern Partners

- The new green deal is highly relevant for both the EU and the three associated EaP states. EaP should be a part of this Initiative and ensure its successful implementation with active participation of the civil society and other non-state actors.
- The EU should launch and support a series of projects which help the environment, raise awareness for environmental concerns and increase EU visibility. We propose two such schemes:
  - **The Euro-bicycle**: in cooperation with local townhalls, the EU could co-finance the creation of bike-sharing schemes in the first 5 largest cities of each EaP state. The bikes could be blue with yellow stars and could be a symbol of European support to eco-friendly mobility, and an almost omni-present advertisement for the EU. This should be matched with support for better bicycle infrastructure.
  - **The Euro-Charger**: a similar approach could be adopted regarding the installation of chargers for electric cars in the largest towns in the EaP, as a way to facilitate transition to greener cars. The EU financing the installation of 300 (blue and yellow) plugs in Kiev, 100 each in Chisinau, Tbilisi would be a visible green and innovative signal. Connecting these plug satiations to solar energy installations will be yet another step forward.
- **EaP countries could also be a source of renewable power:** Georgia has potential to develop even further hydrodynamic power-stations, while Ukraine and Moldova have considerable potential for the production of biogas, solar, wind-power and hydrogen, especially in Ukraine.

- The EU should open the participation of the three associated and willing EaP partners in the EU's Hydrogen strategy for a climate-neutral Europe and European Clean Hydrogen Alliance.
  The EU should make sure that the EU and EaP associated countries develop a common approach on the *Carbon Border Adjustment Mechanism*, which will be one of the key elements for the Green Deal, in order to avoid negative impact on trade relations between EU and EaP countries.
- At the same time, some EaP countries (i.e. Ukraine) aim to move away from the coal industry but lack the experience and mechanisms to ensure a just transition. In this respect, the switch from the coal industry to renewables requires EU support.
- One of the key priorities should be to double the efforts in promoting education on the needs of green changes and changing the societies' behavioural patterns so that there is demand for green policies. Thus, the EU should focus on supporting cooperation of governments and civil society and insisting on the greening of school curricula.
- To address the structural weakness of state institutions responsible for implementation and oversight of the green agenda, the post-2020 deliverables should be geared towards institutional strengthening, and on better implementation and monitoring of the environmental legislation with an effective participation of the civil society.

3. Accountable institutions, judicial reform and the rule of law *Reforms in these areas require smarter, more tailored and more targeted conditionality from external actors like the EU*

- Relevant Annexes to the Association Agreements on cooperation in the area of Justice, Freedom and Security should be upgraded and detailed.
- The new Association Agendas currently discussed by the EU with Georgia and Moldova, as well as future updates to the EU-Ukraine Association Agenda should be a timely occasion to reflect more targeted and tailored joint short- to medium-term priorities to deliver on good governance, rule of law and democratic reforms.

Accountable institutions

- The three associated EaP countries continue to face challenges in making state institutions free from political interference. With the support of the Council of Europe (CoE), the EU has to monitor and guide genuine and measurable reforms to create independent and accountable state institu-

tions (e.g. prosecutor offices, other law-enforcement authorities and anti-corruption agencies). For this, the EU has to offer clear sets of benchmarks and provide regular assessments of their implementation.
- Such assessments should be accompanied by more political and financial support to countries delivering positive results, and economic or political conditionality for those lagging behind (e.g re-programming financial assistance to civil society and other non-state actors). Of particular importance is to work on strengthening parliaments as oversight institutions.

Rule of law

- The EU has been developing new instruments to strengthen the Rule of Law mechanisms in the EU member states, such as comprehensive Justice Scoreboards as well as the Rule of Law reports to monitor performance across the EU. Thus, it will be timely that the EU launches Justice Scoreboards for the EaP or Justice Dashboards similar to the European Commission for the Efficiency of Justice (CEPEJ) Working Group on the Western Balkans, which will measure and monitor the actual state of play in the justice sector.
- The EU should help the EU associated EaP countries to carry out pre-emptive legal screening and self-assessments to identify gaps, set new ambitious policy interventions and link them to the smart, tailored and targeted conditionality of the EU funding.
- There is a need for a reinforced cooperation among the EU and EaP countries' law enforcement agencies namely in the field of asset recovery, financial crimes and high-level corruption. Also, cooperation on the cryptocurrencies legislative framework and tracking of unlawful and hybrid activities funded by money laundered via cryptocurrencies in the breakaway regions in all three associated EaP partners need to be expanded. As these often fund disruptive operations in the EU and EaP countries linked to elections or disinformation undermining the democratic fundamentals of the European societies.
- Initiate an institutional dialogue between the new European Public Prosecutor Office (EPPO) and the fraud investigation bodies from EaP countries on high-level corruption cases and the misspending of the EU funds in this region.
- Make actual use of the anti-fraud cooperation provisions enshrined in the Association Agreements with Georgia, Moldova and Ukraine. Upgrade the legal basis for OLAF (European AntiFraud Office) to conduct on-the-spot checks and inspections on the use of the EU money.
- The EU could also consider supporting (financially and politically) the establishment of independent anti-corruption agencies (similar to NABU in

Ukraine) and ensure cooperation of these agencies with OLAF and other relevant EU agencies.

The EU could make greater use of sanctions to target corruption and corrupt practice via visa bans and account freezes on individuals reasonably believed to be personally responsible for serious human rights violations.

- There is a high need for an "OLAF" for the EaP countries. The EU must get involved in the investigation of systemic frauds taking place Georgia, Moldova and Ukraine but having ramifications in some EU member states as well. Examples abound, leading into banking systems, real estate related money laundering schemes etc. It would be a further tool of deepening association.
- The EU could help EaP countries pursue asset recovery efforts, not least of which in countries like Moldova or Ukraine, where fugitive former country leaders have amassed and expatriated significant fortunes. This help can even take the form of hiring international lawyers and companies to pursue such efforts.

4. Resilient, fair and inclusive societies: A people-centric EaP

- Time and again the civil societies of the EaP states have proved that they are longing for major changes to the way they have been governed so far. Political events in recent years in almost each EaP state have been a testimony for a strong desire for more democracy, more political pluralism, accountable governments, and a stronger fight against corruption. More financing and strong EU diplomatic support are all crucial to strengthen these trends.
- We therefore think that it is important for the EU to scale up financing for NGOs and the independent media and to continue applying strong conditionality to all the governments of the region. These need to focus on the support of the professionalization of the civil society, strengthening the institutional capacities of think-tanks via targeted institutional funding and simplified financial support tools for grassroots CSOs (eg. re-granting). The support of the media should be focused on growing the critical thinking of the public and it should avoid any form of politicization of the media landscape.
- The EU should also insist on citizens' participation and engagement, transparency and accountability as key principles of governance in the EaP.
- The brain-drain and demographics must be seriously tackled in the EaP countries. Diasporas based in the EU contain a strong intellectual and/or human resource component that is increasingly lacking in EaP countries'

efforts to secure the Europeanisation process. The EU should encourage and support structured dialogues on the implementation of circular migration schemes and linking EaP countries' diaspora in the EU to the good governance agenda.

5. Resilient, sustainable and integrated economies

- It is in the shared interest of the three associated EaP states and the EU to continuously boost trade by lowering non-tariff barriers and furthering the integration of the three associated EaP countries into the EU's single market.
- **Full liberalisation of trade** should be the goal, with the immediate priority for the EU being to eliminate all tariff quotas for key exports, not least of which being tomato paste, apple juice and starch for Ukraine; and plums, grape juice and apples for Moldova. To eliminate non-tariff barriers for agriculture commodities, recognition of the equivalence of sanitary and phytosanitary measures should be likewise promoted.
- Full integration into the EU's Single Market is the next logical step of deepening economic integration. Establishing jointly by the EU and three association EaP countries a Roadmap on the gradual and tailored accession to the four freedoms during the next 10 years should be a key deliverable.
- Conclude Agreements on Conformity Assessment and Acceptance of Industrial Products (ACAA) with Moldova, Ukraine (and other willing countries), subject to a positive assessment of national institutional and regulatory frameworks by the EU.
- Effective implementation of the recently updated Annex XXVII (on energy) to EU-Ukraine AA, with its provisions on strengthened monitoring, provides a model for other sectors.
- The three associated EaP states should be invited to join the European Agency for the Cooperation of Energy Regulators (ACER).
- Integration of the willing EaP states into the European Network of Transmission System Operators for Electricity (ENTSO-E) and European Network of Transmission System Operators for Gas (ENTSO-G) will provide significant mutual benefits. Above all this refers to an increased level of competition, free cross-border electricity trading and high reliability of the energy system as well as energy diversification. There is a need for technical guidance and financial assistance to support the gradual integration of Moldova and Ukraine into the EU's energy market.
- On energy security, the EU's Energy Union should include the three associated countries (which are also participants of the Energy Community). One

of the key goals would be the shift of the point of gas delivery to the Ukrainian-Russian border for the new generation of long-term contracts of EU companies with Gazprom.

- Deeper liberalization of services should also be promoted: liberalization of telecommunications, transport services, and postal services could significantly increase the trade and business relations.
  As envisaged by the EU-Ukraine Association Agreement, a special agreement on road transport services should be negotiated. There should be a visible progress towards the liberalisation of transport services between the EU and the associated EaP states.
- Investing in the infrastructure that connects should also remain a key priority. The extension of the TEN-T core networks for the three associated states would allow for greater mobility and increased transport opportunities for the development of economic relations. The EU aid to infrastructure development projects should envisage not only loans but also grant support, accompanied by proper accountability monitoring.
- The inclusion of the *inland waterways* in the TEN-T network plays a special role for Ukraine and the possible assistance needed from the side of the EU in order to make it functional and viable.
- The bottlenecks for intensified bilateral movement of people and goods on the EU-Ukraine and EU-Moldova land borders should be removed by signing and implementing bilateral agreements on joint border controls between Ukraine and Moldova and the neighbouring EU member states. Opening new joint border crossing points is an important deliverable.
- Another long-talked about measure is the acceptance of the associated EaP states into the Single European Payment System, which might bring wide benefits for people who travel and do business in the EaP and EU countries. It could also address some key issues, like money laundering and banking transparency. SEPA expansion to the EaP could be done through an initial assessment, followed by Action Plans like in the case VLAPs. The Action Plans should include conditionalities on combating money-laundering (harmonized with conditions already put into play by the IMF or agreed in Moneyval of CoE) linked with technical assistance and financial rewards for rapid and efficient implementation of their provisions.

6. Resilient digital transformation

- The EU should accelerate the abolition of roaming fees between the EU and its Eastern Partners, on a bilateral basis.

- An important step is to conclude agreements on mutual recognition of electronic trust services that will facilitate trade and economic cooperation by allowing cross-border e-services, recognition of e-signature and digitalization of services.
- The EU should grant to the associated EaP states an internal market treatment in the telecommunications services sector, should follow a positive assessment of the EaP states of national legislation's harmonisation with the EU acquis.
- Movement towards further integration into the EU's Digital Single Market should provide for opportunities for the interested EaP countries to join the EU's digital, research and ICT innovations policies, programmes and initiatives – inter alia, the European Open Science Cloud, the European High Performance Computing Joint Undertaking, the Coordinated Plan on Artificial Intelligence, and the deployment of secure 5G telecommunications networks.
- The EU is set to adopt a Digital Service Act updating the e-Commerce Directive aiming at strengthening the EU's Single Market for digital services and to foster innovation and competitiveness of the European online environment. In this regard, looking at the gradual integration into the EU's Digital Single Market, three associated EaP states should adopt national acts to enable everyone to participate in the digital world; to limit take-down requirements to content that is clearly illegal; to ensure transparency on how online platforms function; to ensure availability, accessibility and effectiveness of redress mechanisms for unjustified decisions by the digital services.
- The digital integration should be based on harmonisation of legislation on personal data protection (including GDPR, other EU acquis and relevant CoE conventions), with necessary EU support.
- Inclusion of the three associated countries into the EU's Digital Economy and Society Index (DESI) will help to summarise their digital performance and track the evolution in digital competitiveness.

Prospects for Integration in the Western Balkans

Jelena Ceranic Perisic

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I. Introduction

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

includes countries that are not members of the European Union. Currently these are: Albania, Bosnia and Herzegovina, Montenegro, North Macedonia, and Serbia.[1]

The European Union and its Member States have consistently, since the Thessaloniki Summit in June 2003, expressed their support for the European perspective of the Western Balkans.[2]

However, since then, only one country from the Western Balkans region became an EU Member State. It was the Republic of Croatia that joined the EU in July 2013. Therefore, at the Council's meeting in November 2019, there was a common understanding of the usefulness of examining the effectiveness of the accession negotiation process.

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

A new enlargement methodology may be considered as a step towards overcoming the impasse in the EU enlargement process triggered by the inability of the Council to open accession negotiations with North Macedonia and Albania in October 2019. France opposed starting negotiations with North Macedonia and Albania, while Denmark and the Netherlands opposed opening negotiations with Albania.

Nevertheless, the reasons for adopting a new enlargement methodology go much deeper than the Council's inability to open accession negotiations with North Macedonia and Albania. Since the economic crisis of 2008, the European Union has been facing economic, political and legal difficulties that threaten to undermine the fundamental values achieved by the Community, such as the peace and stability in the European Communities over the past almost 65 years. In addition, the European Union has been facing a certain

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

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

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

enlargement fatigue ensuing from the most recent enlargement waves in the first decade of the 21st century. Therefore, the willingness of the EU Member States to accept the Western Balkans countries into the European community of nations should also be taken into account.[4] All these factors also affect the efficiency of the EU enlargement process.

"Ever since the process of enlargement itself started, it has been gradually altered due to both EU-related internal issues (for ex. the economic crisis of 2008, Brexit, the 2015 refugee crisis and most definitely the current global COVID-19 pandemic) as well as Western Balkans countries' fulfilment of requirements for accession as set forth in the Treaty of the European Union. During these years of aspirations for European integration of the Western Balkans, the process itself has undergone some changes. Every past enlargement was accompanied by a self-learning process wherein the EU rethought and improved its approach. Their application is observed in the enlargement process of the Western Balkans."[5]

On 6 May 2020, at the EU-Western Balkans Zagreb summit, which took place via video conference on 6 May 2020, EU leaders agreed on the Zagreb declaration. This declaration once again reaffirms the European Union's unequivocal support for the European perspective of the Western Balkans. The European Union is determined to strengthen its support to the region's political, economic, and social transformation. Western Balkans partners reaffirmed this perspective as their firm strategic choice. They also recommitted to carrying out and effectively implementing the necessary reforms towards European values and principles and the primacy of the rule of law.[6]

This paper presents an attempt to examine prospects of integration in the Western Balkans. After short introductory notes (Part I.), the paper gives a brief overview of the position of Western Balkans countries in the European integration process (Part II.). Thereafter, the paper focuses on a new enlargement methodology, its criteria, and instruments for achievement of these criteria (Part III.). Finally, the paper examines the novelty of the instruments provided by a new enlargement methodology and their feasibility as well. Special attention is given to the instrument of closer integration (Part IV.).

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4 Rabrenovic/Ceranic Perisic, 312.

5 Lula Lutjona, Commenting on the New Enlargement Methodology: Implications to the EU Integration Process of the Western Balkans, <https://www.institutegreatereurope.com/single-post/2020/05/06/commenting-on-the-new-enlargement-methodology-implications-to-the-eu-integration-process>.

6 Zagreb Declaration, 5 May 2020, <https://www.consilium.europa.eu/media/43776/zagreb-declaration-en-06052020.pdf>.

II. An overview of the position of the Western Balkan countries in the European integration process

As for the current position of Western Balkans countries in the European integration process, three different groups of countries can be distinguished. The first group consists of countries that have already opened accession negotiations. These are Serbia and Montenegro, and they are considered front runners in the region. In the second group are countries that have recently started accession talks (March 2020), but no chapters have been opened so far. These are North Macedonia and Albania. The third group includes only one country that has not yet achieved the status of a candidate country. It is Bosnia and Herzegovina that is still considered a potential candidate for EU integration.

1. Serbia

Negotiations with the Federal Republic of Yugoslavia (later the State Union of Serbia and Montenegro) were intensified following the democratic changes in October 2000.[7] The State Union of Serbia and Montenegro started the process of accession to the EU in November 2005, when negotiations over a Stabilization and Association Agreement began. After the dissolution of the State Union (2006), Serbia continued with the existing negotiations.

In November 2007, Serbia initiated a Stabilisation and Association Agreement (SAA) with the EU. The European Commission recommended making Serbia an official candidate in October 2011. In March 2012 the European Council granted Serbia official candidate status for EU membership. In January 2014 negotiations were officially opened.[8]

Serbia currently has 18 opened accession chapters, two of which have been provisionally closed.

2. Montenegro

In May 2006, Montenegro voted for independence from Serbia in a referendum. Consequently, the State Union of Serbia and Montenegro was dissolved.[9] While Serbia continued with the existing negotiations, separate negotiations were launched with Montenegro in September 2006. A Stabilization and Asso-

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7 Ceranic Perisic(2014), 290.

8 <https://ec.europa.eu/neighbourhood-enlargement/countries/detailed-country-information/serbia_en>.

9 Ceranic Perisic(2014), 292 et seq.

ciation Agreement was officially signed in October 2007. In December 2010 Montenegro received official candidate status. In June 2012 accession negotiations began.[10]

After almost nine years of accession negotiations all of the 33 screened chapters have been opened, of which three are provisionally closed.

3. North Macedonia

North Macedonia (formerly the Republic of Macedonia) began its formal process of rapprochement with the European Union in 2000. It was the first non-EU country in the Western Balkans to sign a Stabilisation and Association Agreement in April 2001. The SAA came into force on 1 April 2004.

North Macedonia received official candidate status in December 2005. However, negotiations could not be opened for more than a decade due to the naming dispute with Greece. Namely, Greece vetoed Macedonian accession until the resolution of the naming dispute. Greece argued that its constitutional name of the Republic of Macedonia implied territorial ambitions towards Greece's own northern province of Macedonia. Therefore, the European Union, in acknowledgment of concerns raised by Greece, maintained a practice of recognizing the country only as the "former Yugoslav Republic of Macedonia".[11]

In June 2018, an agreement on the naming dispute was finally reached. According to the Prespa Agreement the country is to be renamed the "Republic of North Macedonia". As part of this deal, Greece explicitly withdrew its previous opposition, allowing the European Union to approve a pathway to start accession talks with North Macedonia.

After the resolution of the naming dispute with Greece, accession negotiations with North Macedonia were expected to start immediately. However, the Council decided to postpone the decision to October 2019 due to the objections from certain EU Member States. In October 2019 France vetoed the opening of accession negotiations with North Macedonia.

Finally, after a new enlargement methodology was issued (February 2020), the Council decided to open accession negotiations with North Macedonia (March 2020). However, in November 2020 Bulgaria blocked the official start

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10 <https://ec.europa.eu/neighbourhood-enlargement/countries/detailed-country-information/montenegro_en>.

11 <https://ec.europa.eu/neighbourhood-enlargement/countries/detailed-country-information/north-macedonia_en>.

of negotiations with the Republic of North Macedonia. Bulgaria demanded further guarantees from North Macedonia regarding a friendship treaty between these two countries. This friendship treaty from 2017 refers to some complicated issues from the history of these neighboring countries.

4. Albania

Albania started negotiations on a Stabilisation and Association Agreement in 2003. The Agreement was signed in June 2006 and Albania applied for EU membership in April 2009. However, it was not until 2014 that Albania became an official candidate for EU accession. Again, it took time to start negotiation talks.

It should be noted that Albania's EU accession is bundled with North Macedonia's EU accession. Although it was agreed in June 2018 that negotiations would begin by the end of 2019, the decision was vetoed in October 2019.[12]

Accession negotiations with Albania finally started in March 2020, after a new enlargement methodology was issued. The screening process is under way and no chapters have been opened so far.

5. Bosnia and Herzegovina

Bosnia and Herzegovina has been recognized by the EU as a potential candidate country for accession since 2003. However, it was not until February 2016 that the country submitted its application for joining the European Union. Due to constitutional reforms and engagements with the Dayton Peace Agreement, it took more than a decade for Bosnia and Herzegovina to apply for membership in the EU.[13]

In December 2016, Bosnia and Herzegovina received the accession questionnaire from the European Commission. After Bosnia and Herzegovina submitted its latest response (March 2019), twenty-two policy and political criteria questions remained unanswered. Therefore, Bosnia and Herzegovina remains a potential candidate country until it successfully answers all of the questions of the questionnaire.

In a meantime, Bosnia and Herzegovina's trade relations with the European Union are regulated by an Interim Agreement.

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12 <https://ec.europa.eu/neighbourhood-enlargement/countries/detailed-country-information/albania_en>.

13 <https://ec.europa.eu/neighbourhood-enlargement/countries/detailed-country-information/bosnia-herzegovina_en>.

III. A new enlargement methodology

On 5 February 2020, the European Commission issued the Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions proposing a new enlargement methodology named "Enhancing the accession process – A credible EU perspective for the Western Balkans".[14]

At the very beginning of the Communication, the Commission stated that the firm, merit-based prospect of full EU membership for the Western Balkans is in the Union's very own political, security and economic interest. "In times of increasing global challenges and divisions, it remains more than ever a geostrategic investment in a stable, strong and United Europe. A credible accession perspective is the key incentive and driver of transformation in the region and thus enhances our collective security and prosperity. It is a key tool to promote democracy, rule of law and the respect for fundamental rights, which are also the main engines of economic integration and the essential anchor for fostering regional reconciliation and stability. Maintaining and enhancing this policy is thus indispensable for the EU's credibility, for the EU' success and for the influence in the region and beyond – especially at times of heightened geopolitical competition."[15]

The European Commission also emphasizes that the effectiveness of the overall accession process and of its implementation must be improved further. While the strategic direction of the policy remains more valid than ever, it must get much better traction on the ground.

Despite successive reforms (such as the new approach on the rule of law, and the focus on the fundamentals under the Commission's Western Balkans Strategy from 2018), the process needs to be better equipped to deal with structural weaknesses in the Western Balkans countries, in particular in the area of fundamentals. "It is of major importance to build more trust among all stakeholders and to enhance the accession process and to make it more effective."[16]

A new enlargement methodology sets out concrete proposals for strengthening the whole accession process. The overall aim is to enhance credibility and trust on both sides and to yield better results on the ground. A new enlargement methodology refers primarily to North Macedonia and Albania. However, it is clearly stated that proposed changes can be accommodated within exist-

14 COM (2020) 57 final.

15 Ibid.

16 Ibid.

ing negotiating frameworks, ensuring a level playing field in the region. In the other words, negotiating frameworks for Serbia and Montenegro, countries that have already started accession talks, will not be amended, but the proposed changes could be accommodated within the existing frameworks with the agreement of these two countries.[17]

"A core objective of the European Union's engagement with the Western Balkans countries is to prepare them to meet all the requirements of membership. This includes supporting fundamental democratic, rule of law and economic reforms and alignment with core European values. This will in return foster solid and accelerated economic growth and social convergence."[18]

To achieve these objectives, a new methodology relies on four criteria: more credibility, a stronger political steer, a more dynamic process, and predictability (positive and negative conditionality). To meet each of these criteria, a new enlargement methodology provides several legal instruments.

1. More credibility

According to a new enlargement methodology, for the accession process to regain credibility on both sides and deliver to its full potential, this process needs to rest on solid trust, mutual confidence, and clear commitments on both sides.[19] What does it mean in practice?

On one hand, it means the Western Balkans leaders must deliver more credibly on their commitment to implement the fundamental reforms required. These fundamental reforms include rule of law, fighting corruption, ensuring the proper functioning of democratic institutions and public administration, etc. "Both EU Member States and their citizens have legitimate concerns and need to be reassured. This implies that the political will of the Western Balkans countries should be proven by structural reforms. Furthermore, Western Balkans leaders must also show more efforts to strengthen regional cooperation and good neighborly relations to bring stability and prosperity to their citizens, while giving confidence to the EU that the region is addressing the legacy of its past."[20]

On the other hand, this also means the European Union needs to deliver on its unwavering commitment to a merit-based process. A merit-based process

17 Ceranic Perisic(2020).
18 COM (2020) 57 final.
19 Ibid.
20 Ibid.

implies that when partner countries meet the objective criteria and conditions, the Member States shall agree to move forward to the next stage of the process. All parties must abstain from misusing outstanding issues in the EU accession process. The Commission emphasizes that Member States and institutions must speak with one voice in the region, sending clear signals of support and encouragement.[21]

To regain more credibility on both sides, an even stronger focus should be put on the fundamental reforms. These reforms are essential for success on the EU path and include rule of law, fighting corruption, ensuring the proper functioning of democratic institutions and public administration etc. Based on a new enlargement methodology, fundamental reforms will become even more central in the accession negotiations. This means negotiations on fundamentals will be opened first and closed last and progress on these will determine the overall pace of negotiations.

2. A stronger political steer

The second criteria provided by a new enlargement methodology is stronger political steer. It is known that accession to the EU is a process requiring and supporting fundamental reform and political and economic change in the countries aspiring to join. This process also requires the aspiring countries to demonstrate an ability to take on shared responsibilities as a Member State of the EU. "It is not moving on autopilot but must reflect an active societal choice on their part to reach and respect the highest European standards and values. Equally, the commitment of the Member States to share a common future with the Western Balkans as full members of the Union is a significant political and not simply technical undertaking."[22]

Consequently, both sides should show more leadership and live up to their respective commitments in public, while coming in more directly on matters of concern. Hence, it is time to put the political nature of the process front and center and to ensure stronger steering and high-level engagement from both EU Member States and aspiring countries.

To achieve a stronger political steer, a new enlargement methodology proposes to create new opportunities for high level political and policy dialogue with the countries. It includes regular EU-Western Balkans summits and intensified ministerial contacts, especially in areas where alignment is pro-

21 Ibid.

22 Ibid.

gressing well, and key criteria are being met. For the very first time it is stipulated that accession countries can participate as observers in key European Union meetings on matters of substantial importance for them.[23]

3. A more dynamic process

When it comes to the third criteria, a new enlargement methodology suggests making the process more dynamic. To inject further dynamism into the process and to foster cross-fertilization of efforts beyond individual chapters, it is provided that the negotiating chapters will be organized in thematic clusters. These clusters follow broad themes such as good governance, internal market, economic competitiveness, etc.

To this end, a new enlargement methodology provides negotiating chapters to be organized in six thematic clusters. Those clusters are: Fundamentals;[24] Internal Market;[25] Competitiveness and inclusive growth;[26] Green agenda and sustainable connectivity;[27] Resources, agriculture and cohesion;[28] and External relations.[29] Clustering chapters will allow stronger focus on core sectors in the political dialogue and provide an improved framing for higher level political engagement. It will allow the most important and urgent reforms per sector to be identified. This will give overall reform processes more traction on the ground, by better incentivizing sectoral reforms in the interests of citizens and businesses.[30]

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23 Ibid.

24 Cluster 1: Fundamentals: 23 – Judiciary and fundamental rights; 24 – Justice, Freedom and Security, Economic criteria, Functioning of democratic institutions, Public administration; 5 – Public procurement; 18 – Statistics; 32 – Financial control.

25 Cluster 2: Internal market: 1 – Free movement of goods; 2 – Freedom of movement for workers; 3 – Right of establishment and freedom to provide services; 4 – Free movement of capita; 6 – Company law; 7 – Intellectual property law; 8 – Competition policy; 9 – Financial services; 28 – Consumer and health protection.

26 Cluster 3: Competitiveness and inclusive growth: 10 – Information society and media; 16 – Taxation; 17 – Economic and monetary policy; 19 – Social policy and employment; 20 – Enterprise and industrial policy; 25 – Science and research; 26 – Education and culture; 29 – Customs union.

27 Cluster 4: Green agenda and sustainable connectivity: 14 – Transport policy; 15 – Energy; 21 – Trans-European networks; 27 – Environment and climate change.

28 Cluster 5: Resources, agriculture, and cohesion: 11 – Agriculture and rural development; 12 – Food safety, veterinary and phytosanitary policy; 13 – Fisheries; 22 – Regional policy & coordination of structural instruments; 33 – Financial & budgetary provisions.

29 Cluster 6: External relations: 30 – External relations; 31 – Foreign, security & defense policy.

30 COM (2020) 57 final.

It is important to note that negotiations on each cluster will be opened as a whole – after fulfilling the opening benchmarks – rather than on an individual chapter basis. As a result of the screening process, carried out per cluster, priorities for accelerated integration and key reforms will be agreed between the EU and the candidate country. "When these priorities have been sufficiently addressed, the cluster (covering all chapters) is opened without further conditions and closing benchmarks are set for each chapter. Where important reforms will already have been implemented before opening, the timeframe between opening the cluster and closing individual chapters should be limited, preferably within a year fully dependent on the progress on the reforms, with the focus on remaining measures needed to ensure full alignment."[31]

A new enlargement methodology also refers to negotiations with Serbia and Montenegro that have already been opened. To inject more dynamism into the negotiations with these two countries, work on chapters can also be organized around clusters, while respecting the existing negotiating frameworks and with the agreement of these countries. This will allow for more political focus on key sectors and for building political momentum in the countries around key issues for alignment.

4. Predictability

It is important for both Western Balkans countries and EU Member States that the negotiating process be more predictable. Such a process ensures greater clarity on what the Union expects of aspiring countries at different stages of the process, and what the positive and negative consequences are of the process or lack thereof.

In theory, joining the EU is recognized as a process in which external conditioning is a key instrument of integration. In this process, membership to the EU is conditioned by the fulfillment of a large number of conditions, the most important of which is the harmonization of the legal framework with *acquis communautaire*.[32]

Consequently, the core element of the merit-based accession process is its conditionality. Given this, the conditions must be known from the very beginning. It is of great importance that the candidate countries know the benchmarks against which their performance will be measured, on the one hand, and that Member States share a clear understanding of what exactly is requested

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31 Ibid.

32 Knezevic/Coric/Visekruna, 234.

from the candidates on the other hand. The Commission will better define the conditions set for candidates to progress and those conditions must be objective, precise, detailed, strict and verifiable.[33]

To meet the fourth criteria, predictability, both positive and negative incentives are envisaged by a new enlargement methodology.

"Providing clear and tangible incentives of direct interest to citizens, the EU can encourage real political will and reward results arising from demanding reforms and the process of political, economic, and societal change. If countries move on reform priorities agreed in the negotiations sufficiently, this should lead to:

- Closer integration of the country with the European Union, work for accelerated integration and "phasing-in" to individual EU policies, the EU market and EU programs, while ensuring a level of playing field.
- Increased funding and investments – including through a performance-based and reform-oriented Instrument for Pre-accession support and closer cooperation with IFIs to leverage support."[34]

In addition to the instruments of positive incentives, a new enlargement methodology also envisages the whole spectrum of instruments of negative incentives, i.e. different sanctions for any serious or prolonged stagnation or even backsliding in reform implementation. In serious cases, the Commission can make proposals at any time on its own or at the duly motivated request of a Member State in order to ensure a quick response to the situation.

"The EU could address potential problems in several ways:

- Member States could decide that negotiations can be put on hold in certain areas, or in the most serious cases, suspended overall. Already closed chapters could be re-opened or reset if issues need to be reassessed.
- The scope and intensity of EU funding could be adjusted downward, with the exception of support of civil society.
- Benefits of closer integration e.g. access to EU programs, unilateral concessions for market access could be paused or withdrawn."[35]

A new enlargement methodology emphasizes the importance of transparency of the overall process. Predictability and conditionality will also be enhanced through greater transparency.

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33 COM (2020) 57 final.

34 Ibid.

35 Ibid.

IV. Novelty of the Instruments Provided by a New enlargement methodology

In order to achieve the four criteria provided by a new enlargement methodology, several legal instruments are envisaged. These instruments are a stronger focus on fundamental reforms, high level political and policy dialogue, clustering chapters and positive and negative incentives, i.e. the possibility of closer integration, increased funding and investments and sanctions.

The present part of this paper is an attempt to shed light on the novelty of these instruments. Although the term *new* is constantly used in the document, it turns out that most of them are existing instruments and mechanisms of EU law and are simply applied in a new context.

1. Stronger focus on fundamental reforms

One of the issues strongly emphasized by the Commission is the priority of fundamental political reforms such as the rule of law, functioning of democratic institutions, fighting corruptions, etc. According to a new enlargement methodology, negotiations on the fundamentals will be opened first and closed last and progress on these will determine the overall pace of negotiations.[36] While this approach seems to be the right one, especially in the light of recent developments on this front in some Member States, it should be mentioned that the focus on fundamentals in the EU accession negotiations is not an entirely new approach. The importance of a stronger focus on fundamental reforms was repeated in a series of Commission and Councils documents related to the Western Balkans region in recent years.

Furthermore, even the strongest emphasis given to foundations of political and legal systems in accession negotiations will not provide a full protection against potential abuses of the rule of law and authoritarian drifts in individual countries once they become EU members. Besides, incidents of backsliding on fundamental values have happened not only in new EU Member States. "As well as the greater emphasis on fundamental values in accession negotiation, the EU must also strengthen the mechanisms of their enforcement with incumbent members. It may include, for example, a regular Commission's assessment of Member States' records in the area of fundamental rights and the rule

[36] See above III.1.

of law, more active use of infringement procedure in case of failure to implement EU law, strengthening competences of the European Court of Justice, etc."[37]

2. High level political and policy dialogue

To realize a stronger political steer, a new enlargement methodology envisages regular intergovernmental conferences.[38] This high-level political dialogue implies regular EU-Western Balkans summits and intensified ministerial contacts, especially in areas where alignment is progressing well and key criteria are being met. Such increased engagement could lead to the Western Balkans countries participating as observers in the most important EU meetings on matters that are essential for them.

The idea of creating new opportunities for high level political and policy dialogue with the countries is not completely new. Certain aspects of this instrument, such as regular summits and intensified ministerial contacts, have been mentioned before. However the possibility for representatives from the region to participate as observers in the key EU meetings is to be considered as a novelty offered to the Western Balkans countries.[39]

3. Clustering chapters

The third criteria of a new enlargement methodology, a more dynamic process, should be met by clustering chapters.[40] It is provided that 35 negotiation chapters should be grouped into six thematic clusters. The European Commission is of the opinion that this will allow a stronger focus on core sectors in the political dialogue and will help identify the most important and urgent reforms per sector.

Although it is difficult to assess the effectiveness of this instrument in advance, it seems that it could help and even speed up the negotiation process under the condition that some secondary issues in less important chapters will not hold the entire negotiation cluster. Another doubt relates to chapters

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37 Dabrowski Marek, Can the EU overcome its enlargement impasse?, <https://www.bruegel.org/2020/02/can-the-european-union-overcome-its-enlargement-impasse/>.

38 See above III.2.

39 Ceranic Perisic(2020).

40 See above III.3.

grouping. One may ask, for example, whether statistics and financial control really belong to Fundamentals or whether putting together agriculture and regional policy in one cluster is a rationale move.[41]

4. Positive and negative incentives

To make the accession process more predictable, a new enlargement methodology envisages the instruments of positive and negative incentives.[42] This fourth part of a new methodology has attracted the most attention from the scientific and professional public. The instrument of closer integration is at the center of their interest.

a) Closer integration

A possibility for closer integration of the country with the European Union, as one instrument of positive incentives, seems particularly interesting. This instrument is not a completely new one either. Closer integration is just one of the modalities of differentiated integration, a phenomenon that has always existed in European integrations. Numerous manifestations of diversification derive from the Treaties and from secondary law. Special regimes, derogations, exceptions, and safeguard clauses are to be found in the Treaties right from the start of the process of integration.[43]

The Treaty of Amsterdam has turned the exception into a constitutional principle.[44] Namely, the concept of differentiated integration was institutionalized by the Amsterdam Treaty in 1997. The Amsterdam Treaty constitutionalized a notion of enhanced/closer cooperation, by introducing for the first time the formalized possibility for the future development of flexible integration under the Treaties, subject to certain conditions.[45] Since the conditions for the use of enhanced cooperation were very strict, this mechanism was subject to numerous amendments provided by the Nice Treaty and the Lisbon Treaty. According to the Lisbon Treaty: "Member States which wish to establish enhanced cooperation between themselves within the framework of the Union's non-exclusive competence may make use of its institutions and exercise those

41 Dabrowski.

42 See above, III.4.

43 Ceranic Perisic, 13.

44 Phillipart/Sie Dhian Ho, 330.

45 Ceranic Perisic, 25.

competences by applying the relevant provisions of the Treaties, subject to the limits and in accordance with the detailed arrangements laid down in the Articles 326 to 334 of the Treaty on the Functioning of the European Union."[46]

The history of European integrations testifies that whenever the external borders of the EU have been changed, in terms of increasing the number of Member States and consequently its diversity, the discussion on differentiated integration has been intensified. In this context, differentiated integration, based on the flexibility concept, should be taken as a new principle and a new tool for responding to differences in the enthusiasm and capabilities of the Member States of the EU to take on new tasks of policy integration.[47]

Nowadays, in the context of integrations in the Western Balkans, candidate countries have been offered closer integration with the EU, work for accelerated integration and "phasing-in" to individual EU policies, the EU market and EU programmes.

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

However, when it comes to the EU Single Market, the question is whether it is possible to participate in it without being an EU Member State. If one looks at the modalities of participation in the EU Single Market, one can find that different modalities of participation in the EU Internal Market without full EU membership already exist.

At this point one can recall the case of Switzerland. Regardless of the different positions of the Western Balkans and Switzerland, in terms of legal positioning regarding the EU *acquis* the Swiss participation within the EU Internal Market could be qualified as a type of closer integration or as an integration at its own speed.[48] In its relationship to the European Union, Switzerland follows the so-called *bilateral approach*. Instead of a comprehensive integration, specific areas of mutual concern are regulated through a framework of traditional international treaties and for a very limited purpose only.[49]

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46 Art. 20 TEU.

47 Wallace, 173.

48 Kellerhals, 147.

49 Kellerhals/Baumgartner, 272.

Although the privileged position of Switzerland in the EU Internal Market cannot be compared with the possibility offered to the Western Balkans countries, the case of Switzerland is mentioned more illustratively, in the light of examining the modalities of participation in the EU Internal Market.

Since different modalities of participation in the EU Internal Market have already existed, the instrument of closer cooperation offered by a new enlargement methodology is not challenging because of its novelty, but because of its feasibility. The possibility of "phasing-in" to individual EU policies, the EU market and EU programmes for the Western Balkans countries has opened up a few practical questions. How will closer integration of the country with EU, i.e. "phasing-in" to individual EU policies, the EU market and EU programmes, operate in the practice, especially when it comes to the decision-making process. Does it mean that the candidate country will be allowed to participate in the decision-making process in certain EU policies and to vote in the Council and in the European Parliament? Or does it mean that the representatives of that country will participate only as observers in the above-mentioned EU meetings? Does one of the dilemmas also concerns the sustainability of closer integration in individual EU policies, the EU market and EU programmes over time? Is it feasible that the candidate country participate partially in certain EU policies or only in some aspects of the EU Internal Market? And for how long? A new methodology does not provide an answer to any of these questions.

b) Finding a right balance between positive and negative incentives

Regarding the EU policy of external conditionality and positive and negative incentives for candidate countries, there are opinions that the EU is continuing with the already used and tested strategy of *the carrot and the stick*. Some believe that the EU did increase the *carrot*, but that in turn it also extended the *stick*.

As for the carrot, there is a prospect of closer integration and "phasing-in" to individual EU policies, the EU market and EU programmes and increasing funding and investment. Nevertheless, it seems that by anticipating these instruments of positive incentives the Pandora's box has been opened. "The devil is in details: how 'phasing-in' will operate in practice, the question is whether it will go beyond integration provisions of the SAA, and whether the new Multiannual Financial Framework can allocate more funds for pre-accession aid."[50]

[50] Dabrowski.

In terms of *sticks*, namely negative incentives, it is quite clear that sanctions have been tightened. Negative incentives include putting negotiations in certain areas on hold, suspending the entire negotiation, reopening the already closed chapters, reducing the EU funding, withdrawing benefits of closer integration, etc.[51]

"In practice, however, the critical issue is finding the right balance between positive and negative incentives. Historically, it seems that this balance has been moved towards negative incentives, undercutting the hope of candidate countries that have a real chance of joining the EU in the foreseeable future."[52]

V. Concluding remarks

In the light of the political, legal and economic challenges that the European Union has been facing for more than a decade, the adoption of a new enlargement methodology might be seen as a positive step. Taking into consideration a certain *enlargement fatigue* and a stagnation in the accession integrations, a new enlargement methodology with its instruments can contribute to reinvigorating the accession process.

It is clear that the instruments envisaged by a new enlargement methodology are not new. Most of them are already existing mechanisms and instruments of EU law in a *new guise*. However, it does not mean that they cannot contribute to overcoming the stalemate in the EU enlargement process. If properly applied in practice, these instruments can contribute to speeding up the accession process.

The current COVID-19 pandemic is expected to have a sizeable impact on the EU's economy, pushing enlargement down again in the list of EU priorities. Although the accession process might be delayed for the Western Balkans countries, such a new approach aims to provide solid and clear mutual commitment to credibility by both Western Balkans governments as well as the European Union. "Thus, this reshuffle is to be observed as an opportunity for both the EU and the Western Balkans to put democratic principles first, as well as to encourage Western Balkans civil society to demand further accountability of their institutions into practice."[53]

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51 See above, III.4.

52 Dabrowski.

53 Lutjona.

Finally, in times of increasing global challenges and divisions, the prospect for integration in the Western Balkans might be considered as a geostrategic investment in a stable, strong and united Europe.

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New Reality: Navigating Economic Governance in the EU and Baltic States

Tatjana Muravska

Table of Contents

I. EU Integration: Facing a Formidable Challenge

This article aims to discuss the EU and the Baltic States in a new environment which faces multifaceted challenges of a unique global mixed and multidimensional crisis, some of which are putting the achievements of European integration at risk. It has been said repeatedly: the COVID-19 pandemic is going to have significant, long-term consequences.

This crisis is very different from previous economic downturns being multidimensional due to various health systems problems and, consequently, economic systems. Nations are dealing with simultaneous crises. The 2008-2013 recession and recovery recipes were based on neoliberal fundamentals comprising a globalised market-based system, a loosening of regulatory controls, a weakening of social safety nets, and a reduction of taxes. However, in times of 2008 crises, the neoliberal ideology, advocated by the Washington consensus institutions, supported the implementation of austerity measures (control of budget deficits and public spending) to overcome debt and fiscal problems. The neoliberal orthodoxy directs market-oriented reform policies, the lowering of trade barriers, and the reduction of state influence on the economy.

These measures proved to be not entirely useful and underappreciated in 2020 due to the different conditions provoked by the Covid-19 crisis. A move away from the neoliberal policies and neoliberal approach is unlikely to be the only methodology for overcoming this crisis. The actions taken by governments since the very beginning show that some lessons have been learned from the previous crises and their management. As a result, an austerity policy is not applied to the public sector and is unlikely foreseen in one or two years; the public sector and institutions consider themselves as the guarantors of their citizens' safety and security. Such a trend was bold at the first stage of the crisis, characterised by lockdown policies.[1]

The novel coronavirus has caused unprecedented government interventions in many countries, including EU Member States (MS). The challenges are similar to a large extent in every MS as they all have to mobilise resources to provide post-disaster health and financial services to communities, businesses and individuals. Strategies developed for preventing, managing, and mitigating stress and anxiety for Europeans, even with some uncertainty, can lead to socio-economic recovery.

At the European level, the foundations of European integration are being questioned. The Single Market was built on the free movement of labour, capital and services, Competition Law, State aid, and the Stability and Growth Pact. These pillars have been shaken by the pandemic and will undoubtedly be at the centre of future debates.[2]

The question is whether the EU's essential values will push forward other policies due to the crisis. The author believes that European fundamentals have a strong influence on the EU institutions' political responses and motivate governments to harmonise rules and policies further to overcome the crisis and its consequences for the benefit of economic integration.

II. EU in a Quandary Between the National Policies and the Need for Cooperation

1. The EU Single Market and Socio-Economic Fragility

To maintain Europe's values in a more restrictive global environment, the application of measures for preventing the barriers caused by Covid-19 in order to sustain the Single Market's welfare benefits will be crucial. EU inte-

1 OECD, COVID-19 and fiscal relations across levels of government.

2 Zuleeg.

gration needs rethinking as it is now in a quandary between the national policies of the MS determined by the global pandemic, the effectiveness of their health systems and an urgent need for cooperation by the Member States so as to avoid European divisions and prevent economies and people from the severe economic downturn. This contribution will pay attention to the process of the implementation of the EU's "Marshall Plan" considering new economic, social and political realities, including the competencies of the European Commission (EC) in such policies as social, public health, and health care.[3]

According to the International Labour Organisation (ILO), "the world of work is being profoundly affected by the global virus pandemic. In addition to the threat to public health, the economic and social disruption threatens the long-term livelihoods and well-being of millions."[4]

Most countries in the Western world have spent their resources at an unprecedented scale in order to boost their economies and employment through fiscal, monetary, social protection, and other policies. An essential reference for tackling these challenges is provided in the ILO Centenary Declaration for the Future of Work, which sets out a human-centred approach for increasing investment in people's capabilities, work institutions, and the creation of decent and sustainable jobs for the future.[5] Trade union organisations in several OECD countries responded swiftly to the challenges raised by COVID-19.[6] According to the European Trade Union Confederation (ETUC), short-time work schemes with both employers and governments have been negotiated so that workers continue to receive their wages or a percentage of their salaries. Trade unions have concluded a number of agreements that achieve the triple objective of protecting business, maintaining employment and ensuring that when the EU economies come out of lockdown, they are in the best position to restart their activities. Constructive social dialogue (SD) and decisive responses from all social partners are required to provide synergies between social and economic development, effective employment policy, and a safety net for the future.[7]

Such initiatives illustrate that SD and collective bargaining can be mobilized to complement public action, identify flexible and balanced solutions for both

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3 Von der Leyen.

4 International Labor Organisation, COVID-19 and the world of work.

5 Ibid.

6 The Trade Union Advisory Committee, TUAC Assessment of the OECD Employment Outlook 2020.

7 European Trade Union Confederation, Covid-19 Watch: Short Time Work Measures Across Europe.

companies and workers, and strengthen labour market resilience.[8] Furthermore, many OECD countries extensively promoted teleworking or working from home. During the COVID-19 crisis, it was suddenly in both employers' and employees' direct interest to reduce their exposure to the virus and maintain operations. To promote a rapid move to telework for all processes that allow it, countries took a series of measures to simplify its use, including financial and non-financial support to companies.[9] The crisis demonstrates the urgency of a coherent, pan-European response to critical aspects of labour regulation and in-work poverty. Existing social safety nets cannot be relied upon to provide adequate protection.[10]

Whatever measures the EU and its MS implement, it is crucial to maintain employment rates as much as possible.[11] Employment and unemployment subsidies and the postponement of taxes are essential steps that have already been introduced by many governments but protecting jobs and production capacity at a time of dramatic income loss requires immediate liquidity support. This support is essential for all businesses so that they are able to cover their operating expenses during the crisis, be they large corporations or even more small and medium-sized enterprises and self-employed entrepreneurs. According to the European Central Bank (ECB), "National governments have provided unheard-of fiscal support to firms that retain jobs, helping make the surge in bank loans and corporate debt serviceable ex-post. More than 25 million workers in the euro area – 15% of employment – have been enrolled in short-time work schemes during the second quarter. As a result, jobs and incomes have been protected, and the connections between employers and employees have been preserved."[12]

Some analysts and politicians depict a state social protection role as short-term and unsustainable or even counterproductive in the new global scenario. However, the risk of social exclusion and in-work poverty (IWP), which represents a substantial group among workers and their number, continues to grow in many EU countries and was extant even before the current crisis began.[13] The European Pillar of Social Rights states that "adequate minimum wages shall be ensured."[14] As a response to the current situation, the European Union

8 OECD, Employment Outlook 2019: The Future of Work.

9 OECD, Economic Outlook No. 107.

10 Marchal.

11 Draghi.

12 Lagarde.

13 Peña-Casas/Ghailani/Spasova/Vanhercke.

14 European Council/European Parliament/European Commission, Our World, Our Dignity, Our Future.

aims to introduce a legal instrument on decent minimum wages in consultations with social partners in 2020. A European framework is foreseen to be designed and implemented. This initiative is another example of the interventionist approach in the EU social dimension in times of crisis. Such an approach has a long-term ambition for a Social Europe and the EU's efforts to reduce rising wage inequalities and in-work poverty. It helps to provide vulnerable workers with a financial buffer in case of hard times; create more generous incentives to work, thereby improving productivity, reduce wage inequalities in society, increase domestic demand, the resilience of the economy and close the gender pay gap. However, the legal instrument does not envisage harmonisation of minimum wage setting systems depending on the minimum wage setting designs and traditions of the MS, in full respect of national competencies and social partners' contractual freedom.[15] It would be essential to apply an adequate minimum wage as a critical element of the European Semester and country-specific recommendations.[16]

Moreover, a new European Citizens Initiative (ECI) "Start Unconditional Basic Incomes throughout the EU") was registered at the beginning of the crisis on 15th May 2020 with the collection dates from 25th September, 2020 to 25th September, 2021.[17] The aim is to establish unconditional basic incomes throughout the EU, ensuring every person's material existence and opportunity to participate in society as part of its economic policy. This shall be reached while remaining within the competences conferred to the EU by the Treaties. The prime objective is to reduce regional disparities so as to strengthen the economic, social and territorial cohesion in the EU. The joint statement by the European Council, the European Parliament and the European Commission in its response to the 2030 Agenda for Sustainable Development, stated already in 2017 that, "the EU and its MS will also support efficient, sustainable and equitable social protection systems to guarantee basic income" to combat inequality. The ECI is another tool that allows European citizens to express their "demands" for an increased strengthening of the EU. The need to collect signatures in the majority of the EU MS for this initiative to be valid creates the necessity for citizens to work across borders for the common goal, which could be that of the EU where the voice of the people is heard and counts. Article 11 (4) of the Lisbon Treaty states that "at least one million citizens of the nationality of EU MS may, on their initiative, invite the European Commission, in the exercise of its EU powers, to submit and make proposals

15 European Council, Special meeting of the European Council.

16 Dheret/Palimariciuc.

17 European Citizen Initiative.

for matters arising from the Treaty to citizens."[18] The ECI is seen as an opportunity for citizens to participate directly in shaping the EU's future. The issue has come to the fore under the free market's influence and free movement of labour.

2. Policies and Partnerships

The size and persistence of the socio-economic impact of the Covid-19 crisis are unknowable. The OECD indicated that global economic activity would fall by 6% in 2020, and OECD unemployment climbed to 9.2% from 5.4% in 2019. This is a scenario without a second wave. In the case of a second wave with renewed lockdowns, the OECD has estimated a drop of 7.6% in the world economic output before climbing back to 2.8% in 2021.[19]

The European economy entered a sudden recession in the first half of the 2020 with the deepest output contraction since World War II. To counter the spread of COVID-19, significant containment measures were introduced worldwide, voluntarily shutting down large parts of the economy. A string of indicators suggests that the euro area's economy has operated between 25% to 30% below its capacity during the period of the strictest confinement. Overall, the euro area's economy is forecast to contract by about 8 3/4% in 2020 before recovering at an annual growth rate of 6% next year.[20] This pandemic time has seen unprecedented government interventions across the EU, avoiding the Single Market principles and freedoms. Indeed, the current Covid-19 crisis has changed the conditions under which the common market operates. To adjust to the global structural economic changes and fluctuations requires the creation of a substantive common microeconomic and sectoral policy framework to continue the four freedoms beyond state intervention.

The White Paper on levelling the playing field regarding foreign subsidies by the EC recognises that State aids can distort the Single Market. "In the current context of the COVID-19 crisis, EU MS grant significant amounts of State aid to support individual undertakings and the EU economy as a whole. It is a situation in which State aid is an indispensable means at the disposal of public authorities to stabilise the economy and accelerate research into the coro-

18 COM(2020) 253 final.

19 OECD, Economic Outlook, No. 107.

20 European Commission, Economic Forecast: A deep and uneven recession, an uncertain recovery.

navirus. The current situation illustrates the importance of preserving a level playing field within the internal market, even in exceptional economic circumstances."[21]

The response to COVID-19-related economic challenges is changing philosophies and economic behaviours as well as economic structures. In specific sectors, including health, the demands for reshoring production within the EU are becoming hard to resist. At the global level, the "my country first" narrative is quite strong, as is the need to increase strategic autonomy of countries and ensure the security of supply, along with the desire to rescue companies that would be competitive post-COVID-19, and to save as many jobs as possible.[22]

However, as Covid-19 transmission rates have declined in European countries by June- July 2020, restrictions have been eased, and economies opened up. In this situation, policymakers tried to balance the virus's continued suppression with a progressive restarting of economic activities, including cross-border flows such as tourism. In 2020, recovery plans were implemented at local, regional, national and European levels. The economic impact of the pandemic, and the capacity for recovery, vary significantly across sectors and regions, depending on national abilities to control the spread of the virus, on the duration and stringency of lockdown measures, on regional economic structures and on the scope to support economic activity and resilience. The massive economic, financial and social impact of the Covid-19 crisis presents a vast policy challenge at all levels of government. As the European Commission noted, "the impact and recovery potential also depend on each country's demographic or economic structure, with for instance those with a high number of small and medium-sized enterprises (SMEs) hit harder. This has a considerable knock-on impact on the Single Market and widens divergences and disparities between the MS. This is reflected in the fact that the recession will be close to 10% for some countries, compared to an average of between 6-7.5% elsewhere."[23] EU MS agreed in spring of 2020 on a "roadmap" for recovery in order to relaunch the EU economy. The European Commission has now put forward proposals to implement the roadmap, including territorially focused interventions to support economic, social and territorial cohesion. Next Generation EU (NGEU) is a new recovery instrument of €750 billion, which will boost the EU budget with new financing raised on the financial markets for

21 COM(2020) 253 final.

22 Zuleeg.

23 COM(2020) 253 final.

2021-2024. Besides this instrument, the Recovery Plan for Europe comprises a revised proposal for the Multiannual Financial Framework (MFF) for 2021-27 and further resources committed outside the EU budget.

The NGEU is based on three pillars: 1) supporting the recovery of the MS, 2) kick-starting the economy and helping private investment, and 3) learning lessons from the crisis. According to the A18 in Conclusions of the Special meeting of the European Council (17, 18, 19, 20 and 21 July 2020) "Member States shall prepare national recovery and resilience plans setting out the reform and investment agenda of the Member States concerned for the years 2021-23. The plans will be reviewed and adapted as necessary in 2022 to consider the final allocation of funds for 2023."[24] The abovementioned measures will lead to an advanced approach to the functioning of the Single Market and its instruments.

Unanimity between the EU MS at the time of Germany's Presidency in the EU is being jeopardized by Poland and Hungary vetoing the next EU seven-year budget in protest of a rule-of-law conditionality. The situation is clearly another display of populism tendency and is a search for greater independence and sovereignty by these two countries but neglects, however, the integration benefits the nations enjoy as a result of their EU membership. The budget crisis entails the learning of certain lessons, such as to use qualified majority voting instead of unanimity, for example. The legal part of this dispute could be subjected to the European Court of Justice. Regrettably, this battle over the EU budget in these coronavirus times represented another wave of potential threats to EU values such as solidarity, cooperation and cohesion.

3. Territorial Impact and Cohesion

The coronavirus pandemic is a significant challenge for the EU. The governments need to operate in the context of radical uncertainty, and, according to the OECD study on the territorial impact of Covid-19, the socio-economic asymmetry of the pandemic-borne consequences across Europe, countries, and regions is shaped mainly by the diversity of regional socio-economic characteristics. The regional and local impact of the COVID-19 crisis is highly heterogeneous and has a strong territorial dimension along with significant implications for crisis management and policy responses.[25] The regional differences appeared to be substantial, particularly in between more-developed and less-developed regions.

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24 European Council, European Council conclusions.

25 OECD, The territorial impact of COVID-19: Managing the crisis across levels of government.

Many Southern regions in the EU are regarded as being the worst affected. The key differences among MS and EU institutions are on the scale and mechanism of the European Recovery Package, its size, importance of grants, loans and guarantees, the methods for allocating funding etc. which resulted in the debate that clearly shows different national positions mostly between southern EU countries (Italy and Spain) and the smaller net payer countries (Austria, Denmark, Finland, Netherlands, Sweden). The Eastern European MS, as well as Cyprus and Malta, would prefer a package predominantly or wholly made of grants. Most countries, including Bulgaria, France, Germany, Ireland, Italy, Romania, and Slovenia favour the EC proposal of a mix of loans and grants. Furthermore, there is no clear consensus on links of the Recovery and Resilience fund (RRF) with the European Semester and concern about the absorption capacity for REACT-EU – Recovery Assistance for Cohesion and Territories of Europe, whose mechanism is based on flexible cohesion policy grants for municipalities, hospitals, and companies via MS' managing authorities. No national co-financing is required. Additional issues prominent in the debate include the relationship between investment and reforms, the role of the EU Competition policy, and especially the control of State aid. However, a Franco-German agreement had enabled the approval of the EC plan for recovery in which the role of Cohesion policy in responding to the sectoral and territorial impact of the pandemic was recognised.[26]

Scholars and experts express their opinion that a successful response to COVID-19, which ignores societal or territorial borders, must build on cooperation. To do so, an analysis of the impacts of COVID-19 needs to go beyond national borders and take a European approach. However, one-size-fits-all approaches will not be able to help all regions in their recovery, nor will they utilise the diverse potential for recovery in Europe. Sectors that are less affected by COVID-19 policy responses might play a crucial role in the recovery processes.[27] EU leaders have to be fully aware in order to see the simultaneous challenge of a new global reality and the trends of internal weakening. Consolidation and improved functioning require bold innovation and a complete overhaul in critical areas of EU integration.

4. A Complex Concept of "Health for all and in all policies"

Health is "priceless"; yet achieving and maintaining the best health possible for individuals and the population is costly and requires a considerable workforce. However, it is increasingly recognised that health is a significant contribu-

26 Bachtler/Mendez/Wishlade.

27 Bohme/Besana.

tor to nations' "wealth." Furthermore, in recent years it has become generally acknowledged that health is a much more complex concept than the absence of disease; health is seen as a strong predictor of economic growth. The idea of Health for All and Health in all Policies (HiaP) emerged in the 1970s-1980s. In 1981, Dr. Haldan Mahler, Director General (1973-1983) of the WHO, defined the essential elements of the concept as follows: "Health For All implies the removal of the obstacles to health – quite as much as it does the lack of doctors, hospital beds, drugs and vaccines."[28]

Health in All Policies (HiAP) was formally legitimated as an EU approach in 2006. It resulted from more long-term efforts to enhance action on considering the health and health policy implications of other policies and the recognition that European-level policies affect health systems and scope for health-related regulation at the national level. However, the implementation of HiAP has remained a challenge. European-level efforts to use health impact assessment to benefit public health and health systems have not become strengthened by the new procedures. As a result of the Lisbon Treaty, European-level policymaking is expected to become more important in shaping national policies. HiAP has, at the European level, remained mostly as rhetoric but legitimates health arguments and provides policy space for health articulation within EU policymaking. HiAP is a broader approach than health impact assessment and, at the European level, requires the consideration of mechanisms that recognise the nature of European policymaking.[29]

While the "Health in all policies (HiAP) concept, by excellence is an interdisciplinary approach, and the urgent need for its implementation is now widely recognized, its real implementation at all government levels is lagging. As a result, the public health area of human endeavour has been in urgent need of reforms for several decades."[30]

The new European Policy for Health- Health 2020, and the European Action Plan for Strengthening Public Health was adopted by the 53 Member States of the Region during the sixty-second session of the WHO Regional Committee for Europe in September 2012.[31]

The current Covid-19 health crisis worsened and highlighted the EU's vulnerability to global challenges and turbulence. There is an imperative need to maintain the long-term goals of health policies and research responding

28 Mahler.

29 Koivusalo.

30 Berlin.

31 WHO, About Health 2020.

to economic and social difficulties. Moreover, the crisis requires an improvement in the resilience, well-being and mental health of the population and the mitigation of health inequalities during and after pandemics. The globally interconnected nature of health and the cross-and-trans-disciplinary nature of health research is implemented within the European Research and Innovation Framework. A facilitated global research collaboration through Horizon Europe could ensure that Global Health innovations and solutions benefit all parts of the world, including EU countries.[32]

As the crisis has shown, there is growing confidence in reforms of health systems and an increase of European Community competence in, for example, the tackling of cross-border health threats and the strengthening of health systems and healthcare workforce. Several instruments are suggested by the EC jointly supported by the MS. The most prominent investment is €9.4 billion from the EU's next long-term budget in the EU4Health programme; this is 23 times more than health funding for 2014-2020.[33] The programme will be launched in 2021 and will strengthen national systems by funding initiatives such as tailor-made support and advice to countries, and training for healthcare professionals for deployment across the EU. Additionally, further investment in health will be provided through other EU programmes, including the European regional development and cohesion funds for medical infrastructure, Horizon Europe for health research and innovation, the Digital Europe programme, the European Social Fund, and the rescEU-EU emergency response. A particular focus of these EU programmes is on vulnerable groups.[34]

Furthermore, to support the harmonization of actions, the EU will create a common reserve of medical equipment, which is the first-ever common European stockpile of emergency medical equipment made under the rescEU-EU emergency response to help fill the lack of resources which the many Member States lacked while struggling in the face of the spread of the pandemic in Europe. The EC will finance 90% of the reservation cost, assigning the Euro-

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32 European Commission, On Establishing the Specific Programme Implementing Horizon Europe- the Framework Programme for Research and Innovation.

33 European Commission, Opening Remarks by Commissioner Kyriakides at the Press Conference on the EU4Health Programme.

34 European Commission, EU budget for recovery: €2 billion to reinforce rescEU direct crisis response tools.

pean Emergency response Coordination Centre to manage the equipment's distribution. According to estimates, the initial EU budget for this reserve is 50 million euros.[35]

The efficiency and resilience of national public health systems will be improved with their further harmonization based on the "one health approach" methodology. Investment in disease prevention programmes is foreseen in all MS. As a result of the joint efforts of the MS, national health systems become more efficient and resilient.

The above initiatives at the EU level could lead to a more harmonized approach to public health and healthcare policies among MS and the stronger role of the EU and could increase its competence in the long-term.

Health, as a human capital ingredient, is especially relevant for sustained economic development and social cohesion. These two political objectives now figure prominently on the EU agenda and play a central role in the European Union's Social and Cohesion policies.

III. The Baltic States: The Need for Integration

1. Small and Open Economies

For small economics and open economies, the Covid-19 crisis represents a serious challenge. The Baltic States went through a protracted recovery period after the 2008 crisis and had huge imbalances such as an unsustainable current account deficit, high inflation and a pro-cyclical fiscal policy, a credit and real-estate bubble, booming private debt, and overvalued real estate. However, in recent years, strong growth with good fundamentals such as fiscal discipline and surpluses in current accounts have facilitated strong labour markets; trade is balanced, lending growth moderate and financed by domestic deposits, while real estate is adequately priced. Moreover, membership in the Eurozone guaranteed the Baltics readiness to deal with the current Covid- 19 crisis.

The spread of the virus at the beginning of the pandemic was slower in the Baltic States than one might expect; ironically, the lockdown measures there have been much less severe than in other parts of Europe. The advantage of the Baltics lies in their less densely populated territories, with a quick response to crises due to their size, as well as their being relatively well digi-

[35] European Commission, COVID-19: Commission creates first ever rescEU stockpile of medical equipment.

tized, especially Estonia. However, the second wave hit the nations much more severely. The impact of the crisis could be observed in several dimensions. Although the gravity of the situation in specific economic sectors could be relatively similar across EU countries, the tourism sector in the Baltics, for example, is not large and does not constitute a major revenue in the budget.

Additionally, a relatively less sophisticated manufacturing base with extensive food, wood and IT sectors could also be more resilient to a downturn in demand, even though most of manufacturing is export-orientated depending on the market in the EU, which required revitalisation of the markets among the key partners in the EU. Furthermore, small and open economies are usually more vulnerable to external shocks and hit harder by the crisis. The Baltics' governments are acting, providing support to both businesses and households without significant delays[36]. However, the power of governments is limited compared to wealthier partners in the EU. Overall, the recovery plans adopted at the EU level could help the nations recover with fewer socio-economic consequences relying on economic integration, cohesion, and solidarity values. The crisis will ultimately change the way of doing business along with working conditions and is likely to speed up the digitization process of European economies. By shortening and simplifying the supply chains, it will also bring them closer to the customer. The transition to digitalization is accelerated. Given their developed infrastructure, the Baltic States could be in a good position in the digitization process.

Additionally, Estonia, Latvia, and Lithuania are engaged in joint efforts to ensure the strengthening of the Baltic region's security and defence and the development of the energy market and transport infrastructure regardless of challenges posed by the pandemic. The regional gas market and the project of synchronization of power networks have been implemented. In the territorial dimension, a Real Baltic, which is a major infrastructure project, is vital in the post-crisis recovery, passenger mobility, supply chain management, as well as the process of digitalization and innovation promotion in line with the European Green Deal.

However, European superpowers still are in a better position than the Baltics due to more massive healthcare spending, a wider existing safety net, and more impressive additional fiscal stimulus. Public health remains the main priority for close cooperation between countries and is vital to ensure public health protection.

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[36] Ministry of Economy of the Republic of Latvia, Government approves establishment of alternative investment fund to support enterprises affected by Covid-19.

2. A Re-orientation of Welfare Distribution?

The region's economic development path is not socially cohesive. According to the European Commission, Lithuania is taking progressive steps to reduce poverty and inequality, but the tax and benefit system's effectiveness is limited.[37] In Latvia's case, recent reforms to the taxing and redistributive policies have shown little progress in addressing income poverty and inequality issues, which calls for alternative remedies.[38] In Estonia, the income tax reform would have an insignificant effect on reducing income inequality. However, the preliminary estimates suggest that the reform somewhat reduced the previously relatively high tax wedge for low and middle-income earners.[39] All three countries have exceptionally high rates of relative poverty risk and income inequality. According to the latest statistics, in 2019, at risk of income poverty (more than 1 in 5 persons) in Latvia (22.9%) – the second highest among the EU members, fourth-highest Estonia (21.7%) and the sixth highest in Lithuania (20.6%). Furthermore, as confirmed by Eurostat, these data refer to the year before EU MS introduced the measures against the spread of COVID-19. It will serve as one of the benchmarks for analysing the economic and social impact of the COVID-19 pandemic in the next period.[40]

EU cooperation is essential in supporting the Baltic States' economies and population as the small states with small institutions and limited administrative capacity are vulnerable to external shocks. The Universal Basic Income (UBI) could be an instrument to the list of remedies to overcome the current multidimensional crisis. Furthermore, the Unconditional Basic Income suggested by the European Citizens Initiative has attracted public attention in times of the ongoing unique, global and multidimensional crisis. The Baltic States citizens support the Initiative and the share of their countries' thresholds on collected signatories by 25 January 2021 in Lithuania amounted to 2.59%. However, Latvia and Estonia made 49.22% and 40.24%, respectively. The numbers are increasing daily, showing citizens' support of changes in the social protection system inclined by the Covid-19 emergency.[41]

The analysis by experts in the Baltic States considers the UBI's implementation from the perspective of improving the well-being of people at risk of poverty, social inclusion, and the efficiency of existing social security systems in the critical situations of 2020 and 2021. However, the UBI implementation needs

37 European Commission, Country Report Lithuania 2020.

38 European Commission, Country Report Latvia 2020.

39 European Commission, Country Report Estonia 2020.

40 Eurostat.

41 European Union, Initiative detail | European citizens' initiative - portal.

further consideration as it could negatively affect an existing income inequality because the state budget and social insurance resources are not sufficient to provide both UBI and social benefits. Furthermore, a small amount of the UBI would not balance the existing benefits, and according to studies, the UBI implementation could even lead to deteriorating effects on income equality and to the risk of poverty.[42]

However, there are arguments in favour of the UBI related to inefficiencies of the existing social support systems. The UBI, in turn, is aimed at providing greater income security and would furthermore also have a positive effect on the labour market by reducing the unemployment trap and the low-income trap. People could more actively engage in activities, such as starting a business, re-training, and engaging in education – a very important trend when digitisation and automation are rapidly changing the requirements for workers' skill sets. The existing social protection systems are not always meeting the demands of the modern labour market, as evidenced by the growing popularity of "gig jobs" and self-employment. Some basic income model elements could simplify and improve the existing social security systems.[43] However, the experts of the Swedbank suggested considering the feasible size of the UBI in case of its implementation in the Baltics. If all government social protection spending were distributed equally across the population, this would yield monthly UBI payments of only EUR 117-166, around 48-55% of the at-risk-of-poverty threshold. If only non-elderly spending were to be distributed in equal amounts to those below the retirement age, then the monthly UBI payments would be below EUR 100. Paying only half of the UBI to children increases the UBI paid to those older than 16 only marginally – in the range of 9-12% for both alternatives – but UBI remains significantly below the poverty line.[44] These estimates confirm that the UBI model is not fully convincing from the economic and social perspectives. Additionally, social insurance programmes are based on contributions and expected benefits, which could conflict with the UBI concept. Furthermore, at a political level, a decision-making process should be based on a consensus between social partners based on an institutional setting as a tripartite social dialogue.

At the beginning of the Covid-19 crisis, the Baltic governments applied different emergency measures to deal with the crisis's impact on society and most vulnerable groups. During the first wave of the crisis, the governments have been taking the following steps:

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42 Laurinavičius/Laurinavičius, 50 et seqq.

43 The Friedrich-Ebert-Stiftung, Panel Discussion: Universal Basic Income.

44 Swedbank, *Baltic Sea Region Report*, 23 et seqq.

Box 1

- Estonia launched a 2-billion-euro support programme to provide different economic stimulus. The Estonian Unemployment Insurance Fund compensated employees' wages in March-May 2020. The offering was 70% of the average monthly salary of the employee but no more than 1000 euro. The employer must pay a wage of at least 150 euro to the employee.
- Lithuania launched a 5-billion-euro support plan. The government also foresees subsidies totalling 500 million euros to ensure laid-off workers or workers with reduced working time (salaries) still receive the minimum wage. It includes the 500 million euros for workers' fixed payments to the self-employed who have previously contributed to the social security system.
- Latvia announced coverage of 75% of the costs of outbreak-induced sick leaves or workers' downtime, or up to 700 euros per month. There is also support for "employee downtime" whereby the government made monthly payments of 75% of their salaries, capped at 700 euros (not subject to payroll taxes) if the employer cannot secure work for the employee because of COVID-19.

Source: The Baltic Sea Parliamentary Conference, 2020.

Overall, the Bank of Latvia estimates, Latvia spent less money than its neighbours in the first wave of the Covid-19 crisis for aid measures in general and much less to maintain the population's income. Latvia had paid money to keep household income at 0.3% of GDP, Estonia – 0.8%, Lithuania – 0.9%.[45] The crisis has shown that the Baltic States governments are ready to intervene to mitigate social and economic consequences in the emergency to ensure economically critical support to citizens. However, the states' fiscal ability is relatively small. Consequently, the UBI would not replace the current social security systems based on the constrained security budgets with a flat basic income.

[45] Latvia's national public broadcaster LSM.

Whatever the outcome of the debate on a UBI and state intervention in the economy as well as in the social security system is, it opens up a platform for rethinking the fundamental role of the welfare state.

IV. Conclusions

Countries worldwide find themselves in a new setting, which faces multifaceted challenges of a unique Covid-19 global mixed crisis. The impacts on the health-related, social, economic and political systems, however, depend on the positions of the different countries in the geopolitical framework, political and economic interdependencies, and especially, the actions of governments that pursue nationalist economic policies.

The health crisis and the unprecedented economic collapse have cast doubt on the ability of neoliberal, austerity-driven reforms to perform relevant governance. The crisis has put the achievements of European integration, cohesion and solidarity at risk. The need to reassess the role of the government and good governance is discussed at all levels. The crisis has highlighted solidarity as one of the fundamentals of European integration. As the crisis has shown, there is growing confidence that upcoming reforms of health systems and social support could increase EU exclusive competence in related policies. It is assumed that building a sustained economic recovery in the EU will require an unprecedented level of political cooperation among governments, businesses, and individuals. The above-indicated aspects are subject to further intense trans- and inter- disciplinary research, the results of which could show to policymakers which government interventions have been most successful in overcoming navigating economic governance in the new reality.

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Northern Ireland after Brexit: Still Connected to the European Union

Lee McGowan

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I. Introduction

Some four and half years after the British electorate had voted to leave the European Union (EU), all former ties between the United Kingdom (UK) and the EU were finally severed on 31st December 2020. At a press conference in Downing Street The Prime Minister Boris Johnson proudly hailed the achievement as a "jumbo, Canada style" Brexit deal, adding that it was a time to celebrate as Great Britain had left the single market and the customs union but had retained tariff free access to the EU market. This had laid the basis for a "giant free trade zone".[1] This date marks a defining moment in modern British history. It is interesting that Johnson referred here to Great Britain and not the United Kingdom. The terms are not synonymous as the former excludes Northern Ireland. Indeed, Northern Ireland remains tied to certain EU rules and to the EU customs territory. How, why, and for how long this will remain the case forms the subject of this chapter.

[1] The Guardian, <https://www.theguardian.com/politics/2020/dec/24/boris-johnson-says-brexit-deal-has-settled-uk-europe-question>.

Much has been written and has still to be written about the turbulent years from the referendum on 23rd June 2016 to the final EU/UK deal of 24th December 2020. The Brexit issue consumed British politics and these years were marked by lengthy and fractious parliamentary debates over May's three unsuccessful efforts at guiding her withdrawal agreement through parliament and a range of judicial challenges testing parliamentary authority. Brexit sealed the fate of the United Kingdom during the terms in office of two British prime ministers (David Cameron in 2016 and Theresa May in 2019).

However Brexit remains very much a work in progress and its out-workings will not just continue to cast long shadows over British policy making for years to come but will also threaten to undermine the very structures of the United Kingdom as a political entity. With England accounting for 85% of the UK's population, there were always long held concerns over how far English discourses dictated policies in Northern Ireland, Scotland and Wales. Brexit is now testing the politics of devolution within the UK like never before, and most particularly in Scotland where its government is demanding a new referendum on independence. Writing in January 2021 Gordon Brown, a former British Prime Minister (2007-10) argued that the UK was at risk of being a "failed state and breaking up" unless the government in London addressed the concerns of the regions.[2] He was thinking particularly of Scotland, but the argument also extends to Northern Ireland. Whilst academics and politics often centres on the impact of Brexit on Scotland[3], fewer voices have been heard in relation to both Northern Ireland[4] and Wales[5].

This chapter addresses the gap and focuses its attention on Northern Ireland. This region provided for a unique case for the EU/UK Brexit negotiations from the outset as it: was the only part of the UK (leaving aside Gibraltar) with a three-hundred-mile-long land border with an EU member state, was a region slowly emerging from thirty years of conflict and required careful handling to maintain the peace process. Such sensitivities also explain the interest in this region by the European Commission, the Republic of Ireland and the United States of America. Post Brexit Northern Ireland very much remains an integral part of the United Kingdom, but the particular form that Brexit takes in Northern Ireland through an agreed EU/UK Protocol has not just loosened those links but arguably strengthened the case for Irish unification.

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2 The Telegraph, <https://www.telegraph.co.uk/politics/2021/01/24/united-kingdom-must-urgently-rediscover-holds-together/>.

3 Gallagher; McEwen.

4 Murphy.

5 Hunt/Minto; Trumm.

II. Context and Setting

The UK's departure from the European Union (Brexit) was neither planned nor wanted by the British government and the mainstream parties. Brexit could be portrayed as either an accident or a severe miscalculation by David Cameron's government when it pledged to hold a referendum on the UKs membership of the EU.[6] The European question had long been a contentious issue in the UK, but a popular brand of Euroscepticism only truly emerged in the period after 2000. Cameron's decision was a strategic choice that was designed to outmanoeuvre the eurosceptic United Kingdom Independence Party (UKIP) and quell critics on his own backbenches. It was generally assumed that the UK electorate would vote for economic reasons for the UK to remain in the EU.

There is not sufficient space here to outline the debates, examine the campaign strategies and analyse the voting patterns that ultimately culminated in a narrow margin of victory for those advocating leave (securing some 51.9% of the vote as opposed to the 48.1% for "remain". A 72.2% turnout was impressive but with some 28% of the population not casting a vote, Brexit was supported by just 37% of the entire voting electorate. This was never a convincing result and did not merit the harder form of Brexit that materialised. The vote divided opinion across the UK's four nations with England and Wales narrowly opting for Brexit while both Scotland and Northern Ireland voted against it.

For many the vote reflected the resurgence of English nationalism,[7] but there was a wider mix that included concerns about continued immigration, fears over employment and future job prospects as well as staunch Eurosceptics. Brexit also found support among a section of the population who can be labelled as reckless voters and were ready to reject anything endorsed by the economic and political elites even if it led them to being materially worse off. The EU referendum took place against a perfect storm of public anger and grievance where emotionally charged demands to "take back control" and re-establish sovereignty trumped economic arguments.

Not only was there never any agreed model of what leaving the EU actually meant á la Swiss, Norwegian, Turkish or World Trade Organisation models but little attention was paid by the national (predominantly London based) press to the regional dimension of Brexit, and specifically to Northern Ireland. Post referendum the course trajectory was swiftly set by Theresa May's "Brexit means

6 McGowan/Phinnemore.

7 Black; Wellings (2019); Wellings (2020).

Brexit" mantra.[8] Northern Ireland rapidly emerged as one of the three core issues during the first phase of the EU/UK negotiations in the second half of 2017 (alongside citizens' rights and the final financial divorce settlement) and was to feature as a central theme throughout the entire negotiations.

III. Northern Ireland: A short political history

Northern Ireland was created as a new political entity through the 1920 Government of Ireland Act as part of the larger United Kingdom of Great Britain and Northern Ireland. The Act cast shadows over Irish and Anglo-Irish relations for decades and had envisaged two new devolved parliaments in Ireland, one in Dublin for 26 Irish counties in the South (and which never sat as the terms of the Act were rejected) and one for the remaining 6 counties in the North of Ireland in Belfast. This partition of Ireland was divisive from the outset but was held as an immediate way of preventing any further major unrest if the Protestant majority. Some two thirds of the inhabitants in the north of the island were handed power to determine their own future, and one that was very closely aligned with Great Britain. It had been assumed by leading unionist politicians in 1921 that this majority would never alter and as such Northern Ireland's constitutional status had been permanently enshrined in law and as a matter of fact.

The creation of Northern Ireland, however, was never fully accepted by the minority Catholic population as it ran contrary to their belief in national self-determination and placed them under the dominant rule of the Ulster Unionist Party (UUP). Resentment towards the regime was fueled by well-documented cases of discrimination against the Catholic minority, especially in relation to employment and housing, and ultimately this dissatisfaction led to a campaign for civil rights in the 1960s which in turn splintered and developed a more violent and sectarian strain. Sporadic and inter-communal violence had been present from Northern Ireland's inception, but it intensified greatly after 1969 and the onset of the "Troubles" as a new provisional Irish Republican Army (IRA) that had never recognized Northern Ireland opted for an armed struggle

[8] Independent, <https://www.independent.co.uk/news/uk/politics/theresa-may-brexit-means-brexit-conservative-leadership-no-attempt-remain-inside-eu-leave-europe-second-referendum-a7130596.html>; her then chief political advisor, Nick Timothy, later accepted that this phrase was a mistake; see Seldon/Newell.

campaign to end the UK's "occupation" of the "six counties".[9] The security situation rapidly deteriorated and the British government felt compelled to intervene and to dissolve the Northern Irish parliament in 1972, replacing Northern Ireland under direct rule from London. Political attitudes hardened thereafter and the emergence of the Democratic Unionist Party (DUP)[10] under Ian Paisley thwarted attempts from the UUP to reach any accommodation with the nationalist SDLP and prevented a new power sharing arrangement in 1974.

All subsequent initiatives at returning control to elected representatives in Northern Ireland failed, until the mid 1990s when the IRA, realizing that the armed struggle could not deliver national unity and a British government worn down by the economic, security and personal costs of protecting Northern Ireland, finally and together with most political parties negotiated a new political settlement under the 1998 Belfast/Good Friday Agreement. The DUP opposed it vociferously.[11] This agreement repealed the 1920 Act of Ireland and created a new devolved parliament for Northern Ireland but one built on consensus and requiring a mandatory coalition between the two communities in Northern Ireland. It was cleverly crafted and ensured that the constitutional question of Northern Ireland remaining with the UK or uniting with the Irish Republic would be settled in two referenda, both north and south of the Irish border. No date was ever set. The agreement simply stated that a border poll would occur when public demand wanted one. How this demand was to be expressed was left unanswered.

The road to peace had been facilitated by Irish and British membership of the European Union, and indeed European Council summits had afforded regular and unseen opportunities for the prime ministers of both states from the early 1990s to consider and discuss Northern Ireland. The European Commission emerged as another pivotal actor in the peace process when its president, Jacques Delors, initiated the EU's first Peace Funding programme for Northern Ireland in 1995 following the 1994 IRA ceasefire. The EU dimension is a constant thread through recent Northern Ireland history and the 1998 peace settlement was conceived within the wider EU arena and was recognized by the Commission not just as a positive sign of European integration but one of its greatest achievements. Few then could have imagined a referendum on the UK's membership in the EU.

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9 Republicans, including Sinn Fen, in media communications regularly refuse to recognise Northern Ireland as a legal entity. Its members always refer to the North of Ireland or the six counties. The other main nationalist party, the Social Democratic and Labour Party refers to either Northern Ireland and the North of Ireland and normally uses both terms.

10 Tonge (2014).

11 Tonge (2014); Tonge (2019).

The agreement needs to be understood as a political compromise. Its new arrangements were always going to encounter difficulties. The fortunes of the two largest political parties in 1998, namely the Ulster Unionist Party and the predominantly nationalist Social Democratic and Labour Party (SDLP), waned under the pressures as the electorate turned to the more dogmatic and hard-line forces of the Democratic Unionist Party and Sinn Fein, respectively. The fragility of the political system has been continually tested over party disagreements and the absence of trust especially between the DUP and Sinn Fein led to the suspension of the devolution arrangements in January 2017. It was increasing resentment from the public with Brexit looming and crises in the education and health systems that pressurized these two adversaries back into government (alongside the three smaller parties, the UUP, the SDLP and the Alliance Party) in January 2020. Relations remain tense.

In 2021 Northern Ireland is set to mark its centenary. However, suggestions and plans for commemorations are revealing the core political differences over identity and nationhood that were present 100 years ago. The assumption that the unionists would always be in the majority was hopelessly misguided and the demographics have shifted considerably over this period. Northern Ireland has a population of some 1.893 million people.[12] The identity divide has narrowed over time and while some 48% (or 864,000 people) identify as Protestant/Unionist, there are now some 46% (or 810,000 people) who describe themselves as nationalist/Catholic. In many ways the people of Northern Ireland and the Republic of Ireland are facing the same questions and issues they confronted a century ago.

Brexit has changed the dynamics and unsettled the fragile political consensus that had been achieved in 1998. In the 2016 referendum some 58% of Northern Ireland's voters opted for the UK to remain in the EU. Closer analysis of the vote reveals that there were significant discrepancies between the nationalist and unionist communities. While some 93% of the Catholic/nationalist population rejected Brexit in case it damaged the UK's now cordial relations with the Republic of Ireland only some 30% of unionist voters opposed Brexit. The DUP had always been avowedly Eurosceptic and regarded Brexit as an opportunity to bolster relations with Great Britain and confirm their British identity. The DUP ignored the vote against Brexit in Northern Ireland and its 10 MPs in the House of Commons were to play a pivotal role in parliamentary debates and very unintentionally not only weakened the links between Northern Ireland and the UK but initiated renewed debate for a border poll.

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[12] NISRA.

IV. Northern Ireland and the UK/EU negotiations

Given the relative paucity of interest or recognition of Brexit for Northern Ireland prior to the referendum, this region of the UK moved centre stage from the commencement to the very end of the EU/UK negotiations. Northern Ireland was always going to require some form of "special" approach or treatment given its recent history and a need to consolidate the peace process. A once militarised border between North and South had become increasingly frictionless through the introduction of the single market on 1 January 1993 and the 1998 peace settlement. The future openness of this border was brought into question following the Brexit vote and for some it manifested another illustration of the island's partition and even repartition. How serious any suggestions of a return to violence were are questionable, but there is little doubt that any manifestation of any form of border controls and checks played out badly in purely political terms. Theresa May spoke of the need to continue the frictionless trade and that nobody wanted "to return to the borders of the past." Such aspirations were only achievable with a softer version of Brexit or creating a set of distinct arrangements for Northern Ireland, such as becoming part of the European Economic Area A.[13]

The harder the form of Brexit pushed in Westminster, the more necessary it became to find some form of "special" arrangement for Northern Ireland. May's original Withdrawal Agreement had provided one solution to the problem – the so-called backstop arrangement that envisaged the entire UK remaining in the EU customs arena if agreement on a deal could not be reached. This option was unacceptable to hard Brexiteers, including the DUP, as it kept the UK aligned with EU tariffs, prevented the UK from regaining its sovereignty and ability to carve out its own trade policy and tied the UK to rulings from the Court of Justice. May introduced three unsuccessful attempts at securing approval of her deal in parliament before pending her resignation. All three were opposed by the 10 DUP MPs.

Her successor, Boris Johnson, buoyed by a majority for Brexit following a surprise December 2019 election, secured an agreement on Northern Ireland with the European Commission through a Protocol and a trade deal with the EU. The deal met the conditions of his English colleagues, but the protocol instantly alienated his DUP supporters in the process. In retrospect, the DUP had severely miscalculated their power and influence and with a very changed arithmetic and Johnson's new 80 seat majority within the House of Commons

[13] McCrudden et. al; The Guardian, <https://www.theguardian.com/politics/video/2016/jul/25/theresa-may-no-hard-border-between-ni-republic-ireland-brexit-video>.

Northern Ireland's DUP MPs simply became superfluous to the Prime Minister's immediate Brexit needs. Johnson delivered Brexit, confined the previous so-called "backstop" arrangements to history and solved the intricacies of the Irish border question by keeping Northern Ireland within the EU's single market for goods and key aspects of the EU acquis through the creation of a new Irish Sea Border between Northern Ireland and Great Britain.

None of the political parties in Northern Ireland were content with the final outcome of the UK's government's Brexit deal with the European Union. For the parties that had opposed the very idea of Brexit from the outset this is not surprising, but for the parties that had advocated withdrawal, the outcome was not the one they had envisaged or campaigned for and their anger centred not on their own miscalculation but on the terms of the Northern Ireland Protocol (formally, the Protocol on Ireland/Northern Ireland). Before addressing such concerns and the repercussions of the deal, we first turn our attention to the terms of this Protocol.

V. The Ireland/Northern Ireland Protocol

The Ireland/Northern Ireland Protocol entered into force on 1 January 2021 following the end of the UK transition period.[14] The Protocol contained three primary objectives; to prevent the emergence of a hard border on the island of Ireland; to ensure the integrity of the EU's single market, and to allow unfettered access of goods between Great Britain and Northern Ireland as well as bringing Northern Irish goods into discussions in other trade talks. The protocol was confirmed between the UK government and the European Commission several weeks ahead of the eventual EU/UK trade and Cooperation Agreement on 23rd December 2020 and would have entered into force even in the absence of an EU/UK arrangement.[15] It should be noted that the Brexit deal does mitigate a number of major issues relating to the Irish Sea border such as tariffs. The protocol is primarily concerned with trade between Great Britain and Northern Ireland and the movement of goods. The movement of UK and Irish nationals between both islands was already a long- established reality through the Common Travel Area (since 1923) and has since been reaffirmed by the UK government.[16] The protocol is a major landmark event, as for the first time in Northern Ireland's history the nature of the economic ties between Great Britain and Northern Ireland is altered. True, the Proto-

14 HMG (2020), The Northern Ireland Protocol: Policy Paper.

15 European Commission, UK-EU Trade and Cooperation Agreement: Protecting European Interests.

16 HMG (2019), Common Travel Area: Right for UK and Irish Citizens.

col may not have changed Northern Ireland's constitutional position, but it has certainly generated a new distinctiveness that tests the political connections between Great Britain and Northern Ireland and is already arousing unease and anger among working class unionists.[17]

The opening sentences of the Protocol recognise the significant challenges that Brexit brings to the island of Ireland, reinforcing the need to reaffirm commitments to the peace process and to find a "unique solution" to ensure the UK's orderly withdrawal from the EU. An open border between Northern Ireland and Ireland is the core issue. The UK was not immune from external pressures. Downing Street was increasingly aware of the concerns from the Democratic Party in the United States over any hard border on the island of Ireland and strongly hinted that anything that jeopardised the peace process would have implications for imminent UK/UK trade deal negotiations. The only viable solution for Boris Johnson to avoid border controls on the island became an Irish Sea border.

Under the Protocol Northern Ireland remains part of the EU's single market for goods and falls within the EU's customs territory. Alignment with EU rules (Articles 5-10) is also to be respected in relation to VAT and the Single Electricity Market (Art.9). The first paragraph of Article 5 states that all goods travelling from Great Britain to Northern Ireland are tariff free unless the goods are at "risk of moving into the EU" to the Republic of Ireland and the other EU26. European Commission officials will be in situ at crossing points in Northern Ireland to monitor trade coming from Great Britain. The protocol (article 5, paragraph 4) effectively establishes a regulatory zone on the island of Ireland where alignment on a range of EU goods must be followed, mostly in relation to agriculture- related and manufactured goods. In addition, and to ensure a level playing field, always a key aspect of the European Commission's concerns, the Protocol (Art.10) limits the application of state aid when such subsidies effect trade between Northern Ireland and the EU. The final point to make in this short overview is that the European Courts retain oversight of EU law as it applies in Northern Ireland.

In practice, goods between Northern Ireland and the Republic of Ireland may cross freely over the Irish border as they had done prior to the agreement. In contrast, with Great Britain no longer in any regulatory or customs arrangement with the EU and free to establish its own rules, and with Northern Ireland remaining in the EU single market for goods while the rest of the UK was

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17 Sunday Life, <https://www.belfasttelegraph.co.uk/sunday-life/news/loyalist-leaders-facing-community-backlash-with-brexit-stance-blamed-for-food-shortages-and-irish-border-poll-momentum-40002710.html>.

outside of it, it became necessary to introduce new and additional formalities in relation to goods moving from Great Britain to Northern Ireland. In short, Northern Ireland remains linked to the European Union and as such commentators should recognise that only Great Britain has truly departed the EU.

The protocol states that all goods entering Northern Ireland from Great Britain should comply with the EU's single market and specifically with regard to product requirements and agricultural standards (Institute of Government, 2020). In practice this means that firms will have to adhere to and complete any necessary paperwork, even if these goods are not bound for the EU (in or via Ireland). Following the UK/EU Agreement goods are not subject to tariffs and customs duties, but declarations are still necessary and traders will need to take account with the new "rules of origin". It is true that many British companies are currently working their way through the complexity of "rules of origin", new non-tariff barriers and customs formalities in relation to trade with the EU 27 (including Ireland), all making trade more costly. Many seem to have been unprepared for the changes in relation to goods being shipped to Northern Ireland.

Responsibility for ensuring the protocol's implementation falls to a newly created Joint Committee, as agreed as part of the Withdrawal Agreement. This Committee is tasked with monitoring developments, reviewing customs duties and addressing any emerging issues of concern.[18] Teething problems were to be expected as were adjustments to the terms of trading. Changes were noticed almost immediately as disruptions occurred with the flow of goods and food (with some empty shelves in major supermarkets) from Great Britain to Northern Ireland and even the decision of some firms in Great Britain opting to no longer trade with or to substantially reduce trade with Northern Ireland.[19]

Initial concerns arose almost immediately over the increased costs of importing second hand cars from Great Britain to Northern Ireland as it involved changes to the way that VAT was calculated with the tax being paid on the price of the car rather than on the profit margin.[20] This was resolved, but the list of issues is growing. Questions arose over the intricacies of *groupage* and exactly how many pallets of consignments could be placed on one lorry if separate forms were needed for each purchaser. These questions initially caused problems but were quickly settled. Others questions are much less clear cut.

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18 House of Commons Library, Joint Commission Decisions on the Northern Ireland Protocol.

19 The Guardian, <https://www.theguardian.com/politics/2020/dec/03/four-in-10-uk-food-firms-to-cut-supplies-to-northern-ireland-poll-brexit>.

20 BBC News, <https://www.bbc.co.uk/news/uk-northern-ireland-54967496)>.

There is growing discontent among the eel fishing industry in Northern Ireland as it can no longer deliver to Great Britain on account of EU environmental regulations and frustrations that travelling with pets between Northern Ireland and Great Britain is now subject to new checks (on vaccinations and rabies shots).[21]

Trade will certainly take longer to move and to process. At the core of concerns from hauliers, importers and exporters are the new arrangements and form filling requirements. A grace period of three months (until 1. April 2021) has been provided to iron out difficulties on most goods and to allow for issues to be resolved. Whether this timetable can be met remains open to question and it is expected that we will see more companies no longer delivering certain items, such as alcohol, to Northern Ireland or even not delivering at all. In hindsight, it seems that the government failed to grasp and appreciate the full extent and impact of the protocol and the ensuing political fallout, but criticism can also be extended to many companies in Great Britain who were not cognizant of the changes the Protocol required. There are positives for Northern Ireland. Its new status provides local companies with both opportunities and advantages over their counterparts in Great Britain as they have unfettered access to the Great Britain and EU markets without any checks or additional paperwork. These same firms will be able to avail of the major expansion of ports in the Republic of Ireland, such as Rosslare, as a route directly into the EU26.

VI. Political Reaction

The Protocol has its critics and when all is said and done it should be recognised as a political compromise. Acutely aware of the political sensitivities and especially among the wider unionist community in Northern Ireland the UK government has pledged to allow the Northern Ireland Assembly to vote on the continuation of the Protocol, specifically Articles 5 to 10, after 4 years in operation (due in December 2024). A specific timetable and process to achieve this has been established by the UK government.[22] Essentially, the "consent mechanism" (Article 18 of the protocol) envisages several scenarios. If the Assembly opts to give its approval by a simple majority (of its 108 members) alignment with the EU will continue for another four years (following an independent review of the Protocol initiated by the UK government) and another vote. However, if consent is given under the cross- community provisions laid out

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21 Politico, <https://www.politico.eu/article/wild-eels-driven-from-uk-market-brexit/>.

22 House of Commons Library, Joint Commission Decisions on the Northern Ireland Protocol.

in the 1998 Belfast Agreement that translates into either a majority of MLAs in both nationalist and unionist MLAs in attendance or 60 per cent of MLAs with 40% in attendance from both the unionist and nationalist communities, alignment continues and another vote will not occur for 8 years.

Under the current composition and given the arithmetic within the Assembly the first option is the most likely outcome of any vote. The DUP has opposed the consent mechanism on these grounds, arguing that a majority vote ran contrary to the terms of the Belfast Agreement, as it did not require support from both communities. The UK government has rejected such views as have most other prominent party voices in Northern Ireland such as Sinn Fein, the SDLP and the Alliance Party. All are wary of giving the DUP any veto in the process and the rolling nature of the provisions if a vote were required every four years. If a majority wishes to reject the protocol it is the Joint Committee that would be tasked with providing the UK government and the European Commission alternative options but these would need to protect against the return of a hard border and any dangers to the peace process. Given such an outcome, however, the Protocol envisages a two-year time-frame to prepare an alternative scenario in which period alignment would continue. Some authors such as Hayward[23] correctly argue that the consent mechanism should be approached with caution as the idea of democratic accountability for the Northern Ireland Assembly is in practice heavily curtailed because even if it were to vote to de-align from the EU, it would be passing responsibility for any new arrangements into the hands of the unelected Joint Committee. Moreover, any of the areas that are covered in the Protocol such as the Common Travel Area and citizens' rights will continue regardless of any vote in the Assembly.

At the start of 2021 the DUP finds itself very much on the defensive. This party had not just campaigned for Brexit but dismissed all suggestions that Brexit entailed negative repercussions. With the chances of further alignment being agreed in the future, DUP party members have taken to attacking the Protocol as the problem and an "unmitigated disaster" and have demanded its suspension.[24] Ian Paisley Junior's comments to the Northern Ireland Affairs Committee in Westminster illustrated the party's inner frustrations and in presenting the Protocol as something they have always opposed the party is seeking

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23 Hayward (2020).

24 Irish Times, <https://www.irishtimes.com/news/politics/paisley-calls-for-britain-to-disapply-northern-protocol-due-to-trade-disruption-1.4451671>; Belfast Telegraph, <https://www.belfasttelegraph.co.uk/news/brexit/ian-paisley-and-claire-hanna-in-name-calling-row-over-ditching-ni-protocol-39942103.html>.

to deflect attention away from its role in advocating Brexit. The DUP's arguments that the Protocol can be disapplied may look possible, but they are simply ill-informed. Article 16 of the Protocol can be invoked unilaterally by either the UK government or the European Commission to resolve any serious "economic, societal or environmental difficulties".

Ultimately, such articles are last resort clauses, are rarely activated and in this case potentially run the risk of damaging trust and relations between the government in London and EU official if triggered by the UK government.[25] For these reasons Boris Johnson, who is more concerned about the wider UK picture and any damage to UK/US relations, will be extremely reluctant to deploy Article 16. It is ironic that those unionist parties who had campaigned vociferously for Brexit as a means to deepening their relations with the UK whilst simultaneously regarding this outcome as a way of distancing themselves from the Republic of Ireland have actually brought about a degree of separateness between the UK and Northern Ireland by undermining the ties between both. Accordingly, the DUP will persist in their attacks on the Protocol. The blame from the DUP's perspective rests squarely with "Brussels' intransigence" (as stated by Diane Dodds, the DUP Minister for the Economy in the Northern Ireland Assembly) to refuse to allow the entire UK to leave the EU.[26] It is misguided and fails to acknowledge that this could never have been the case. Brexit may turn out to interpreted by future historians as a poison chalice for unionism in Northern Ireland, but it may also be regarded as one as well for Boris Johnson's Conservative and Unionist party as its Brexit agenda has unsettled the wider constitutional fabric of the British Union.

VII. Northern Ireland and a second 100 Years: Future Trajectories

The result of the 2016 EU referendum has arguably thrown the structures of the United Kingdom into question. Much focus falls on the ambitions of the Scottish National Party led government in Edinburgh to hold another referendum on independence within the next two years. Opponents of this strategy within the Conservative Party argue that the earlier 2014 referendum on Scottish independence was a once in a generation event and that the SNP's calls are premature. However, these same critics fail to appreciate the point that the 2016 EU referendum, where the Scottish people had voted for the UK to remain in the EU and whose views were set aside in London, transformed the

25 Hayward/Phinnemore.

26 Northern Ireland Assembly, <http://data.niassembly.gov.uk/HansardXml/plenary-18-01-2021.pdf>, 44.

political landscape in Scotland and beyond. If the SNP score a decisive win in the Scottish Parliament May 2021 elections, as is widely expected, there will be demands for a new referendum on independence. Opinion polls currently show that support for independence has increased since 2014 with some 58% now advocating Scotland's break from the UK.[27]

Such an outcome would almost certainly buoy the supporters of a similar poll on Northern Ireland's constitutional position within the UK. The situation is very different as the two main communities (or large sections of each one) express different political and cultural identities. There are two competing historical narratives at play; one that celebrates British culture, language and traditions and another that lauds Irish culture, language and identity. Both are reflected and reinforced through many schools which largely remain almost exclusively Protestant (state controlled) or Catholic (Catholic maintained). Integrated schools still only make up some 7% of the entire school system.

Different anniversaries, emblems and images form mutually exclusive parts of both co-existing narratives. The unionist community defines its identity within a British context. It honours the thousands of sacrifices that its citizens made in defending the UK during the World Wars (and heavy reference is made to the Battle of the Somme in 2016) which is commemorated through the wearing of the red poppy on Armistice Day. It regards itself as a nation under siege and was forced to defend its way of life from the terrorist forces that tried to destroy Northern Ireland during the Troubles. In contrast, a competing narrative from the nationalist and republican community embraces an Irish identity, lauds the 1916 Easter Rising (during the First World War) with the wearing of an Easter Lilley, tells a story of partition and discrimination in Northern Ireland and shares a view of themselves as the "victims" of British armed occupation. The Irish language provides another example of division and distrust. Whereas the nationalist community can see the widening use of Irish in Catholic maintained schools as an expression of culture, the unionist community views such developments as nothing less than a political strategy that only creates further tensions, and potential future discrimination against them if the knowledge of Irish becomes a requirement for the public sector jobs market.

Creating an agreed narrative that somehow encompasses both views of history is necessary for the future but it is far from being straightforward. The orange (unionist) and green (nationalist) narratives will play out and be on show as

[27] The Scotsman, <https://www.scotsman.com/news/politics/poll-shows-scottish-independence-support-surging-joint-record-levels-snp-set-majority-3070791>.

Northern Ireland marks its centenary in 2021. If coming to some agreed understanding about the past is difficult, finding agreement on the future is even more problematic as tensions between the two main communities never lie far beneath the surface. They can flare up at over interpretations of past events as the current legacy debate demonstrates in relation to agreeing who were the perpetrators and who were the victims of the conflict. They are equally susceptible to policy choices and events.

Brexit is a very apt example and has the capacity to represent a decisive game-changer in shaping Northern Ireland's future political trajectory. Irrespective of whether Brexit is regarded as a positive or negative point in British politics, the process, the referendum vote and the outcome generated further (and unhelpful from a consolidating peace perspective) divisions among the two communities in Northern Ireland. This relationship needs careful managing and nurturing because whatever the end goal of the peace process is, i.e. Northern Ireland remaining within the UK or joining the Republic of Ireland, a section of the population will find itself aggrieved and potentially ready to engage in violence. Discussions about a poll now were always going to prove politically divisive and likely to exacerbate tensions. Just two days after the Brexit vote Martin McGuinness,, the then Deputy First Minister, argued that a border poll was now a "legitimate right".[28] The call was immediately denounced by the DUP. Sinn Fein's confidence rests in changing demographics and especially among the young where just over some 50% of those in primary and secondary education identify as Catholic and from Sinn Fein's perspective will lean towards Irish unification.[29] There is no such guarantee.

Brexit certainly energised the supporters of Irish unification and has brought the issue of Irish unification into greater political focus than at any time over the last 100 years. The mechanism for holding a border poll on Northern Ireland's constitutional future is provided for under the Belfast Agreement, but the key is public demand for one. Until this point successive Secretaries of State for Northern Ireland, together with both main unionist parties, have argued that no such clamour exists, and as such Northern Ireland remains an integral part of the UK. This position was supported by opinion polls. In one commissioned for the BBC and RTE (Irish State Broadcaster) conducted in 2015, only some 13 per cent of respondents supported Irish unification in the short to term (10 years) whereas some 30% supported it as an aim over their

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28 Daily Express, <https://www.express.co.uk/news/uk/683490/EU-referendum-Martin-McGuinness-calls-border-poll-unification-Brexit-vote>.

29 Irish Times, <https://www.irishtimes.com/news/ireland/irish-news/northern-ireland-polls-can-provide-more-confusion-than-clarity-1.4344768)>.

lifetime.[30] This option found support among just 3% of the unionist community. Interestingly some 52% of the nationalist community supported continuing links with the United Kingdom (either by "direct rule" from London or by devolved government).

Some six years later and after Brexit there has been a shift in attitudes with more of the nationalist community supporting a border poll. According to a widely publicised poll commissioned for the Sunday Times, the state of play in January 2021 suggested that some 51 (50.7)% of the Northern Ireland public wanted to see a poll on Irish unification by the end of 2025.[31] 44.4 per cent rejected such a poll. Removing the "don't knows" increases support for unification to 53.3 per cent, much to Sinn Fein's delight and unionist fears. Such snapshots of public opinion always require some degree of caution as context is all important. Indeed, wanting a poll does not in itself translate into voting for Irish unification. This particular poll revealed this reality as only 42 per cent would intend to vote for Irish unification while 47 per cent prefer Northern Ireland to remain in the UK. 11 per cent did not know and this group may hold the key to either outcome.

Arlene Foster, the leader of the DUP, and expressing the views of almost all unionists, described any such poll as "absolutely reckless" given the political sensitivities it will generate and will be certain to make a case for the union with the UK.[32] There are still many questions to be asked about the nature and constitutional fabric of a "united" Ireland and moreover, how that reshapes many areas of public policy, particularly health and taxation. The voters in the Republic of Ireland will also be required to give their consent to a united Ireland and will have as many similar economic questions to raise about the cost of the process and who bears it. More importantly, assuaging concerns from the unionist community will need to be paramount. Colm Eastwood, the leader of the SDLP, has spoken about the need to engage with "every community, sector and generation" and argued that with the United Kingdom "coming to an end" it was time to build a new future together.[33] It is now conceived wisdom that a referendum on Irish unity is coming, whether some people in Northern Ireland remain hostile and whether some people even in the Irish Republic like it or not.[34] The timing may well be influenced by events in Scotland.

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30 BBC News, <https://www.bbc.co.uk/news/uk-northern-ireland-34725746>.

31 Sunday Times, <https://www.thetimes.co.uk/article/northern-irish-back-border-poll-within-five-years-6ndbkz80s>.

32 BBC News, <https://www.bbc.co.uk/news/uk-northern-ireland-55783805>.

33 Ibid.

34 Irish Times, <https://www.irishtimes.com/opinion/a-referendum-on-irish-unity-is-coming-whether-we-like-it-or-not-1.4454681>.

This paper does not seek to second guess the outcome of a border poll but suggests that even if the current constitutional status quo for Northern Ireland were not changed, it is the duty of all politicians, both North and South of the border, to set out to explain their preferences for Irish unity and to secure popular support. Unlike the Brexit referendum, it is argued here that a simple majority will not suffice and that there will have to be a winning threshold that should arguably centre around the 60% mark in both referenda on either side of the Irish border. The Belfast Agreement only refers to a majority of public support and there remain questions over what materials might be deployed as evidence of such a view (e.g. through election or opinion polls). Central to the discussions will be the nature of the new Irish state and the role of the minority unionist position within it who would comprise one sixth of the population of the new state. There are three potential models.[35] The first envisages the full absorption of Northern Ireland into the current structures and political system of the Irish Republic but this form will not prove politically acceptable to unionism. A second sees the creation of a new federal system based around the four historic Irish provinces (Connaught, Leinster, Munster and Ulster). This option will be unlikely as the provinces are unequal in terms of population and economic power and Northern Ireland only comprises 6 counties with the other three being in the Republic. A newly constituted Ulster province would not garner the support of the unionists.

A model that realises unification but hands some form of devolved authority to what had constituted the territory of Northern Ireland is the only viable option in political management terms. Unionists might be more open to this option but will still need to be convinced. That said, there are still a vast array of challenges and not least of these is just how well prepared officials, ministers and politicians in the Irish Republic are to enter into such discussions or to think about how best to accommodate the North. Would the National Health Service be retained in Northern Ireland; would elected officials in a devolved Northern Ireland be allowed to vote in all of Ireland's parliamentary debates; would Ireland opt to join the UK Commonwealth? It is to be expected that such an asymmetric model could be worked out without too much awkwardness, but the discussions will be complex. Preparations are needed and have already begun in some circles in the Republic of Ireland.

35 Doyle/O'Leary.

VIII. Conclusions: Northern Ireland after Brexit

Post Brexit Northern Ireland finds itself in a rather unique position to the rest of the UK when it comes to its relationship with the EU. The Protocol effectively places Northern Ireland in the form of half-way house, being still part of the UK but also closely connected in an economic zone with the Republic of Ireland and the wider EU in relation to the free movement of goods. This new arrangement was a compromise that sought to minimise disruptions to trade across the island of Ireland and to prevent any threat to the ongoing peace process in Northern Ireland. The Protocol will prove much more problematic both politically and operationally than its creators had ever envisaged. The difficulties surfaced in the first month of its existence and in a very unhelpful manner when the European Commission without warning and any consultation invoked Article 16 to stop the movement of the Covid vaccine across the Irish border. This decision was a major "fiasco" and was quickly rescinded as it caused political uproar across the UK and Ireland.[36] The Commission's move was even described by the First Minister of Northern Ireland as a "hostile and aggressive" act.[37] The entire episode proved damaging to the EU itself as after years of stressing its belief in the peace process it was ready to abandon its commitment in an act of Covid nationalism. The Commission's miscalculation has resulted in intensifying demands from many sections of the unionist community to abandon many aspects of the Protocol. Any such move would draw resistance from primarily nationalist voices in Northern Ireland. Once again, Brexit is having an unsettling effect on Northern Irish politics.

As Northern Ireland turns one hundred it is time not only to reflect on the past but also the future. The people of Northern Ireland should be starting a dialogue over the region's next 100 years over whether Northern Ireland should remain an integral part of the UK or accede to the Irish Republic. Such a discussion was always necessary but Brexit has accelerated the timetable and makes this exercise more difficult as sections of the two communities are ever more entrenched in their distinctive identities. A border poll may be moving closer but the outcome still remains open. A united Ireland will see the full reintegration of Northern Ireland into the European Union. Yet, there is another alternative scenario where the UK government makes the case for the UK union ahead of any referendum. Ultimately, Northern Ireland's future will

36 BBC News, <https://www.bbc.co.uk/news/world-europe-55872763>.

37 The Guardian, <https://www.theguardian.com/world/video/2021/jan/29/arlene-foster-eu-limit-on-vaccines-into-northern-ireland-is-hostile-and-aggressive-video>.

be determined by its people. The options may seem relatively clear but the tasks and challenges should not be underestimated. Building consensus on an agreed future is a necessity but it makes for a difficult road ahead.

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Future Participation in the Single Market: Prospects for Northern Ireland, Scotland and Wales

Tobias Lock

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I. Introduction – where we were in 2016

The result of the 2016 Brexit referendum in the United Kingdom revealed significant regional differences. While a majority of voters in England and Wales voted in favour of Brexit, voters in Scotland and Northern Ireland – with 62% and 55% respectively – expressed a preference for remaining in the EU. This resulted in calls for a differentiated Brexit, which would respect these divergences in preference. In the case of Scotland, these calls were particularly loud given that Scottish voters had spoken out against Scottish independence less than two years earlier. One of the arguments against independence in that campaign had been that Scotland would lose its EU membership if it opted for

independence, a result which the Brexit vote – in the eyes of the pro-independence and governing Scottish National Party – had now achieved, but without the consent of the Scottish people.

Over the following months various models were discussed, which could accommodate the divergent wishes of voters in the four constituent parts of the UK. Aside from an overall call for a "soft" Brexit – commonly understood to mean membership of the European Economic Area (EEA) coupled with continued membership of the customs union[1] – this discussion included calls for a differentiated Brexit for Scotland (as well as Northern Ireland). The discussion featured variations of various precedents: the "reverse Greenland" model would have resulted in the UK formally remaining in the EU, but for the EU Treaties to be amended to no longer apply to England and Wales, resulting in only Scotland and Northern Ireland remaining bound by EU law. The "reverse Svalbard" model would have resulted in the UK re-joining the EEA, but again for the EEA Treaty not to apply to England and Wales, resulting in only Scotland and Northern Ireland remaining in the EU single market. The latter was also advocated by the Scottish Government in a white paper entitled "Scotland's Place in Europe" published in December 2016.[2]

None of these proposals, however, came to fruition, notably because the UK Government did not accept the arguments made (by the Scottish Government in particular). The result was that on 31 January 2020 the UK left the EU as a whole with England, Scotland, and Wales leaving under the same terms while Northern Ireland retained closer links to the EU's customs union and single market for goods under the Protocol on Ireland/Northern Ireland, which forms part of the EU-UK Withdrawal Agreement.[3] While formally Brexit had been achieved, the Withdrawal Agreement foresaw a transition period of eleven months, during which most EU law would continue to apply to and in the UK, so that Brexit was only achieved substantively after 31 December 2020.[4]

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1 This was also supported by the Welsh (Labour) government, which generally accepted the Brexit vote, but argued for a soft Brexit.

2 On these different models see Lock, New Dynamics in the European Integration Process.

3 Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, OJ L 29 of 31 January 2020, 7 et seqq.

4 See Art. 126-132 of the Withdrawal Agreement.

In late December 2020, the EU and the UK also concluded their future relationship agreement, which they christened the Trade and Cooperation Agreement (EU-UK TCA).[5] That agreement equally envisages the same relationship with the EU for England, Wales and Scotland.

II. Where we are now: fragmented relationships with the EU single market and within the UK internal market

The current relationship between the different parts of the UK on the one hand and the EU on the other is a fragmented one. While the relationship between England, Scotland, and Wales and the single market is governed by the EU-UK TCA the relationship of Northern Ireland with the single market is governed by the EU-UK Withdrawal Agreement, and in particular its Protocol on Ireland/Northern Ireland.

1. The EU-UK TCA

From an EU law perspective, the TCA between the EU and the UK is an association agreement – concluded on the basis of Article 217 TFEU – with a free trade agreement at its heart.[6] The trade elements are supplemented by chapters on transport, social security coordination, fisheries, on law enforcement and judicial cooperation in criminal matters, and participation of the UK in EU programmes.

In trade terms the TCA envisages quota- and tariff-free trade in all goods. It goes beyond other free trade agreements concluded by the EU in that this includes agricultural goods. However, goods trade is not frictionless. Importers and exporters must submit paperwork; tariffs may be payable due to rules of origin, notably if the good had previously been imported from a third country and is now exported to the other party.[7] Physical checks on paperwork and the goods themselves are possible and do occur, which

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5 Trade and Cooperation Agreement Between the European Union and the European Atomic Energy Community, of the One Part, and the United Kingdom of Great Britain and Northern Ireland, of the Other Part, OJ L 444 of 31 December 2020, 14 et seqq.

6 At the time of writing the TCA was only provisionally applicable pursuant to a Council decision made on the basis of Article 218 (5) TFEU; see Council Decision (EU) 2020/2252, OJ L 444 of 31 December 2020, 2 et seqq.

7 The agreement foresees only a bilateral cumulation of origin as regards goods originating in one of the parties (i.e. EU or UK), but not diagonal cumulation which would allow for imported goods from certain third countries on which tariffs have been paid to "count" as originating in one of the parties.

restricts their free flow. Furthermore, the agreement does little to remove technical barriers to trade (such as differences in product standards) as there is no longer mutual recognition of standards as would have been the case during the UK's EU membership. There is not even a clause permitting mutual recognition of conformity assessments. Additionally, there may be requirements for import and export licences under the TCA and VAT and excise duties are payable on goods crossing the border.

On services the TCA consists of a fairly basic agreement guaranteeing national treatment – i.e. non-discrimination – in the main. This means service providers must comply with the rules of the party that they wish to operate in. No mutual recognition of professional qualifications is envisaged. Both parties have agreed, however, that they wish to establish a common framework for cooperation on matters of financial regulation and that provision is made for visa-free travel for short business trips.

There is additionally a degree of volatility in the TCA. This is due to clauses that permit the termination of the agreement and so-called "rebalancing measures" or "remedial measures". The latter are contained in Title XI on the level playing field. Under that title, both parties entered into commitments to ensure a "level playing field for open and fair competition", which is spelled out in greater detail to include commitments on competition policy, subsidy control, state-owned enterprises, labour and social standards, and the environment and climate change. Changes to the status quo are permitted, but not if they result in significant divergences that have a "material impact on trade". In other words, if competition between both parties becomes unfair due to the lowering of labour or environmental standards by one of the parties and this leads to a change in trading patterns or investment patterns, then the other party is entitled to take "rebalancing measures" to address the situation.

Further volatility results from a review clause, which allows each party to call for a review of the "trade" part of the agreement after four years, which may result in the termination of the trade part of the agreement after one further year. In addition, the entire TCA may be terminated by either party with 12 months' notice.

2. The Protocol on Ireland/Northern Ireland

Where Northern Ireland is concerned, those parts of the TCA concerning trade in goods are largely supplanted by the Protocol on Ireland/Northern Ire-

land, which forms part of the EU-UK Withdrawal Agreement. In essence, the Protocol keeps Northern Ireland in the single market for goods and also, for most intents and purposes, in the EU's customs union.[8]

This outcome is not obvious, however, and the Protocol is in many regards an exemplary use of smoke and mirrors in legal drafting. Whereas Article 4 (1) of the Protocol boldly declares that Northern Ireland is part of the customs territory of the UK, Article 5 (3) of the Protocol makes it clear that the EU customs code applies "to and in the United Kingdom in respect of Northern Ireland". This generally results in EU customs duties being payable on goods entering Northern Ireland from outside the EU customs union, i.e. including from Great Britain, unless these goods are not "at risk of subsequently being moved into the Union, whether by itself or forming part of another good following processing."[9] Due to the TCA customs duties will only be payable on goods which are not classed as UK goods under the TCA's rules of origin, so that this (potentially high) barrier to trade has been flattened considerably. Nonetheless, traders still need to fill in the necessary customs paperwork, such as entry summary declarations and the like.

Furthermore, the UK must not charge customs duties or charges having equivalent effect on goods entering Northern Ireland from the EU. For most intents and purposes Northern Ireland is therefore a *de facto* part of the EU customs union with one key exception: it is not automatically covered by EU international trade agreements, so that e.g. for goods produced in Ireland with materials originating in Northern Ireland, the Northern Irish proportion of these materials does not count as being of EU origin, which may cause issues with rules of origin in free trade agreements with third countries.

Additionally, Annex 2 to the Protocol lists the provisions of secondary EU law applicable in Northern Ireland. These are the entirety of EU secondary law dealing with regulatory standards for goods meaning that goods produced in Northern Ireland must comply with EU standards. Furthermore, the Protocol contains a prohibition on quantitative restrictions on imports and exports and decrees the applicability of Articles 34 and 36 TFEU in Northern Ireland for goods originating in the EU. This means that the principle of mutual recognition – first formulated by the ECJ in the *Cassis de Dijon* case[10] – benefits

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8 On the Protocol, see Weatherill, 222 et seqq; Dougan, 676 et seqq.; Lock, Von Komplexität und Kompromiss, 203 et seqq.

9 Goods at risk are further defined in Decision No. 4/2020 of the Joint Committee set up by the Withdrawal Agreement, OJ L 443 of 30 December 2020, 6 et seqq.

10 CJEU, Decision of 20 February 1979 in Case 120/78, ECLI:EU:C:1979:42 – Rewe-Zentral AG/ Bundesmonopolverwaltung für Branntwein (Cassis de Dijon).

EU goods imported into Northern Ireland. Curiously a parallel provision giving Northern Irish goods the same mutual recognition in the Union is not contained in the Protocol. Despite this, one can still conclude that Northern Ireland remains a *de facto* part of the EU single market in goods.

The consequence is that customs duties may be payable and customs and regulatory checks must be carried out on goods moving from Great Britain to Northern Ireland. According to Article 6 of the Protocol, the UK may ensure unfettered access of goods moving from Northern Ireland to the rest of the UK.[11] Trade in goods within the UK is therefore not barrier-free.

Additionally, there are flanking provisions on state aid and a provision ensuring Northern Ireland's continued participation in the single electricity market. As far as the free movement of people is concerned, Northern Ireland will be in the same position as the rest of the UK and will not continue to participate in it. However, the UK will remain part of a common travel area with Ireland, which the Protocol on Ireland/Northern Ireland protects expressly in Article 3. The Common Travel Area allows citizens of Ireland and of the UK to move freely throughout the Common Travel Area and to reside there. It is an informal arrangement – i.e. it does not have a legal basis in international law but is given effect in the respective domestic laws of Ireland and the UK – which was recently reiterated in a memorandum of understanding between both parties.[12]

3. The UK Internal Market Act 2020

The UK Internal Market Act 2020 was passed in December 2020 and contains the rules governing trade between the different parts of the UK. The Act was introduced to manage the fledgling UK internal market. During the UK's EU membership most potential barriers to trade resulting from different regulatory approaches in the four parts of the UK were dealt with by EU law, in particular minimum standards laid down in EU internal market legislation. With EU single market rules no longer applicable, the UK needed to introduce its own legislation to deal with these questions. The UK Internal Market Act 2020 operates on the basis of similar principles to those of the EU single market, i.e. market access through mutual recognition and non-discrimination. However, in contrast to the EU single market the UK Internal Market Act 2020 results in

[11] It goes almost without saying that no such checks would be necessary on goods moving between those parts of the UK that make up the island of Great Britain.

[12] More on the Common Travel Area below at IV.3.b)aa); <https://www.gov.uk/government/publications/memorandum-of-understanding-between-the-uk-and-ireland-on-the-cta/>.

further-reaching intrusions into the regulatory autonomy of the constituent parts of the UK as the principle of mutual recognition is not softened by as wide-ranging options to "justify" higher Scottish or Welsh standards or by flanking UK-wide minimum standards brought about by harmonising legislation.[13] This set-up opens the door for a race to the bottom in terms of regulatory standards, which the devolved legislatures may struggle to prevent.[14]

III. What options for Scotland/Wales while they are part of the UK?

As indicated above, attempts by the Scottish government to convince the EU and the UK government to grant it a special status in regard of the single market remained unsuccessful. At first glance, the only plausible option would be for Scotland and Wales to be given the same status as Northern Ireland. One could make a political case for it on the basis that voters in Scotland – at least – also expressed their desire to remain in the EU. The obvious rebuttal on the part of the EU and the UK would be that Northern Ireland finds itself in a specific situation: first, it is a post-conflict society and the arrangements in the Protocol on Ireland/Northern Ireland are designed to help preserve the peace on the island of Ireland; second, Northern Ireland is the only part of the UK that has a land border with an EU Member State; and third, Northern Ireland is unique in that a sizeable proportion of its population have Irish – and thus EU – citizenship[15] and most people living there have a right to an Irish passport.[16]

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13 For an overview see Dougan/Hayward/Hunt/McEwen/McHarg/Wincott; UK Internal Market Bill, Devolution and the Union, Centre for Constitutional Change, 2020, <https://www.centreonconstitutionalchange.ac.uk/publications/uk-internal-market-devolution-and-union>.

14 Thus the practical effects of an envisaged "keeping pace" provision in the Scottish UK Withdrawal from the European Union (Continuity) (Scotland) Bill, introduced in 2020. Section 1 of that Bill empowers the Scottish Government to enact secondary legislation to give effect to EU secondary law that came into effect after 31 January 2021 so far as its subject matter is within devolved competence.

15 According to estimates, there are around 700,000 Irish passport holders living in Northern Ireland (out of a population of a round 1.8 million), see <https://factcheckni.org/articles/do-more-than-700000-born-in-northern-ireland-have-an-irish-passport/>.

16 According to Irish citizenship law, anyone born on the island of Ireland (including Northern Ireland) before 2005 is automatically an Irish citizen; for people born since 2005 the rules are stricter, but it is sufficient if a parent was an Irish citizen, i.e. most children born in Northern Ireland still qualify to this day if e.g. one of their parents was born on the island of Ireland.

Moreover, this option could result in undesirable barriers to trade between the various parts of the UK. If the Protocol on Ireland/Northern Ireland were extended to Scotland or Wales, this would result in these parts of the UK applying the EU customs code – *de facto* membership of the customs union – and their *de facto* participation in the single market for goods. Hence the land borders between England and Wales or England and Scotland would become customs borders for the EU's customs union and regulatory borders for the single market in goods.

Hence goods moving from England to Wales or Scotland might attract customs duties (due to rules of origin), unless they were not deemed at risk of subsequently being moved to the EU. Furthermore, these goods would need to be compliant with EU regulatory standards as set out in the Protocol. Checks would become inevitable. Obviously, such checks would no longer be necessary on goods moving from either Wales or Scotland to the island of Ireland. This means that the checks now taking place at most of the major ports on the Irish Sea – with the exception of Liverpool in England – would move from these ports to the land borders on the island of Great Britain. Goods moving from Scotland or Wales to England could be granted barrier free access to England.

Moreover, the extension of the Protocol on Ireland/Northern Ireland would have a significant impact on the UK's own internal market. After all, the regulatory standards on goods to be complied within three out of four parts of the UK would be set by the European Union. The principle of market access *qua* mutual recognition that governs the UK's internal market in that field would therefore be inoperable for English goods moving to Scotland or Wales if they were "at risk" of being moved into the EU. This might then seriously impede the incentives for setting different domestic standards in the UK in the first place given that English goods produced to these standards would usually not be allowed to be moved outside of England.

The extension of the Protocol to Scotland and England might furthermore raise difficulties concerning state aid. Article 10 of the Protocol stipulates that EU state aid rules apply "in respect of measures which affect that trade between Northern Ireland and the Union which is subject to this Protocol". Hence the United Kingdom must comply with EU state aid rules for any measures that might affect trade between Northern Ireland and the EU. Such measures need not necessarily be targeted at Northern Ireland, however. It is conceivable that a measure applying throughout the UK – e.g. a particular tax break or a funding scheme – may have the effect of distorting or threaten-

ing to distort competition[17] and thus put companies in Northern Ireland at an uncompetitive advantage compared with companies in the single market.[18] If this state aid clause were extended to cover trade between Scotland and Wales and the single market, then this would potentially have repercussions for any state aid measures envisaged by the UK Government even if that state aid might directly only benefit companies in England as it might still indirectly benefit e.g. their subsidiaries in Scotland, which could fall foul of EU state aid rules.

Finally, the text of the Protocol on Ireland/Northern Ireland is not entirely conclusive but needs implementation and refinement by the Joint Committee. A practical question in this regard would be whether the governance mechanism pertaining to the Protocol – which is geared towards the specifics of Northern Ireland – is suitable for being extended to Scotland and Wales. There are serious doubts that that could be so, especially concerning one particular feature, which is the requirement for renewed democratic consent by the Northern Ireland Assembly, which is owed to the specifics of the Northern Irish decision-making processes grounded in the Good Friday Agreement, and which could not easily be translated to the Welsh or Scottish context.

IV. What options for Scotland (or Wales) in case of independence?

Current polling data shows a clear trend in favour of Scottish independence amongst Scottish voters with the vast majority of polls in 2020 showing a majority in favour of it.[19] By contrast, Welsh voters remain at best tepid about

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17 See Art. 107 TFEU, to which Annex 5 of the Protocol refers.

18 The potentially far-reaching effects of Art. 10 of the Protocol have been somewhat softened by way of a political agreement between the EU Commission and the UK Government in the Joint Committee. This resulted in a unilateral declaration on part of the EU Commission that "an effect on trade between Northern Ireland and the Union which is subject to this Protocol cannot be merely hypothetical, presumed, or without a genuine and direct link to Northern Ireland", see Unilateral Declaration of the EU on the application of the Union's State Aid rules under Article 10 of the IE/NI Protocol, <https://ec.europa.eu/info/sites/info/files/brexit_files/info_site/5._art_10_declaration_to_publish.pdf>.

19 See e.g. The Press and Journal, Independence: Poll shows 58% of Scots back breakaway from UK, which reported on a new poll in December 2020 that was the 17th in a row showing a majority in favour of independence, <https://www.pressandjournal.co.uk/fp/news/politics/uk-politics/2745601/independence-poll/>.

the prospect of Welsh independence at around 25%.[20] Given the remote prospect of Welsh independence, this part of the contribution will concentrate on Scotland.

It should briefly be mentioned that Northern Ireland is in a different situation here as the option to leave the United Kingdom – which is expressly guaranteed in the Good Friday Agreement – would not be one of Northern Irish independence but of unification with Ireland, a present EU Member State.[21] In case of Irish unification, the European Council has already acknowledged that current Irish EU membership would extend to Northern Ireland.[22]

There are many unknowns as to what might happen as regards Scottish-EU relations in case of Scottish independence, but one can make some informed guesses based on the EU's past practice as well as the Brexit experience, which provides some lessons for how Scottish independence might develop.

1. Lessons from Brexit

There would of course be many differences between Scottish independence and Brexit, but there would be certain similarities in terms of process and certain choices that would have to be made.

The first lesson is that there would be more than one relationship to sort out at the same time. Scotland is no longer a part of the EU single market and its current relationship with the EU is determined by the TCA. In case of a vote for independence, an independent Scotland would therefore find itself part of a triangle of relations that would likely determine the bulk of its future international (trading) relations. These are: the relationship between Scotland and the rest of the UK (rUK); the relationship between Scotland and the EU; and the relationship between the EU and rUK. This means that it would have to negotiate its exit from the UK; its future relationship with the EU; and all the while the EU-UK relationship might be evolving too, be it towards greater or lesser integration.[23] Additionally, Scotland would also have to establish its relationships with the wider world. These relationships are inter-connected: Scotland will have choices, but the exercise of these choices in one relationship

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20 See the Yougov Wales Independence Referendum Tracker, <https://docs.cdn.yougov.com/ew9dwj6qt6/YG Trackers-Wales - Indy ref.pdf>.

21 See s. 1 (2) of the Northern Ireland Act 1998.

22 See Minutes of the Special Meeting of the European Council held on 29 April 2017, EUCO XT 20010/17, <https://data.consilium.europa.eu/doc/document/XT-20010-2017-INIT/en/pdf>.

23 On the in-built volatility of the TCA see above II.1.

(say with the EU) will lead to constraints in other relationships (say on trade with third countries). And obviously negotiating partners may not be willing to agree to Scotland's choices.

The second lesson concerns process: the first set of negotiations would be with the UK from which an independent Scotland would need to extract itself. Brexit has shown that such a process can take longer than expected and that it may take place in stages. Brexit technically happened on 31 January 2020 – 3.5 years after the referendum – but its full effects did not materialise until the end of the transition period on 31 December 2020. In case of Scottish independence, it is likely that there would also be transitional arrangements. The 2013 White Paper by the Scottish Government suggested that the transition would happen while Scotland was still a part of the UK, the assumption being that immediately after the successful independence vote, Westminster would agree to total devolution to Scotland and that Scotland would have time to build the institutions and other things that would be necessary for its existence as an independent country.[24] The Brexit experience, however, suggests that while this might still be the case, there would probably have to be a transition out of the United Kingdom's economic framework. This might mean that Scotland could become independent *de jure*, but would remain in a customs union with the UK and possibly within the UK's regulatory orbit, i.e. the UK internal market, for another while.[25]

The third lesson results from the Protocol on Ireland and Northern Ireland which illustrates some of the trade-offs in the economic relationship that might have to be made if an independent Scotland wanted to retain strong economic ties with the rUK and build similarly strong ties with the EU. As will be shown, the degree of permeability of the land border between Scotland and England is likely to be a determinant in what choices Scotland might realistically make as regards its relationship with the EU.

2. Scotland's path to independence

In contrast to the route for the unification of Northern Ireland and Ireland, there is no pre-defined constitutional avenue to Scottish independence. The Act of Union of 1707, which established the UK, does not contain a termination clause. Equally, the Scotland Act 1998, which is the key constitutional instrument for Scotland, is silent on the matter of independence. In fact, it expressly

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24 Scottish Government, Scotland's Future (2013), <https://www.gov.scot/publications/scotlands-future/>.

25 Zuleeg.

designates "the Union of the Kingdoms of Scotland and England" – established by the Act of Union 1707 – as a "reserved matter", meaning that the Scottish Parliament cannot legislate on a dissolution of that union. Hence an Act of the Scottish Parliament providing for a legally binding referendum on independence would in all likelihood not be recognised as "law" in Scotland or the rest of the UK.[26] That said, a good argument can be made that a consultative referendum (i.e. a non-binding poll) would be within the Scottish Parliament's powers.[27] If the Scottish Parliament passed legislation to hold such a referendum, it is likely that this would be challenged by the UK Government in the Supreme Court.[28] Depending on the outcome of that case, a referendum could take place or not.

Alternatively – and probably the preferred option of the Scottish Government – a future independence referendum would follow the pattern of the 2014 referendum. On the basis of the "Edinburgh Agreement" of 2012 between the UK and Scottish governments, the UK Government expressly allowed the Scottish Parliament to legislate on an independence referendum before a given date. Technically this was done by way of a so-called Section 30 order, which enables the UK Government – by way of an "Order in Council" – to modify the reserved matters under the Scotland Act. In other words, it allows the UK Government to (temporarily) devolve certain matters to the Scottish Parliament.[29]

No matter which path is pursued, it would be imperative for an independent Scotland to receive international recognition as an independent state, which

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26 S. 29 (1) Scotland Act 1998.

27 Anderson et al., The Independence Referendum, Legality and the Contested Constitution: Widening the Debate, UK Constitutional Law Blog, <https://ukconstitutionallaw.org/2012/01/31/gavin-anderson-et-al-the-independence-referendum-legality-and-the-contested-constitution-widening-the-debate/>; Barber, Scottish Independence and the Role of the United Kingdom, UK Constitutional Law Blog, <https://ukconstitutionallaw.org/2012/01/11/nick-barber-scottish-independence-and-the-role-of-the-united-kingdom/>; MacCormick, 725 et seq.; the counter-view is articulated by Tomkins, The Scottish Parliament and the Independence Referendum, UK Constitutional Law Blog, <https://ukconstitutionallaw.org/2012/01/12/adam-tomkins-the-scottish-parliament-and-the-independence-referendum/>.

28 This is possible under s. 33 of the Scotland Act 1998, according to which the Advocate General for Scotland and the UK's Attorney General – both ministers in the UK Government – can refer a Scottish Bill to the Supreme Court on whether the Bill is within the competence of the Scottish Parliament.

29 The Edinburgh Agreement resulted in The Scotland Act 1998 (Modification of Schedule 5) Order 2013 of 12 February 2013, <http://www.legislation.gov.uk/uksi/2013/242/pdfs/uksi_20130242_en.pdf>.

would open the doors for membership in international and supranational organisations, including the EU. International recognition would most probably only occur if independence happened with the consent of the UK as international law does not currently recognise an unconditional right to unilateral secession.

Assuming the UK Government agrees to Scotland becoming an independent state, an independence vote would be followed by a negotiation between the UK Government and the Scottish Government on the precise terms of independence. Legally, this would involve the conclusion of an international agreement between Scotland and rUK and would be accompanied by internal legislation in the UK and by the (independent) Scottish Parliament. The timeline for completing this is difficult to predict. The Scottish Government's white paper on independence from 2013 assumed that independence could be accomplished within about 18 months from a successful independence vote.[30] Considering that the Scottish Government at the time was staunchly in favour of Scottish independence, one can assume that the 18-month period between a vote for independence and actual independence is an optimistic best-case scenario. But even if this ambitious schedule were achievable, there would be the further question of whether the Scotland-EU relationship could be sorted out at the same time. This is at least doubtful, so that another form of transition – be it via associate membership of the EEA[31] or, more traditionally, by way of an association agreement concluded under Article 217 TFEU – would be necessary before a durable relationship could be agreed.

As far as relations between an independent Scotland and the EU are concerned, Scotland has essentially got four choices: no relationship with the EU; a permanent association agreement or free trade agreement (akin to the TCA); membership of the European Free Trade Association (EFTA) and EEA, which would make Scotland part of the EU single market, but leave it outside the customs union; or full EU membership.

It is the stated ambition of the current pro-independence Scottish Government that Scotland should become an EU Member State,[32] though as will be

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30 The white paper envisaged the 24 March 2016 to be Scotland's independence day following the referendum of 18 September 2014; see FN 22.

31 Proposed by Zuleeg.

32 See e.g. the various newspaper articles by Scottish First Minister Nicola Sturgeon published in EU newspapers in early January 2021 on the issue: e.g. "Independence is Scotland's only route to rejoining EU" Irish Times, 2 January 2021; "Wir wollen ein unabhängiges Land", Der Spiegel, 6 January 2021; "Noi scozzesi resteremo nella famiglia Ue", Corriere della Sera, 1 January 2021.

shown, EEA membership might also suit an independent Scotland, at least temporarily. Hence this contribution will not discuss the "no relationship" or "permanent association agreement" options as these are currently not realistic.

3. EU membership

a) Process

There is little doubt that an internationally recognised independent Scotland would qualify for EU membership.[33] The process is spelled out in rudimentary terms in Article 49 TEU, which reads:

> Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union. The European Parliament and national Parliaments shall be notified of this application. The applicant State shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the consent of the European Parliament, which shall act by a majority of its component members. The conditions of eligibility agreed upon by the European Council shall be taken into account.
>
> The conditions of admission and the adjustments to the Treaties on which the Union is founded, which such admission entails, shall be the subject of an agreement between the Member States and the applicant State. This agreement shall be submitted for ratification by all the contracting States in accordance with their respective constitutional requirements.

Article 49 thus stipulates three conditions for membership: a geographical condition, which an independent Scotland would easily fulfil as it would be a European State; and two political conditions: respect for the values in Article 2 TEU, i.e. the founding values of the EU, such as human dignity, freedom, democracy, equality, the rule of law, etc, and a commitment to promote these values. However, in practical terms, the process is much more complex than a plain reading of Article 49 TEU would suggest as the EU requires prospective Member States to comply with the so-called Copenhagen criteria, which are hinted at in the third sentence of Article 49 (3) TEU. These entail political criteria relating to the stability of institutions guaranteeing democracy, the rule

[33] International recognition would probably only happen if the rUK consented to Scottish secession. A unilateral secession, by contrast, would encounter resistance from the international community.

of law, human rights and respect for and protection of minorities; economic criteria, i.e. a functioning market economy and the capacity to cope with competition and market forces; and the adoption of the entire EU *acquis*.

The process of accession involves accession negotiations, which commence once a country has been granted candidate status. It is entirely within the discretion of the EU to grant such status as there is no right for states to become EU members. A further question to be considered in this regard is whether the EU would be willing to start negotiating Scottish EU accession before Scotland has formally become independent, so as to enable a seamless transition into the EU. This had been envisaged in 2014 given that Scotland would have then been part of a Member State that would have wanted to remain in the EU after independence. In view of the changed circumstances whereby Scotland is now outside of the EU, this may no longer be an issue.

An independent Scotland would most likely become a democracy respecting the rule of law and espousing the basic values of the EU and it is likely that it would also continue to operate a functioning market economy. A potentially more problematic criterion might be the obligation to sign up to the EU's *acquis communautaire*, i.e. the entirety of EU law. The ease with which an independent Scotland would fulfil these criteria would depend on how far Scotland would have diverged from EU law since 1 January 2021. To an extent this will be outside the powers of Scottish lawmakers given that due to the devolution settlement and the dynamics of the Internal Market Act 2020 with its strong market access principle, much of the law of the internal market of the UK will in practice be dominated by England even if it technically falls within devolved competence.[34] Politically more difficult might be the necessary commitment to join the Economic and Monetary Union (with the end result being the adoption of the Euro as a currency) as well as a commitment to become part of the Schengen Area, which entails open borders including a common visa regime.[35]

Once negotiations are concluded, they result in an accession treaty, which would need to be ratified by Scotland according to its constitutional requirements – whatever they may be – and by the EU by way of a unanimous decision in the Council and the consent of the European Parliament.

b) EU accession and the Anglo-Scottish border

The trade-offs that an independent Scotland may have to make when it comes to securing membership of the EU single market *qua* EU membership are par-

34 See Dougan et al. (FN 13).

35 Lock, Negotiating EU acession.

ticularly stark where the land border between England and Scotland is concerned. If Scotland became an EU Member State, that border would become an EU external border. Assuming that the overall EU-rUK relationship continues to be based on the TCA, the EU and rUK will continue to operate different customs regimes and there will be no close regulatory alignment between the rUK and the EU single market. Hence similar issues as with the border between Ireland and Northern Ireland would arise.[36]

Obviously, Scotland does not have the same history of violence as Northern Ireland, so that the erection of border infrastructure would not meet the same concerns of violent attacks that were feared regarding the border in Ireland. That said, one can assume that a visible border with border checks between Scotland and England would nonetheless be considered undesirable both by opponents and supporters of independence as it could lead to disruptions for travellers and goods transport. It is likely that those opposed to independence could make the threat of a hard border a theme in a revived "No" campaign.

So how probable is it that EU membership would result in a border between England and Scotland that would be visible and where checks on those crossing the border would be carried out? Typically, two types of checks occur at international borders: identity checks on persons crossing the border (passport checks) and checks on goods crossing the border (customs and regulatory checks in particular).

aa) Checks on persons

As far as checks on persons at the Anglo-Scottish border are concerned the key determinant will be whether an independent Scotland can avoid having to commit to joining the Schengen Area and remain part of the Common Travel Area (CTA). The CTA is a non-formalised arrangement between Ireland and the UK that came about after Irish independence, which allows Irish and UK citizens to travel and reside in both jurisdictions, including the Channel Islands and the Isle of Man. A recent Memorandum of Understanding – while not itself binding – outlines and affirms its key features.[37]

The reason that even after Brexit there are no passport checks for persons crossing the border in Ireland is that both Ireland and the UK form part of the CTA. Ireland currently enjoys an opt-out from the Schengen *acquis* and the continuation of the CTA between Ireland and the UK is expressly mentioned in the Protocol on Ireland/Northern Ireland, which forms part of the

36 Hayward.

37 For the MoU, see FN 11; for a detailed analysis of the MoU, see de Mars/Murray, 815 et seqq.

Withdrawal Agreement. The CTA is, however, much weaker in security terms than the Schengen zone. It only applies to Irish and UK nationals, so that non-nationals, even if lawfully present in Ireland may not simply cross into the UK and vice versa. This is because – unlike with Schengen – there is no common visa regime that would enable that. Basing travel without checks on persons on the CTA therefore requires both sides to operate without strict controls on those not entitled to cross these borders.

Assuming that Scotland is permitted to remain part of the CTA by Ireland and rUK, the question is whether in accession negotiations Scotland could convince the EU that it should be granted an opt-out from (at least) those parts of the Schengen acquis that would require it to conduct passport checks at its external borders with rUK. There are reasons to suggest that it might be successful in doing so. First, Scotland could point to Ireland's opt-out and the parallels with that Member State: both would be former parts of the UK that have become independent so that strong personal and economic ties might justify a special arrangement. Second, Scotland – like Ireland – would be sharing an island with a non-EU Member State. Third, the EU has in the past shown some flexibility in relation to new Member States as regards the Schengen regime: for instance, Cyprus only started the process of becoming a full member of the Schengen Area in 2019 – fifteen years after becoming an EU Member State – chiefly due to the complex border arrangements it has with Northern Cyprus.[38]

bb) Checks on goods

As far as checks on goods are concerned, the political drama around the Protocol on Ireland/Northern Ireland, which delayed Brexit by almost a year, shows that avoiding these can be legally and politically difficult. Membership of the EU requires both membership of the EU's customs union and of the EU's single market. If an independent Scotland were part of the EU, there would be a need to check goods crossing the border for compliance with the EU's (or the UK's) customs regime and for compliance with regulatory standards. In the Protocol on Ireland/Northern Ireland, these issues were resolved by way of a quasi-membership of Northern Ireland in the EU customs union and single market for goods. The parallel for Scotland would be continued (quasi-)membership of the UK's customs zone and internal market for goods, which would

[38] On an independent Scotland in the CTA and EU membership, see also Maher.

be an obvious non-starter from an EU perspective. Additionally, the EU has historically shown very little flexibility towards accession states when it comes to the preservation of the single market and customs union.[39]

Hence a different solution would need to be found. Here one needs to reiterate the differences between Scotland and Northern Ireland. In the latter case, the aim was to avoid the erection of all border infrastructure.[40] Not even camera surveillance at an otherwise open border would have been an option as surveillance cameras would have been a target for violent attacks.

The same would not necessarily be true for the Anglo-Scottish border given that there are not the same safety concerns and concerns around the preservation of a peace process. Furthermore, the Ireland/Northern Ireland Protocol was negotiated in light of the threat of a no-deal Brexit: the border would have to be kept open without controls or visible infrastructure even in case of a no deal Brexit. Hence the obstacles were high.

By contrast, the conclusion of the TCA in the EU-rUK relationship has brought some clarity: it is unlikely to develop beyond a free trade agreement any time soon. Despite the remaining volatility noted above, any decisions around the Anglo-Scottish border can now be made with a much greater degree of certainty around the overall future trading relationship between Scotland as an EU member and rUK. Notably, if the TCA applied to trade between Scotland and England, the need for customs checks would largely be reduced to checks concerning compliance with rules of origin. These could be reduced to spot checks as all consignments crossing the border would require the necessary

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39 See Hayward, who provides the example of the Slovene-Croatian border, which became a lot "harder" after Slovenian accession to the EU even though it was historically an open border and is being crossed by thousands of frontier workers every day.

40 See the commitment in paras. 43 and 49 of the Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union of 08 December 2017, TF50 (2017) 19, <https://ec.europa.eu/commission/publications/joint-report-negotiators-european-union-and-united-kingdom-government-progress-during-phase-1-negotiations-under-article-50-teu-united-kingdoms-orderly-withdrawal-european-union_en>; reportedly, UK security bodies voiced fears that any border infrastructure could be the subject of attacks: e.g. Irish Independent of 14 October 2019, PSNI warned that IRA could use any Border posts as ambush sites, <https://www.independent.ie/business/brexit/psni-warned-that-ira-could-use-any-border-posts-as-ambush-sites-38590786.html>; or Irish Post of 7 October 2020, Brexit checkpoints on Irish border could be targeted by IRA - claim MPs, <https://www.irishpost.com/news/brexit-checkpoints-on-irish-border-could-be-targeted-by-ira-claim-mps-194714>.

paperwork and camera technology at the border could be sufficient to identify those traders who did not fill in their paperwork. Regulatory as well as sanitary and phytosanitary checks would still be necessary, but these would not necessarily have to take place at the border itself. In other words, traffic up and down the main arteries connecting the Scotland and England could flow normally.[41]

Of course this would only be the case if Scotland obtained an opt-out from the Schengen acquis. Should this not prove possible, Scotland might have to consider membership of the EEA instead of EU membership.

4. EEA membership

As an alternative to EU membership, Scotland could join the EEA, i.e. emulate Norway, Iceland and Liechtenstein.

There are drawbacks to this solution, the main one being a loss of control. EEA membership means having to follow the EU single market acquis without having any say in the EU's law-making processes. This would not be a particularly attractive situation to be in in the long term. At the same time, EEA membership might prove attractive for an independent Scotland as it does not imply membership of the Schengen zone and would allow Scotland to conclude its own free-trade agreement with the rUK, so that management of the Anglo-Scottish border might become easier.

a) Process

According to Article 128 EEA Agreement, Membership of the EEA is only open to states that are either EU Member States or members of EFTA. Article 56 of the EFTA Convention allows "any state" to accede to EFTA, provided that the EFTA Council (i.e. the currently four EFTA members) approves its accession. An independent Scotland would therefore fulfil the formal criteria for acceding to EFTA and thus to the EEA. Given that no new state has joined EFTA since Finland's accession in 1985 or the EEA as an EFTA state since its inception,[42] there is next to no practical experience to draw on as far as the process of accession to either is concerned.

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41 There is an additional difference in that the Anglo-Scottish border is considerably shorter with far fewer roads crossing it than the border in Ireland; see Hayward.

42 Plenty of states have joined the EEA when they became EU Member States, however, but such membership follows more or less automatically from EU membership.

b) EEA membership and Schengen

EEA membership is independent from membership of the Schengen Area. While it is true that all EEA member states are currently members of Schengen, this is not a consequence of the EEA agreement, but happened by way of separate agreements with the EU: Norway and Iceland joined Schengen in 2001 and Liechtenstein in 2011. An independent Scotland could therefore choose to become an EEA member without having to commit to becoming a Schengen member. Provided that Scotland's continued participation in the CTA could be secured, this could therefore be a viable option if Scotland were unable to secure an opt-out from Schengen in accession negotiations with the EU. Checks on persons crossing the Anglo-Scottish border could thus be avoided.

c) EEA membership and trade in goods

EEA membership would not entail membership of the EU customs union. This would have the important consequence that an independent Scotland would not have to enforce the EU's customs code at its border with England and it would mean that an independent Scotland would not be confined to the overall EU-UK agreement when it comes to its trade with rUK. In fact, EFTA and EEA membership allows member states to conduct their own external trade policy and negotiate their own trading arrangements with other countries. This is where the temporal element becomes particularly important: at present, the trading relationship between Scotland and the rest of the UK is naturally very close. After independence, this might change, but any change would be gradual, so that at least for a certain period there could be a strong economic case in favour of maintaining close trading links with the rUK. Moreover, as Brexit has shown, the process of disentanglement is likely to be complex and take place in phases. It may well be that an independent Scotland will find itself in a type of "transition period" for a while after independence, during which it might maintain very close links with rUK through a free trade agreement, but might also want to embark on establishing closer links with the EU single market. The EEA might provide a stepping stone in that direction. At the same time, there is the latent danger that Scotland might decide to join the EEA temporarily, but then never realise its overall ambition of full EU membership.[43]

Obviously, EEA membership would – even if Scotland maintained close customs ties with the UK, e.g. through some form of customs union – necessitate regulatory compliance of goods crossing from rUK into Scotland with EU stan-

[43] Zuleeg.

dards. As stated above, the practical question would be whether necessary regulatory checks would require the establishment of border posts or large border infrastructure or whether technology coupled with spot checks might be sufficient.

V. Conclusion

The future relationship between the devolved parts of the UK and the EU's single market is a complex one to predict. It is unlikely that Wales and Scotland will be able to receive the same levels of access to the EU single market as Northern Ireland while still part of the UK, unless of course the overall UK-EU relationship develops in that direction. In the case of independence, which as far as Scotland is concerned is a very realistic prospect, difficult choices would have to be made. The arduous Brexit process has highlighted the complexities involved in negotiating transitions out of and into highly integrated markets. Brexit has also brought to the fore the complex trade-offs that such a step entails as well as their economic and societal implications.

An independent Scotland would probably want to keep flows of trade and people with rUK as uninterrupted as possible, while at the same time seeking alignment with the single market. This chapter discussed two options to achieve this: EU membership and membership of EFTA/EEA. The former is the preferred option of the current Scottish Government and would have the great advantage of an independent Scotland having a say in the rule-making process at the EU level. A potential disadvantage would be the obligation to join the Schengen Area, which would result in border checks on persons crossing between England and Scotland, unless of course Scotland secured the same opt-out of Schengen as Ireland, which is a distinct possibility. Additionally, the trading relationship between Scotland and rUK would be determined by the overall EU-UK relationship, currently the TCA.

EEA membership by contrast would result in a loss of control and sovereignty over single market rules, but would have the advantages of not involving membership of the Schengen Area or a duty to be bound by the TCA, so that a further-reaching trading relationship with rUK would be conceivable. Hence EEA membership might at least be a temporary option for an independent Scotland while it extracts itself more fully from the economic orbit of the UK. However, long-term it might not satisfy Scotland's ambitions for re-joining the political heart of Europe.

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Brexit and Beyond: UK's Future Relationship with the EU

Alex de Ruyter

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I. Introduction

The outcome of the referendum held on the 23rd June 2016 to ascertain whether the United Kingdom (UK) should leave the European Union (EU) sent shock waves throughout the political establishment in Britain, Europe and the wider world. With 52% of UK voters deciding to leave, the result, christened "Brexit" was an outcome that was not expected, but one that displayed significant geographical variations across the UK, with Scotland, Northern Ireland and London all voting by substantial majorities to stay in the EU, whilst England and Wales voted to leave.

Various explanations have been put forward for this, with a strong slant of research arguing that the vote result was a reaction against globalisation and "metropolitan elites"[1], or of certain localities feeling "left behind"[2]. Since then, there has been much speculation about why people voted to leave, including

[1] Pidd H., Blackpool's Brexit voters revel in "giving the metropolitan elite a kicking", The Guardian, 2016, <https://www.theguardian.com/uk-news/2016/jun/27/blackpools-brexit-voters-revel-in-giving-the-metropolitan-elite-a-kicking>.

[2] Rodríguez-Pose.

claims that the decision was a referendum on immigration.[3] Recent research, however, has interpreted the Brexit vote by correlating it to various socio-demographic characteristics (e.g., education, age and income). For example, Swales found those who were most likely to vote Leave were those with low-incomes, those with a low educational qualifications and those who felt that the UK had "got a lot worse in the last ten years".[4]

However, prior to 2015, membership of the EU was not a major political issue in the UK. In fact, in no month between 2007 and 2013 (inclusive) did more than 10% of those polled1 consider it to be one of the most important issues facing Britain. In 2015 (before the referendum) the UK was one of the most Eurosceptic countries in Europe by most measures, but it was not an extreme outlier.[5] Public attitude surveys had indicated a rising concern with "migration" in the wake of the Global Financial Crisis (GFC) in 2008,[6] coinciding with a period of marked migration from the former communist states of Central and Eastern Europe.[7] However, it was only with the announcement of the EU referendum in 2015 by the Prime Minister at the time, David Cameron in order to try and see his "Eurosceptic" MPs within his own party; that people begin to consider EU membership as a serious issue facing the country.[8]

Today, a majority of those in the UK believe that leaving the EU was a mistake.[9] Brexit is therefore now best seen as a political project being pursued by a Eurosceptic elite particularly in terms of the desire by these individuals to pursue divergence from EU regulatory norms rather than a truly "popular" or "populist" endeavour.[10] Its legitimacy as a political project today hinges on the notion that the UK Government under Prime Minister Boris Johnson – a leading figure in the "Leave" campaign – has somehow restored "sovereignty" to the UK without paying a prohibitive economic price, and for which the current Covid-19 pandemic (at the time of writing) has served to shield some of the immediate disruptive impacts of Brexit from public view. In the discussion that follows, we consider the lead-up to the trade agreement that has been agreed and its key aspects, and then consider the immediate and longer-term impacts of Brexit on the UK and the EU.

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3 De Zavala/Guerra/Simão.

4 Swales.

5 TNS Opinion & Social.

6 TNS Opinion & Social.

7 Office for National Statistics.

8 Ipsos-MORI.

9 NatCen Social Research.

10 See Gomez/Rowe/de Ruyter/Semmens-Wheeler/Hill.

II. The lead-up to and signing of the UK-EU trade agreement

In the tumultuous lead-up to the trade agreement being finally agreed upon by both parties in late December 2020, the UK Government's rather shocking declaration that they would effectively seek to abrogate the Northern Ireland Protocol of the Withdrawal Agreement in order to secure a UK-wide internal market was never likely to be borne out in practice – the legislation (Internal Market Bill) faced fierce opposition in the upper chamber ("House of Lords") and earned the opprobrium of senior figures in the governing Conservative Party's own ranks. Even if it were passed in its current form (which was uncertain due to the implacable opposition of the Lords and the parliamentary timetable), it would have required additional, explicit consent from MPs to ever use the provisions contained therein (which was far from guaranteed).

As it was, the contentious legislation was subsequently withdrawn, although it could be argued that the breach of good faith demonstrated by the UK Government has undermined relations with the EU going forward – a situation exacerbated by an outburst of "vaccine nationalism", with the intervention (since rescinded) of EC President Ursula Von der Leyen; threatening to invoke Article 16 of the Northern Ireland Protocol to stop vaccine exports to Northern Ireland and therefore the rest of the UK, being particularly provocative.[11] The threat to undermine the Withdrawal Agreement also soured relations with the newly-elected Democratic presidency of Joe Biden in the United States. Indeed, it could be argued that a major turning point in the UK Government's attitude towards negotiations with the EU was Biden's firm stance on a UK-US trade agreement being contingent on there being no hard border between Great Britain and Northern Ireland.

Some commentators even argued that the UK Government was willing to countenance a no deal outcome with the EU whilst it had a sympathiser in the form of Donald Trump in the White House.[12] With Trump evicted from office and the Biden presidency opening espousing improved relations with the EU as a key priority, the UK's negotiating hand was subsequently weakened. In any event, on December 24th 2020 (with only 7 days remaining until the expiry of

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11 O'Leary N., "I regret that article 16 was mentioned": Von der Leyen statement in full, The Irish Times, 2021, <https://www.irishtimes.com/news/world/europe/i-regret-that-article-16-was-mentioned-von-der-leyen-statement-in-full-1.4473479>.

12 Helm T./Borger J., Johnson will wait for US election result before no-deal Brexit decision, The Guardian, 2020, <https://www.theguardian.com/politics/2020/oct/24/johnson-will-wait-for-us-election-result-before-no-deal-brexit-decision>.

the "transition period" of continued UK membership of the EU Single Market and Customs Union) the two negotiating parties reached agreement on a draft treaty governing trade between the two.

The UK Prime Minister Boris Johnson had claimed that the signing of a trade agreement between the two parties meant that the issue of the UK's relationship with the EU had been settled and "put to bed for a generation"[13] and that Brexit truly had been "done". However, we would argue that the UK's relationship with the EU has *not* been settled and the nature of the trade agreement reached leaves many glaring gaps. On this one could disagree in three key facets.

First, in terms of a legal process, on the EU side, for the agreement to pass into law, it had to of course be approved by the European Parliament. Given the last minute nature of the agreement, scrutiny and ratification of the deal by the EU Parliament had to wait until at least the end of February 2021. Whilst it was always unlikely that the deal would be rejected by MEPs, it could only be provisionally applied (at the time of writing) until their assent was obtained.

Second, the deal itself contained a number of provisions that have served to "kick the can" down the road as it were, but with the effect that in a number of years, certain areas will need to be renegotiated or reviewed. The most obvious example here was fishing, whereby the trade agreement committed both parties to a five-and-a-half year transition period (including the right of incumbent EU vessels to continue fishing between 6 to 12 miles off the UK coast) before a transfer of EU quota to the UK takes place. Furthermore, the agreement also commits both parties to a four year cycle of reviews, with the aim of "*considering whether arrangements, including in relation to access to waters, can be further codified and strengthened*" – UK-EU Draft Trade Agreement, Article FISH.18: Review Clause.[14]

More generally, in terms of governance of the agreement, the EU concern over a level playing field and avoiding the potential for "unfair competition" by the

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13 Fox.

14 Her Majesty's Government and European Union; Although this in itself is hardly unreasonable – as external factors impinging on aspects of an agreement could change, both parties would require scope to review aspects of an agreement on a periodic basis. However, it does point to the obvious fact that trade agreements are not set in stone, but can be renegotiated over time, as Donald Trump demonstrated in renegotiating the North American Free Trade Agreement (NAFTA) in 2018 to US advantage, see for an informal assessment Tankersley J., Trump Just Ripped Up Nafta: Here's What's in the New Deal, The New York Times, 2018, <https://www.nytimes.com/2018/10/01/business/trump-nafta-usmca-differences.html>.

UK had been a major stumbling block in the negotiations that could have scuppered the whole agreement. As such, the text of the agreement is vouched in terms of "fair competition" and "sustainable development", with the achievement of climate neutrality by 2050 from both parties. However, there is some ambiguity over the final wording of the commitment to regulatory alignment, as stated on page 179 of the draft agreement:[15]

> "The Parties affirm their common understanding that their economic relationship can only deliver benefits in a mutually satisfactory way if the commitments relating to a level playing field for open and fair competition stand the test of time, by preventing distortions of trade or investment, and by contributing to sustainable development. **However the Parties recognise that the purpose of this Title is not to harmonise the standards of the Parties. The Parties are determined to maintain and improve their respective high standards in the areas covered by this Title**" (emphasis added).

Whilst the EU had sought a lockstep mechanism to ensure dynamic regulatory alignment, the UK fought for a looser mechanism. Ultimately, the parties have agreed that the terms of trade should be reviewed at most every four years in order to assess whether the agreement still maintains an appropriate balance between protecting against unfair competition and facilitating trade and investment. An earlier review is possible in the event that substantial remedial measures have been taken due to a policy of one side having a significant impact on competition due to labour standards, state aid provisions or environmental standards, amongst others.

However, a basic commitment to non-regression (with the upholding of the Precautionary Principle for areas such as agriculture and the environment in the draft agreement particularly noteworthy[16]) would appear to suggest that the UK's room to manoeuvre for regulatory divergence is limited, as for example, the section on labour and social standards[17] would attest. Nevertheless, it is noteworthy that this only affects areas that *directly* impact trade and investment, suggesting a somewhat greater scope to diverge from previous EU norms than had hitherto been the case.

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15 Her Majesty's Government and European Union.

16 Her Majesty's Government and European Union, Article 1.2: Right to regulate, precautionary approach and scientific and technical information, 180; sic. "in accordance with the precautionary approach, where there are reasonable grounds for concern that there are potential threats of serious or irreversible damage to the environment or human health, the lack of full scientific certainty shall not be used as a reason for preventing a Party from adopting appropriate measures to prevent such damage".

17 Her Majesty's Government and European Union, Chapter six: Labour and social standards, 200.

However, the agreement is quite explicit in terms of upholding existing labour standards in place in the UK (as at the end of the transition period) for the areas of: fundamental rights at work; occupational health and safety standards; fair working conditions and employment standards; information and consultation rights at company level, and; restructuring of undertakings. And furthermore that:

> "**Each Party shall have in place and maintain a system for effective domestic enforcement and, in particular, an effective system of labour inspections** in accordance with its international commitments relating to working conditions and the protection of workers; ensure that administrative and judicial proceedings are available that allow public authorities and individuals with standing to bring timely actions against violations of the labour law and social standards; and provide for appropriate and effective remedies, including interim relief, as well as proportionate and dissuasive sanctions" (pp. 200-01, emphasis added).

Should a dispute arise between the UK and the EU, then the invocation of a resolution procedure would refer the matter to an independent arbitration panel,[18] consisting of three persons with requisite expertise in law and international trade, selected (or drawn by lots) from approved lists from both sides.[19] That such an opaque mechanism should have been agreed by both sides was allegedly due solely to the UK's insistence to exclude the European Court of Justice from any arbitration role over disputes.

Third, and perhaps foremost, the deal can be considered as representing an unstable equilibrium (to use the parlance of economics), as in essentially being a free trade agreement (FTA) that commits both parties to a zero-tariff, zero-quota trade regime in the movement of goods, with some notable exceptions such as seed potatoes.[20]

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18 UK-EU Draft Trade Agreement, Art. INST.15: Establishment of an arbitration tribunal.

19 Ibid., Art. INST.16: Requirements for arbitrators.

20 Department for Environment Food and Rural Affairs; What is noteworthy here is that the EU ban on the export of seed potatoes was based on the premise mentioned by the UK DEFRA that "there is no agreement for GB to be dynamically aligned with EU rules" (<https://www.bbc.co.uk/news/business-55433319>), reiterating that the nature of regulatory alignment could be problematic going forwards. Suffice to say, that the seed potato industry is over-represented in Scotland will play into the hands of the Scottish National Party (SNP) in fuelling further support for Scottish independence from the UK.

III. The Near Future

Brexit is a process, not an event. Having secured a very basic trade agreement that excludes membership of the EU Single Market or Customs Union, what can we expect to happen over coming months? From the outset, the defining event of 2021 will be the Scottish Parliament elections in May, for which the Scottish National Party (SNP) is expected to be returned with a majority, and thereby pursue its goal of securing another legally binding independence referendum – for which polls currently suggest majority support in Scotland (a theme we will return to later). As such, it almost goes without saying that the UK is not a cohesive territorial entity. In the interim, note that our discussions below pertain to Great Britain (GB) – the EU relationship with Northern Ireland (NI) has been framed in large part by the Withdrawal Agreement (and is covered in depth elsewhere in this volume). Nevertheless, as noted elsewhere, the UK populace appear to favour a much closer relationship with the EU than has been agreed. As such, the current outcome is not a stable equilibrium.In considering the immediate impact of the trade agreement, we can be confident in noting that there will be negative economic consequences for both parties, although the proportional impact on the UK will be considerably larger than that on the EU. As a result, there is a clear economic incentive for closer economic relations between the two sides, although the politics of this remain fraught. In the UK, there are outspoken voices in the media and governing Conservative Party (the so-called "European Research Group" of ultra-Brexit supporters referred to earlier) who desire a particularly distant relationship with the EU – even the current (loose) agreements are a compromise.As they have an outsized impact on the UK Government, any move closer to the EU is likely to be framed as "defeatism" or "caving in". This group are also amongst those who view the UK's regulatory framework to be overly generous to workers and impose excessive costs on businesses.[21] Interestingly, this does not appear to be a view that is widely shared by many British businesses themselves.[22] Likewise, for the EU it is important that Brexit is not seen as costless for the UK. After all, if member states are able to gain all the benefits of membership without needing to abide by the "rules of the club" then what is the EU's *raison d'être*? If the UK post-Brexit is seen to be a success then others are likely to be encouraged to follow its path, undermining the European construct.Nevertheless, neither the UK, nor the EU should be seen as a homogenous bloc. For the EU, the impact will fall disproportionately on Ire-

21 Kwarteng/Patel/Raab/Skidmore/Truss.

22 Thomas D., City of London bosses warn against post-Brexit deregulation, Financial Times, 2021, <https://www.ft.com/content/1a2c7e3d-2bd9-4f9c-90c1-0732df98488e>.

land. Smaller EU suppliers to UK customers (whether business-to-business or direct to consumers) will also struggle and there is likely to be some short-term impact on Calais and that it will be impacted. As for the UK, certain agricultural and manufactured commodities will also be affected much more intensively than others. Smaller businesses (and consumers who are used to swift and costless ordering of goods from the continent) will be especially affected and some are likely to go bust as a result of formerly profitable business models imploding. Others will choose to relocate part (or all) of their operations to EU member states if the costs of doing business from the UK are prohibitive.Nevertheless, whilst a net negative for both overall, in either case there will be individuals, industries and certain locations that benefit. Moving certain financial services functions out of London might benefit Amsterdam, Paris, Dublin, Luxembourg or Frankfurt (although as yet there is little evidence to suggest that this will have any significant impact on employment in the sector in the UK). The present agreement will dictate the nature of relations from 2021 to (mid)-2024 at least, when there is a British election. However, the UK and EU will need to continue talking (hopefully in rather less strained tones). Such talks are likely to centre on elements of potential cooperation. There will be economic pressure to facilitate certain things, although this is currently felt much more acutely by the UK. This works both ways: narrow economic logic dictates that the EU should seek the closest possible relationship, even at the cost of allowing the UK elements of the Single Market. Politically, it is impossible to offer an ex-member state this kind of access. Whatever happens, the pandemic provides convenient political cover for any economic dislocation.It is concerning, although perhaps not surprising that the 50% of UK trade that is with the EU has experienced notable disruption since leaving the EU Customs Union and Single Market. This is despite the best efforts of the UK Government to minimise disruption (or at least minimise disruption in the eyes of the public) by phasing in import checks, requiring hauliers travelling onwards to the EU to have a Kent Access Permit and setting up inland Border check points so as to prevent the lorries queuing up to Dover and the Channel Tunnel. As such, for all the reasons alluded to above, Brexit is most certainly not “done” and should be considered as an on-going process, rather than a discrete event. As such, we now turn to the UK Government’s attempts to foster trade agreements outside of the EU.Trade Agreements As part of its desire to reorient away from the EU orbit, the UK Government, under the rhetoric of being a “Global Britain” aspires to promote “free trade” across the globe (the irony of having erected trade barriers with its largest trade partner notwithstanding). To date this has involved the (re)-negotiation (or “rollover”) of exiting EU trade deals involving some 60 non-EU countries. However, the UK Government has also officially lodged an application to join the Comprehensive and Progressive

Trans-Pacific Partnership (CPTPP), a grouping of 11 countries on the Pacific Rim. This is in broad accordance with the UK government's stated post-Brexit priorities of securing free trade agreements with Australia, New Zealand and the USA. Whilst this is hailed by the government as a great move by the UK to champion "global free trade" which be of immeasurable benefit to UK businesses the reality is likely to be much more muted. Of course, this is of less significance than the political optics of being seen to deliver post-Brexit trade "deals". In this vein, the present Secretary of State for International Trade, Liz Truss, makes frequent mention of the 60 non-EU countries with whom the UK has "achieved" deals since exiting the EU, conveniently omitting the fact that all of these deals are actually rollover agreements from existing deals that the UK was already party to as a (former) member of the EU. We would posit, therefore, that many trade agreements will prove to be more important in rhetoric than reality. The much vaunted agreement with Japan for example, is estimated to only boost UK GDP by 0.07%.[23] Indeed, the UK Government's own analysis suggested that a trade deal with the US (by far the UK's most important individual trading partner outside of the EU) would only add up to 0.16% to GDP over 15 years.[24] For the Trump-like language of trade "deals" with far-flung countries very conveniently ignores the fact that nations tend to trade most with their immediate neighbours, given the nature of international production. That is, the supply chains that form the dominant component of world trade run on the principles of lean production, which seek to reduce the costs of transport and storage and ensure just-in-time delivery of products. The blunt reality is that the likes of Toyota are not going to dramatically increase exports from their UK operations to the Asia-Pacific when they already supply those markets from 14 production companies in the region.[25] It thus shouldn't be surprising then that the relative gains of CPTPP membership would be trivial, given that CPTPP countries account for less than 10% of the UK's exports. Added to this is the fact that existing trade agreements already cover some of the largest of these member states. To all intents and purposes, it has excluded the 80% or so of the UK economy that is comprised of services, and leaves open key issues in areas such as the nature of data transfer between the UK and the EU and also the degree of equivalence for financial services (though at present these are both unilaterally within the remit of the EU to determine).

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23 Department for International Trade, Final impact assessment of the agreement between the United Kingdom of Great Britain and Northern Ireland and Japan for a comprehensive economic partnership.

24 Department for International Trade, UK-US Free Trade Agreement.

25 <https://www.toyota-global.com/company/history_of_toyota/75years/data/automotive_business/sales/activity/asia/index.html>.

Thus, an assessment from examining certain aspects of the draft trade agreement is that the UK, despite the public statements emanating from Whitehall (and the support of the hard Brexit European Research Group of MPs, whose vote in favour of the trade agreement appears based on the dubious notion that a "robust" UK Government could disregard commitments to a level playing field) will largely remain in the regulatory orbit of the EU.

IV. The Longer Term (Post-2024)

Long-term predictions and prognostications are always difficult, but there are certain parameters that will inevitably shape the UK-EU relationship (assuming there continues to be a *United* Kingdom). As such, both the UK and EU face significant mid-term pressures. In the case of the UK, we suggest that these have the potential to fundamentally and systematically undermine the existing constitutional settlement and it is to this issue that we now turn.

1. The Disunited Kingdom

As mentioned earlier, notwithstanding the situation in Northern Ireland, the EU is increasingly unlikely to be dealing with the UK as a single cohesive territorial entity. Political pressures in favour of Scottish independence are steadily mounting. From today's vantage point, this looks like a question of "when" rather than "if". At first glance, an independent Scotland would appear to favour re-joining the EU. Scotland voted 62-38 in favour of remaining in the EU and there is a significant desire to re-join. Brexit has fundamentally challenged the UK's current constitutional settlement in much the same way that it has challenged the operation of the Good Friday Agreement[26]. The present framework is itself barely 20 years old – devolution was introduced in 1999, with additional powers handed over to the Scottish Parliament and Welsh Assembly in the years since. The challenge is that the current settlement was designed with the UK's status as an EU member state assumed.

As such, the regulatory framework ensuring unfettered market access in goods was set not in London but in Brussels. Whilst areas like agriculture were notionally "devolved", in practice all areas were governed by European sanitary and phytosanitary regulations and the Common Agricultural Policy. International trade agreements were similarly entered into by Brussels, with the UK Government signing off on any mixed agreements as appropriate.

[26] The present Withdrawal Agreement and the East-West impediments to trade present, we would suggest, a "least bad" option for Northern Ireland rather than protecting the Good Friday Agreement in a positive sense.

Brexit has fatally undermined this. The UK now faces a tension between devolved competencies and those that are reserved for Westminster. Thus, whilst the Scottish and Welsh governments have significant authority over healthcare, the UK Government in London retains the right to sign international agreements. If the UK were to agree to give US pharmaceutical companies greater rights during healthcare procurement – perhaps in order to gain a trade deal with the USA – that poses a dilemma. After all, the ability to sign trade agreements is reserved for Westminster, but in order to do so it needs to (re)enter domains that have long been devolved.

This is not just a theoretical issue: both the Scottish and Welsh governments are of a radically different political hew to Westminster – there's an obvious incentive to fail to cooperate. Indeed, this tendency has been all-too-visible during the UK's coronavirus crisis with Scotland and Wales pursuing avowedly independent policies. In order to avoid just such circumstances, a number of additional competencies have been reserved to Westminster. The result has been – rather predictably – labelled a "power grab" by the devolved administrations (with more than a little justification in several instances). The UK Government's clear instinct is to centralise: something that does not sit well with many, particularly in Scotland and Wales.

However, in the event of Scottish independence, were Scotland to join the EU as an independent state, there are significant hurdles to overcome. First would be the question of currency, second the question of fulfilling the Maastricht criteria and finally how the border with England would be affected. All of the challenges of Brexit would be magnified tenfold. Worse, all of the present dilemmas would emerge even more strongly. More broadly, negotiations over the break-up of the UK are likely to be extremely challenging for both parties. Whilst the economic logic of England moving towards EU standards would be strengthened still further, the political imperative would cut the other way. This might pose a challenge to other EU states facing secessionist movements (notably Spain).

Welsh independence and much stronger regional voices in England are both possible in the medium and longer term but are a much more distant prospect. In any event, the rancour of the EU referendum and its aftermath makes it extremely unlikely that England will seek to re-join the EU in any realistic timeframe (not to mention the understandable reticence of many existing EU members given such a prospect).

2. Political Change in the UK

Notwithstanding the prospects for Scottish independence and Irish unity, a huge amount hinges upon the outcome of the 2024 election. In spite of its long history of support for the "European project", views in today's Conservative Party range from Eurosceptic through to extreme "Europhobia". The Party has a strong "Atlanticist" wing and closer engagement with US standards might act to preclude shared UK-EU standards in agriculture etc. It is highly unlikely that whilst in power they will pursue closer engagement with the EU as an institution.

However, that does not necessarily mean that no closer engagement or relationship is possible. There is scope for limited bilateral agreements but also, crucially, with European institutions outwith the EU (but within which EU members might act or be present as a bloc). Whilst perhaps largely a matter of semantics, this is likely to enable greater pragmatism amongst the leadership (with the keeping up of appearances being crucial for this group).

The situation is likely to be radically different if the opposition Labour Party were to come to power. It is probable that, under its present leadership, it would seek much closer relations with the EU. Whilst membership of EFTA (and ultimately the EEA and/or a full customs union) might be preferred, this is likely to be limited by public opinion in marginal constituencies (which were much more pro-Brexit than the UK as a whole). Nevertheless, the EU can be optimistic of much closer engagement were the current opposition to come to power.

3. Political Change in the EU

Finally, there is a tendency in the UK to assume that the situation and politics of the EU will remain largely static. Nothing could be further from the truth. The pandemic has seen a dramatic move with the €750bn Covid-19 recovery package. Whether further moves towards fiscal centralisation occur will be instrumental in whether the Eurozone becomes a stable (optimal) currency area. This in turn is likely to have ramifications for the UK's relationship with the rest of the EU. Political change elsewhere will also play a role: events in Catalonia will affect Scotland's chances of joining, whilst a host of changes of political leadership across the continent will impact relations with the UK. It also remains to be seen what the longer-term implications (if any) of the recent political missteps by the European Commission over vaccine procurement might be for relations in the medium term.

V. Conclusion

The UK and EU have reached an FTA, but the present outcome represents an unstable equilibrium. As such, we believe that a closer relationship in future is likely. Economically, it is clear that both sides would benefit from the closest possible relationship: the major impediments to this will be political. Within the UK, a majority of opinion views Brexit as a mistake, but key constituencies remain strongly in favour of leaving the EU (albeit they are much less hostile to the idea of cooperating with European institutions). The challenge for the future is this: how can the UK (assuming it somehow survives as a political entity) be reintegrated into the European project without being a formal EU member?

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Crises have long been a recurring feature of European integration. In many cases, further steps toward integration have only been possible under the pressure of such crises. However, in recent years, the EU has faced multiple, overlapping crises, at times calling the integration process itself into question. In 2015, the eurozone crisis escalated to the point where, for the first time, a member state faced the possibility of exiting the eurozone. At the same time, the massive influx of refugees into the EU exposed significant shortcomings in both the Schengen area and the common asylum policy. Finally, the British referendum on 23 June 2016 resulted in a majority vote in favor of Brexit, marking the first-ever departure of a member state from the EU. Against this backdrop, the 12th Network Europe conference examined the numerous challenges facing the EU as well as potential future scenarios for European integration. The publication includes contributions from André S. Berne, Jelena Ceranic Perisic, Viorel Cibotaru, Alex de Ruyter, Ivana Kunda, Tobias Lock, Lee McGowan, Peter Christian Müller-Graff, Tatjana Muravska, and Attila Vincze.

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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